

## **Supreme Court case no. 21-083128SIV-HRET Ikano Bank AB m.fl. – Bank Norwegian AS**

### **WRITTEN STATEMENT – GAVIN CHARLSTON (GOOGLE LLC)**

#### **INTRODUCTION**

- 1. What is your background and position in Google LLC?**
  - Practicing law for almost 14 years.
  - Spent five years in private practice representing a wide range of clients, including technology companies and online platforms, before joining Google in 2012.
  - At Google, in my capacity as trademark counsel I've handled trademark issues relating to our advertising products since joining.
  
- 2. What is your role in Google in relation to the Google Ads service?**
  - Like many in-house trademark lawyers, my work involves what's considered to be "traditional" counseling work, such as advising on the selection of new brands and enforcing our brands.
  - But a significant portion of my time is devoted to assisting and guiding our advertising business on its role and responsibilities as an intermediary and neutral advertising platform
  - In this capacity, I am responsible for Google having the right policies in place governing how third party trademarks are featured or used by advertisers, taking into consideration applicable laws and regulations.
  - I am also responsible for Google having the correct processes in place for reviewing, assessing, and actioning complaints about advertiser use of trademarks that violates our policies.
  - Finally, where there are particularly unusual or "close calls" relating to a removal request, I opine directly on the appropriate course of action
  
- 3. Can you elaborate on what you mean with Google as an "intermediary" platform?**
  - Google Ads sits between the business advertiser, on the one end, utilizing our platform to create and target its ads, and the consumer, on the other end, utilizing our search engine and, when relevant to their search, clicking on ads.
  - Because it's advertisers who generate their own ad content and determine their ad targeting, they're ultimately legally responsible for those materials. As the intermediary, our responsibility is to have the right policies and removals tools in place to restrict infringing activities and conduct.
  - That general body of law is often referred to as intermediary liability or secondary liability law, which is why I used that reference here.

#### **GOOGLE ADS IN GENERAL**

- 4. The case at hand concerns "search ads", i.e. the ads that appear on the top and at the bottom of the search results list in Google Search. What is search ads, and what is the benefit of such ads?**
  - Google's advertising business has really been focused on ensuring ads are actually relevant and not disruptive to the user since day one. It's hard to remember back

to the internet of 1999 and 2000, but flashing banner ads, pop ups, and other aggressive advertising was the norm. It was also rarely an ad for anything actually helpful or useful to the user.

- Google's search ads allow businesses to direct their ads to users who are searching for things that may be relevant to their business, and allow users to supplement the organic search results with one or more clearly identified ads that may also be relevant to their search.
- We offer many Google services for free, including Gmail, Google Books, and of course the search engine itself. Google Ads helps to support keeping those products free and accessible to users around the world.

**5. When a user makes a search on Google Search, two types of information will show: Organic results and ads. Can you explain the difference between these two?**

- The Google search engine is used around the world to conduct literally billions of searches every day. The searches generate what we call "organic results," which are culled from the internet and provided based on an algorithmic determination of relevance to the user's query.
- Unlike Google Ads, which are generated by businesses using tools and technology we provide, organic search results are simply websites found across the internet that may be relevant to the consumer's search.
- While Google hosts the ads created by its business customers, the organic search results are just an index of what's available on the web.
- We take the integrity of the organic search results very seriously, and have an external "honest results policy" that makes clear that organic results can never be purchased. Organic search results are determined based on a complicated and ever evolving set of algorithms, taking into consideration factors like website content, links, and click history.
- In addition to providing organic search results, for certain queries Google will also provide one or more clearly marked advertisements at the top or bottom of the search results page. These ads are also served and appear only if they are determined to be of likely relevance and interest to the user in question. As mentioned previously, we call these search ads.

**6. What factors are taken into consideration in determining whether ads should show, and in what order?**

- Advertisers target search ads by selecting a set of terms, or keywords, upon which they'd like their ads to appear. Advertisers "bid" on these keywords by setting the maximum amount they're willing to pay each time a user clicks on their ad.
- But beyond keyword targeting, a combination of factors is taken into consideration in determining where an ad is placed and whether any ads are shown at all.
- In fact, in many instances we don't return any ads if our systems determine that we don't have any ads that would be relevant to the user's query that meet our quality standards.
- Whether an ad will appear in response to a given query ultimately depends on numerous factors: the number of advertisers that have bid on the associated keywords, their bids for those keywords, the quality score for each ad and keyword, and many other factors, such as the user's prior search history and history of clicking on ads, the time of day, and the user's location.

