

A Doctrinal Study of Trademark Infringement in India's Keyword Economy

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*Abstract- This paper examines how keyword advertising has unsettled established trademark law in India, and what courts have done about it. Search engine marketing now sits at the centre of digital commerce, but the legal concepts designed to govern trademark use — particularly "commercial use" and "likelihood of confusion" — were not built with invisible algorithmic triggers in mind. The study traces the shift in Indian jurisprudence from the rigid, visibility-driven approach in *Consim Info* to the functional approach established in *Google v. DRS Logistics*. Drawing on Section 29 of the Trade Marks Act, 1999 and the safe harbour provisions under Section 79 of the IT Act, 2000, it identifies a clear judicial movement toward the "informed user" standard. The paper ends by proposing a regulatory approach that gives trademark owners meaningful protection without closing the keyword market to fair competition.*

Index Terms- Keyword Advertising, Trademark Infringement, Section 29 Trade Marks Act, Initial Interest Confusion, Intermediary Liability, Section 79 IT Act, Google Ads Jurisprudence, Digital Marketing Law India.

I. INTRODUCTION

The way businesses compete for consumer attention has changed dramatically. Where once a brand's visibility depended on hoardings, print advertising, or shop-front placement, it now hinges on a few lines of sponsored text at the top of a search results page. At the heart of this shift is the "keyword economy" — a system where companies bid on search terms, often including the registered trademarks of their competitors, to capture traffic. This is standard practice in Search Engine Marketing (SEM), but it raises a question that trademark law has struggled to answer cleanly: does using a rival's mark as an invisible backend trigger actually constitute "use" of that mark under the law?

Under the Trade Marks Act, 1999, infringement generally requires a use that creates confusion in the public mind. But keywords are invisible — a consumer never sees the trademark that triggered the ad they clicked on. This creates a genuine doctrinal puzzle: can a mark be "used" in any legally meaningful sense if nobody sees it being used? This paper looks at how Indian courts have worked through that puzzle, and where the law currently draws the line between hard-nosed competitive marketing and actual intellectual property infringement.

NEED OF THE STUDY

(In the IJVRA format, this often follows the Introduction to justify the research)

India's digital economy has grown faster than its statute books. The Trade Marks Act, 1999 was written for a world of physical goods and visible signs — it simply did not anticipate search engine auctions or algorithmic advertising. The Delhi High Court has issued rulings on keyword advertising that are not always easy to reconcile with one another, and the doctrine of "Initial Interest Confusion" in particular has been applied inconsistently. There is, therefore, a real need for a clear-eyed doctrinal analysis of how these recent Division Bench decisions fit together, and what principles they collectively establish for balancing IP protection against the demands of a competitive digital marketplace.

II. RESEARCH METHODOLOGY

This paper uses a doctrinal research methodology, meaning it focuses on close reading and analysis of statutes and case law rather than empirical data collection. The sources relied upon are primarily secondary in nature, and fall into three categories:

- Statutory Instruments: A careful reading of the Trade Marks Act, 1999 and the Information Technology Act, 2000, with attention to provisions directly relevant to digital advertising.
- Judicial Decisions: Key rulings from the Delhi and Madras High Courts, examined chronologically to trace how the law has evolved.
- Academic Literature: Relevant legal scholarship on digital IP rights in India, used to contextualise judicial developments and identify gaps in existing analysis.

III. STATUTORY ANALYSIS OF KEYWORD ADVERTISING

The central difficulty in analysing keyword advertising under trademark law is straightforward: the Act was written with tangible, visible uses in mind, while keywords are entirely invisible to consumers. Reconciling this gap is where the real doctrinal work lies.

A. The Concept of "Use" under Section 2(2)(c) and 29(6)

Infringement under the Act requires a "use" of the registered mark in the course of trade. Section 2(2)(c) has long demanded a "visual representation" — and search engines leaned on this for years, arguing that a keyword buried in backend code, invisible to any user, simply cannot qualify as visual use. It is a neat argument. But Section 29(6) undercuts it directly: using a registered mark on "business papers or in advertising" counts as use — and keyword bidding, which is what drives the advertising, fits that description squarely.

The recent judicial consensus in *Google LLC v. DRS Logistics (2023)* settled this question. The court held that bidding on a keyword is "commercial use" under the Act — not because the mark appears visibly, but because the bidding process is inseparable from the advertising it generates, which is designed precisely to redirect consumer traffic.

