

Table 7. Cumulative total internet use, 2006

Country grouping	Population (million)	Per capita internet use, per 100 inhabitants	Total use (multiplication of two previous columns)	Percentage share	Cumulative (%)
Low income	2420	4.2	10,164	8.8	8.8
Low middle	2276	11.4	25,946	22.5	31.3
Upper middle	811	22.4	18,004	15.6	46.9
High income	1031	59.3	61,138	53	100.0
			115,252	100	

Source: UNCTAD⁵.**Table 8.** Cumulative total mobile phone use, 2006

Country grouping	Population (million)	Per capita phone use (per 100 inhabitants)	Total use (multiplication of two previous columns)	Percentage share	Cumulative (%)
Low income	2420	6.9	16,698	12.9	12.9
Low middle	2276	18.2	41,650	32.3	45.2
Upper middle	811	31.7	25,708	19.9	65.1
High income	1031	43.5	46,848	34.8	100.0
	6538			100	

Source: UNCTAD⁵.

as the following numbers indicate. In particular without China the two bottom groups then contain only 21.1% of total internet users as against the 31.3% shown in Table 7.

Conclusion

Conventional measures of the digital divide assign the same weight to each country regardless of its population size. Yet, from a welfare point of view, it makes

sense to use size as a device to weigh countries in rich and poor regions of the world. Then one derives for comparison the absolute number of internet users and mobile phone subscribers in these two different parts of the world. This results in either a disappearing divide or a reversal in favour of developing countries. The role of China, the world's largest country, is shown to be central to these results. The relevant policy response, however, should not be one of compla-

gency, but rather of increasing further the size of the digital divide in favour of the developing countries.

The point is that even when the digital divide disappears, there are still vast numbers of individuals in developing countries with no access to the internet or mobile phones. Arguably, the current literature focuses too much on closing the (unweighted) digital divide. For this is only a step in a much longer procedure of providing IT access to the majority of the population in developing countries.

Notes

1. Parts of this paper are based on James²; which does not contain the section on analysis provided here.
2. Note that here we measure the relative digital divide, i.e. the ratio of the internet and mobile phones in developed to developing countries. One can also measure an absolute divide, where one amount is subtracted from the other.

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4. Todaro, M., *Economic Development*, Pearson, 2006, 9th edn.
5. UNCTAD, The Information Economy Report, Geneva, 2006.

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Trademarks as keywords used in search engines

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The internet has led to some novel business models. One such is Google's AdWords program begun in October 2000, that is now Google's primary revenue source. Under the AdWords program, advertisers pay Google a fee for linking their advertisements to certain keywords or phrases. When a user types that word or phrase into the search engine, advertisements linked to that keyword appear prominently next to or above the search

results. Sometimes, businesses choose their competitor's trademarks as keywords, seeking to juxtapose their own advertisements with those of their competitors. The legal question that has arisen is whether the sale and use of trademarks as keywords constitute trademark infringement, and, if so, who is liable for that infringement. The dichotomy here is that while trademark owners see the practice as trademark in-

fringement because internet users cannot distinguish between a trademark owner's website and a keyword advertiser's website when both appear as a paid-for search engine result, the keyword advertisers see it as a permissible form of comparative advertising¹, such as the practice of erecting a billboard across the street from a competitor's store. In fact, Google has found itself facing litigation from both sides².

The litigation between American Blind & Wallpaper Factory (ABWF) and Google in the US is an interesting example of the intricate nature of trademark infringement involving the use of keywords. To prove trademark infringement in the US, a plaintiff must show that^{2,3} (1) it possesses a mark, (2) the defendant used the mark, (3) the defendant's use of the mark occurred "in commerce", (4) the defendant used the mark in connection with the sale, offering for sale, distribution, or advertising of goods or services, and (5) the defendant used the mark in a manner likely to confuse consumers'.