**7. Does the highest bidder always get to show their ad at the top of the search results list?**

- No. Simply bidding on a keyword does not guarantee that an ad will show at all when a user enters that term into the search engine, let alone that it will show at the top. As I've mentioned, the ads must also be relevant to the user's search. This means that even if a large company selling shoes were to bid a high amount on a keyword relating to coffee, its ads still likely would not show given the lack of relevance.
- 8. "Quality score" is a factor which is taken into consideration when determining if and, if so, where an ad will show. Can you please explain how this quality score impacts what ads show and the cost for the ads?**
- We refer to the overall relevance of the ads to the keyword as a "quality score." The quality score is determined by a number of factors, including the contents of the ad and the corresponding websites the ads lead to.
  - Ultimately quality score is really about relevance to the user, and we take that very seriously. Ads with a higher quality score, but lower bid amount, can show above ads with higher bid amounts, given our algorithmic determination that it's more likely to be helpful to the user.
- 9. Is it possible that even if, for example, Bank Norwegian bid on Ikano Bank's trademark as a keyword, Bank Norwegian's ad would not necessarily show?**
- Yes, that's very possible. As I've mentioned, there are a wide variety of factors that determine whether a particular ad would show.
  - Bank Norwegian's ads presumably would have a lower quality score than Ikano Bank's own ads when considered in the context of "Ikano Bank" as a keyword. Accordingly, Ikano Bank would have a higher likelihood of showing, and, depending on the factors I've mentioned, Bank Norwegian's ads might show in a lower position, or might not show at all.
- 10. Does this mean that Bank Norwegian's ad can show even if Bank Norwegian has not bid on Ikano Bank's trademark as a keyword? What could be the reason for this?**
- This could be possible if Bank Norwegian opted to target keywords related to the banking industry and selected the "broad match" type for those keywords.
  - When an advertiser chooses to broad match a keyword, their ad may show when the keyword is part of the user's query, but also might show when related terms are part of the user's query. These terms could be synonyms for the selected keyword, or other terms relevant to the specific industry.
  - It's also possible that if Bank Norwegian bids on bank-related terms and selects to phrase match those keywords, their ads will show when the word "bank" is in the query, even if it's part of another bank's name.
- 11. What determines the price you have to actually pay for a click when bidding on keywords?**
- Advertisers typically don't pay their bid amount when a user clicks on their ad. Their actual cost per click is determined by a complicated formula that includes consideration of quality score, the amount other advertisers have bid on the keyword, and other technical factors.
- 12. Are there any other factors, in addition to those mentioned above, that are taken into account when determining if ads can appear?**
- Ads must meet a set of strict policies before being eligible to display. This includes a number of technical requirements as well as content requirements. We have very strict policies in place, for example, prohibiting intellectual property

infringement, as well as misrepresentation or other deceptive or misleading behavior.

- From Google's standpoint, ensuring that users have a good experience when they click on ads is paramount. If users have a bad experience or are harmed or deceived, they may not use the Google search engine again, and are also less likely to click on ads in the future.
- Accordingly, extraordinary resources are dedicated to ensuring ads quality and policy compliance. These include the costs associated with engineers maintaining our sophisticated policy checking systems, as well as the teams of analysts who review and respond to complaints about ads.

## **GOOGLE ADS AND BIDDING ON COMPETITOR'S TRADEMARKS AS KEYWORDS**

### **13. For how long has Google accepted bidding on competitor's trademarks as keywords?**

- In its early days, about 20 years ago now, Google briefly restricted advertisers from bidding on competitor trademarks, but this was found to be severely limiting for both businesses seeking to put their ads in front of consumers who may be interested in their products, as well as for users who might benefit from seeing an ad for an option different from what they might have initially searched for.
- Accordingly, beginning in 2004 Google began to allow this practice in certain geographies, and continued to expand it to additional markets. It was applied to Norway in 2010, and made fully global in 2013. Accordingly, this has been our global policy for over eight years now, and advertisers may bid on keywords that contain or consist of competitor trademarks anywhere in the world under our policies.