The contentious issue here was whether a competitor's use of other businesses' trademarks in the AdWords program is 'use in commerce' under the Lanham Act⁴, which provides that 'the term "use in commerce" means the *bona fide* use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark'. It further provides that a mark is deemed to be used in commerce on services 'when it is used or displayed in the sale or advertising of services and the services are rendered in commerce'. American Blind's objection was that when someone puts 'American Blind & Wallpaper Factory' into Google's search box, advertisements of other companies are listed beside the search results, luring users to click on them.

Origin of the confrontation between American Blind and Google

The story began when an attorney on behalf of ABWF wrote a letter dated 23 July 2002 to Google that ABWF's competitors have 'flagrantly attempted to confuse consumers and capitalize illegally on ABWF goodwill and reputation by purchasing identical or substantially similar keywords from search engines'⁵. In September 2002, Google agreed to block the use of three keywords registered with the United States Patent & Trademark Office (USPTO) and owned by American Blind – 'American Blind & Wallpaper Factory', 'American Blind Factory', and 'DecorateToday' – from use by other customers in keyword advertising. However, Google defended the use of a list of 36 other similar unregistered keywords that American Blind had

claimed infringed on its trademarks. These included phrases such as 'American blind' and "decorate today"⁶. When further exchanges of letters failed to change the stand of either party, each side took the other to court, albeit different courts.

Google moved first. On 26 November 2003, it preemptively moved the US District Court, Northern District of California for declaratory judgment that its AdWords program did not infringe on ABWF's trademarks and demanded a jury trial⁶ stating that 'Google believes and maintains that descriptive terms (including terms such as "blind", "wallpaper" and "factory", which are component parts of American Blind's trademark) are not entitled to any such treatment, and that Google's sale of keyword-triggered advertising does not violate the Lanham Act'. ABWF responded by asking the court to dismiss the lawsuit.

Without waiting for the court's response, ABWF promptly opened a second litigation front. On 27 January 2004, it filed a lawsuit in the US District Court for the Southern District of New York against Google and several third-party defendants⁷ who pay Google so that they can display 'virtually the same results of search queries as those displayed by Google', claiming trademark infringement, false representation, dilution, injury to business reputation and dilution (under New York General Business Law §360-1), unfair competition, tortious interference with prospective economic advantage, and in the alternative, contributory trademark infringement and contributory dilution. It asked for damages, including any profits earned as a result of the alleged infringement and punitive damages. It also sought both a temporary and permanent injunction barring Google and its partners from selling keywords that match or are similar to its trademarks or from displaying competitors' search results when such terms are entered. Google, in turn, moved the court to dismiss the lawsuit.

So, Google and ABWF were litigating in two separate courts, California and New York, on the same issues.

Progress in the California court

ABWF's motion⁸ to dismiss Google's motion for declaratory judgment was de-

nied by the California court⁹ on 12 April 2004. On 4 May 2004, American Blind answered Google's claims and brought counterclaims¹⁰ against the latter that were essentially a repetition of its charges against Google made in the lawsuit filed in the New York court in January 2004.

On 30 March 2005, Google's motion to dismiss American Blind's trademark infringement and dilution claims were denied⁹. The court '(1) GRANTED as to American Blind's claim of tortious interference with prospective business advantage and (2) DENIED as to American Blind's other claims (mentioned in the counterclaims¹⁰)'. Although Google maintained that its keyword advertising is not 'use in commerce', it also argued that terms like 'American Blind' are descriptive and thus not protectable. The court indicated that it would consider at a later date, 'both the relevant facts and the applicable law in the context of a fuller record'. It concluded that ABWF had made sufficient allegations of indirect infringement and dilution by the defendant's advertisers as well as contributory liability on the part of defendants to merit further consideration.

On 26 December 2006, Google sought summary judgment. On 18 April 2007, the court granted some claims and rejected others¹⁰. In particular, the court concluded:

1. That Google's sale of trademarked keywords in its AdWords program, keyword usage and keyword triggering constituted a trademark use in commerce, thereby denying Google's claim that it was not so.
2. That the terms 'American Blinds' and 'American Blind' are descriptive, and that ABWF has not shown secondary meaning, so ABWF has no trademark rights in the terms.
3. That American Blind's trademarks are not famous or distinctive, so dilution claims are invalid.

The stage was thus set for a jury trial to decide on likely consumer confusion on the remaining three American Blind's trademarks, namely 'American Blind Factory', 'Decoratetoday', and 'American Blind & Wallpaper Factory'. However, faced with economic hardship, ABWF made a business decision to drop its lawsuit against Google. Both compa-

nies agreed to dismiss the litigation¹¹ on 30 August 2007.

Progress in the New York court

The proceedings in the New York court went along similar lines as that of the California court. In early 2005, the New York court upheld ABWF's rights to continue its case on claims of trademark infringement, unfair competition, contributory trademark infringement and contributory dilution, while granting Google's motion to disallow American Blind's claims of 'tortious interference with prospective business advantage'. Given ABWF's hardships, this lawsuit too was dropped.

Metatags

An issue related to keyword searches is the use of metatags. To facilitate keyword searches, search engines typically create an index of webpages that use each keyword as a metatag in their HTML (hypertext markup language) code. Therefore, search engines may be programmed to provide high placement on a list of webpages in response to a user's search query for a specific keyword, say, in proportion to the frequency with which that term appears within the metatags and within the text of the webpage. Consequently, use of proprietary marks in metatags may lead to similar trademark infringement problems as the use of trademarks in keywords. However, an important difference between the US trademark law and the EU Trade Marks Directive arises due to their respective definition of 'trademark'. Unlike the US law, the EU Directive fails to include metatags, because metatags serve to locate the goods or services on the web and not to distinguish them¹².

Remarks

Presently, it is uncertain how the keyword-metatag-trademark misuse can be controlled in commerce. Lower court decisions have been mixed. Until the highest court of a country addresses the issue,

or further case law discloses a predictable outcome, AdWords type programs in that country will continue to be risky. In fact, the issues are much wider and international in nature since the internet is global and operates in cyberspace. The debate must necessarily include international harmonization of intellectual property rights, jurisdictional issues, national sovereignty, and developmental economics.

Glossary

Trademark: Any sign which can distinguish the goods and/or services of one trader from those of another. A sign includes any word, name, symbol or device, or any combination of these.

Declaratory judgment: A judgment where the court states its opinion regarding the matter before it, without requiring that either of the parties do anything.

Tortious interference: The causing of harm by disrupting something that belongs to someone else.

Secondary meaning: A descriptive sign acquires a secondary meaning over its primary meaning if over time and usage in the marketplace, the consuming public begins to generally associate that sign as an indication of origin from one particular source for the goods and/or services in question. When this happens to a sign that is inherently non-distinctive, it becomes protected under trademark law after developing a secondary meaning.

Dilution: Many trademarks are deemed to have a distinctive quality, and any third-party use that diminishes this distinctiveness is considered to be a dilution.

Jury system: A system of trial where a panel of laymen (the jury) decide whether the accused person is guilty or not. The jury applies the law, as stated by the judge, to the facts of a case. The judge instructs the jury, but remains aloof from the deliberations of the jury.

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3. U-HaulInt'l, Inc. v. WhenU.com, 279 F.Supp.2d at 727 (E.D. Va., September 2003).
4. Lanham Act, Chapter 22, Subchapter III, §1127, http://www.law.cornell.edu/uscode/html/uscode15/usc_sup_01_15_10_22.html. The Lanham Act along with common law and state statutes control trademark protection in the US.
5. American Blind's counsel's letter dated 23 July 2002 to Google regarding AdWords trademark complaints; http://www.eff.org/IP/TM/Google_TM_Cases/20030723_abwf_letter.pdf
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