### **14. Why is it important for Google to allow bidding on competitor's trademarks – and whose interests do you have in mind?**

- As I mentioned, for a brief period of time Google did restrict the use of trademarks as keywords, and this was found to have severely limiting effects on both businesses and consumers.
- Businesses are always trying to target their advertisements to users who may be interested in their products or services. We see this in the real world all the time, with companies paying to have their products displayed on a shelf next to a more well known brand, or to have a coupon provided when checking out of the grocery store for an alternative product to try next time.
- Ultimately, bidding on a competitor's brand as a keyword is no different from the historic practice of taking out an advertisement in the phone book on the same page where your competitor's business is featured.
- We accordingly found the restrictions on keywords to be far too limiting. They could restrict ads by resellers of legitimate products, or providers of repair services for third party products.
- We absolutely don't want users to be confused by Google Ads, but the keyword restrictions weren't achieving that effectively. We instead concluded that keyword restrictions were not the right approach, and we instead invest significant resources to allow trademark owners to restrict their brand terms from appearing in the text of their competitor's ads.
- Our policies in fact go beyond the law, which does provide for referencing competitor trademarks in ads for comparative purposes. Given the nature of the keyword triggering associated with search ads, we do not permit those types of comparative references.

**15. In Google's view, how does the practice of bidding on competitor's keywords affect competition between businesses?**

- It's absolutely critical for businesses to be able to show their ads to consumers who may be interested in them. Many of the businesses we know and love and use every day would not exist were it not for effective advertising.
- Accordingly, competitive keyword advertising may allow an upstart shoe company, just getting off the ground but offering a superior product, to show its ads when users enter more well known shoe brands into the search engine.
- Or it may allow an airline to show discounted flights with better route options to a traveler searching for a particular airline.
- In fact, many consumers will often start their research on a particular product by entering a brand they're familiar with, with the understanding that this will surface potential alternatives and other brands that they'd like to explore.
- Accordingly, having the opportunity to place ads before those users is critical from a business perspective, and indeed, the benefits Google Ads afford to small businesses and the overall economy can't be overstated.

**16. In Google's view, how does the practice of bidding on competitor's keywords affect the consumers?**

- The benefits to users that arise from competitive keyword bidding cannot be overstated. More robust competition in any business sector typically leads to improved opportunities for consumers, including better pricing, better products, and better service.
- Indeed, competition authorities have specifically looked at this issue, and concluded that unfettered access to bidding on competitor keywords is critical for competition and consumer benefit.

**17. To your knowledge, are there any countries where bidding on competitors' trademarks as keywords is prohibited by law/court orders?**

- We are not aware of any countries that have, either statutorily or through judicial precedent, declared competitive keyword bidding to be unlawful per se.
- As I mentioned, our policy on keywords is global and we consider it to be supported by the law. Ultimately we don't allow IP infringement on our ad platform, and that's why we have the robust policies in place I've mentioned previously, because we're ultimately in alignment with government authorities in not wanting to expose our users to bad or deceptive advertisements.

**18. Do you have any impression or knowledge of whether the practice of bidding on competitors' trademarks as keywords is common in the rest of the world, especially in Europe?**

- It's our general understanding that this practice is common around the world.
- If you take a step back and think about it, in today's internet world consumers are extremely familiar with the notion of entering in the name of one thing, and seeing options and alternatives for others.
- From shopping online, to surfing Netflix, to searching for airline deals on an internet travel agency, consumers regularly expect and encounter ads and listings for alternatives.
- We don't have any specific data on how many advertisers engage in this practice, but we see it regularly across industries. Indeed, we regularly see our own

competitors targeting our own brands as part of their keyword bidding strategy, and this is something we freely permit.

**19. Before the Court of Appeal, the appealing parties and Virke claimed that this marketing practice can be considered as “free-riding” or “unethical” - do you agree?**

- When it comes to legitimate competitive keyword advertising I’d strongly disagree. As I’ve mentioned, there are legitimate reasons for targeting users in this manner, it’s a behavior that’s occurred in the offline world for decades, and it’s something consumers are particularly familiar with online.
- So in no way do I think this practice is free-riding or unethical; quite the opposite, I think it’s a terrific opportunity for businesses and consumers.

**20. Before the Court of Appeal, the appealing parties and Virke claimed that if bidding on competitors’ trademarks as keywords is allowed, the prices for advertisers will increase, it will be impossible to protect your own brand, and the only party benefiting from such practices will be Google. Have you seen any of the above described effects?**

- As I’ve mentioned, we’ve had these policies in place allowing competitive keyword bidding for more than 17 years in some jurisdictions, and we simply haven’t seen that happening.
- Between the organic results and knowledge panel, brands have plenty of free space on every search results page, and users can easily find them if that’s what they’re looking for, so I’d disagree it’s necessary for a brand to bid on its own name to “protect itself.”
- Brands also always have an advantage if they do choose to bid on their own terms given the likely higher quality score, which would reduce their costs.
- And even non-competitors sometimes have reasons to bid on third-party brands, so this practice happens even outside of the competitive context. Again, we haven’t seen any indication that this unfairly burdens brands or creates unmanageable advertising costs.

## THE AD DESIGN

**21. Can you explain Google’s thoughts and ideas behind the Google Ad design?**

- In my role as trademark counsel I’m not directly involved with the teams that handle our ad design.
- In my general capacity as a member of the legal team supporting our ads products, however, I’m familiar with the overarching principles that inform our ad design.
- Of course, ads labeling is an area of extreme scrutiny and regulator interest, and so it’s something we take very seriously.
- We have what is known as an “honest results policy” that we share publicly on our sight, and it emphasizes that ads must be clearly identified as compared to organic results.
- At one point in time there was a shaded background for advertisements, but this in fact reduced the ability for users to distinguish ads due to various factors such as screen contrast settings and color blindness.
- We accordingly shifted a number of years ago to individually labeling each ad on the search results page, and are confident this is in line with our honest results policy and regulatory requirements.

**22. Are you aware of any scrutiny/discussions with consumer authorities concerning insufficient and/or lacking ad labelling?**

- Ads labeling and ad disclosures are always an area of interest to regulators, and I'm sure our ads labeling is no different. Given how much scrutiny we face, I'm confident that the teams responsible for our ads labeling decisions do so with detectability, and the best interests of our users, in mind.

## TRADEMARK PROTECTION

### **23. Google's policies for Google Ads, use of trademarks, and help for trademark owners, which include mechanisms for avoiding detrimental use of trademarks, have been presented as evidence. Could you please explain what kind of trademark use Google takes actions against in relation to Google Ads?**

- As I've mentioned, we will restrict trademark terms from appearing in the text of competitor ads, and we've imposed those restrictions ever since we changed our approach to keywords back in 2004.
- As a courtesy to trademark owners and to minimize any risk of confusion, we will apply these restrictions not just to ads that exist at the time of the complaint, but ads that may be added to our systems in the future, even by businesses and websites that don't exist at the time of the complaint.
- Through this policy, trademark owners can rest assured that their brands aren't allowed to appear in their competitor's ad text, even if those references might be permitted under local law as a legitimate comparative reference. Our policies don't require some type of confusion - it's just a blanket restriction.
- Additionally, in member states of the EU and European Free Trade Association, when the use of a trademark as a keyword, together with the content of the ad, is confusing as to the origin of the advertised goods, we will disapprove that keyword and ad.
- Beyond the trademarks policy and pages referenced here, Google has a number of additional policies restricting ads promoting counterfeit goods, ads engaged in misrepresentation, and other fraudulent and deceptive activities. Ultimately, it's critical that users have a good experience when encountering Google Ads, and our policies are designed to achieve that.

### **24. Can you please explain how the trademark policy is enforced?**

- We have a detailed page on our advertising help center outlining our policy and its requirements. But simply typing in a search for "Google ads trademark complaint" will lead users to the page.
- Brand owners can use a form linked through that site to provide their trademark details - this would include the registration information, the countries in scope, and any other information relevant to the report.
- We then validate the information provided, and add the term to our system so that it's restricted from showing in competitor ad text going forward.
- Again, this can be applied against all competitors regardless of whether they have any ads running at the time of the complaint, so it's a very prophylactic measure to mitigate potential trademark abuse or misuse

### **25. Is this enforcement mechanism often used by trademark owners?**

- Absolutely. Most major brands have a complaint on file for their key terms in their key markets. And most companies familiar with Google Ads are also familiar with our trademark policies and procedures.

### **26. How often does it happen that Google takes action against ads?**

- Ads are restricted based on trademarks every single day, and we receive hundreds of new complaints every month. This could be a new brand that wasn't previously in our system, or it could be an update to an existing brand to cover new territories or goods and services.
- We have approximately thirty employees whose sole remit is to process these complaints and ensure they're actioned promptly, which I think is another reflection of how seriously we take our commitments here to ensuring that our ads provide a good experience for both users and businesses.

Place/Date: Marin County, California, USA / October 11, 2021

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Gavin Charlston