B. Deceptive Similarity and the "Confusion" Test (Section 29(2))

Section 29(2)(b) requires that using an identical or similar mark must be likely to cause public confusion. In keyword advertising, that is where the

IIC doctrine enters — and makes everything harder. The question courts have to grapple with: if a user clicks a sponsored link under a momentary false impression but quickly realises they are on a competitor's site, has confusion in any legally meaningful sense really occurred? Indian courts have not consistently answered this, which is precisely why the doctrine needed the correction it eventually received.

C. Dilution and Unfair Advantage (Section 29(4))

Section 29(4) gives well-known marks wider protection. Even where goods or services are entirely different, using a mark in a way that "takes unfair advantage of" or is "detrimental to the repute" of the mark constitutes infringement. In keyword advertising, this most commonly surfaces when a smaller player bids on a famous rival's trademark simply to ride its goodwill — no consumer confusion needed. Courts tend to look at how nakedly opportunistic the conduct appears.

IV. THE JUDICIAL EVOLUTION: FROM PROTECTIVE FORMALISM TO THE INFORMED USER STANDARD

Indian courts have not arrived at their current position on keyword advertising quickly or cleanly. The case law tells a story of genuine doctrinal uncertainty — an early hesitation to apply old trademark concepts to invisible digital triggers, then a decisive recognition that commercial use is commercial use regardless of visibility, and finally a more calibrated standard that asks what a real internet user actually experiences. Three phases, three courts, one evolving answer.

A. The Phase of Uncertainty: *Consim Info Pvt. Ltd vs. Google India (2010)* In the early days of search engine litigation in India, the Madras High Court in *Consim Info* was confronted with a question Indian courts had no real precedent for: could invisible meta-tags and backend triggers amount to "visual representation" under Section 2(2)(c)? The court did not find a clear infringement case — but it planted a seed that would shape the law for years. It introduced the Doctrine of Initial Interest Confusion (IIC) into Indian trademark law — suggesting that brief confusion at the moment of a search could be enough

to harm a proprietor's goodwill. Later courts would both build on that idea and significantly cut it back.

B. The Recognition of Digital Use: *Google LLC vs. DRS Logistics (2023)* The Delhi High Court's Division Bench finally provided a clear answer to the "use" question. The court rejected the argument that keyword bidding is a purely internal, technical process invisible to consumers. It held unambiguously that bidding on a registered trademark is "commercial use" in advertising under Section 29(6). The court went further on the intermediary question too: by actively recommending registered trademarks to advertisers through its "Keyword Planner" tool, Google crossed the line from passive conduit to active participant. That involvement, the court held, meant Google could no longer claim unconditional Safe Harbour under Section 79 of the IT Act.

C. The Pragmatic Refinement: *MakeMyTrip vs. Booking.com (2023)* The most recent development introduced a necessary nuance: the "Informed User" standard. The Delhi High Court accepted that while keywords do constitute "use" under the Act, that alone is not enough — use is not automatically *per se* infringement. The court observed that today's internet user is not easily fooled — most people can tell the difference between a "Sponsored" link and an organic result. By shifting the standard from "Initial Interest Confusion" to "Probable Deception," the court protected fair competition, allowing companies to bid on a rival's mark without fear of liability — as long as the resulting advertisement does not actively mislead consumers about who they are dealing with.

V. COMPARATIVE DOCTRINAL ANALYSIS: SYNTHESIZING THE SHIFT

The transition from *Consim Info* to *MakeMyTrip* marks a real shift in how the law approaches conduct in India's keyword economy — not just at the margins, but in terms of what standard of care is expected from search platforms and advertisers alike.

A. From Visibility to Functionality For years, the "visual representation" requirement gave search engines a reliable defence against trademark claims. That defence has now largely collapsed. Courts have moved toward a functional interpretation. What

matters now is not whether a consumer can see the keyword, but whether that keyword does real commercial work — and it clearly does. This is a sensible development. A legal framework that ignores how digital advertising actually functions would quickly become irrelevant in a marketplace increasingly driven by algorithms.

B. The Erosion of Initial Interest Confusion (IIC) A significant point of divergence lies in the application of the IIC doctrine. *Consim Info* took a markedly protective stance on the IIC doctrine — essentially, any real risk of consumer diversion was enough to make out a *prima facie* case. That approach, while understandable given the novelty of the issue at the time, set a low bar that later courts found difficult to justify. The *MakeMyTrip* ruling corrected that course. It is best understood as a "Pragmatic Correction." The court held that IIC cannot apply where the user — seeing a clearly marked "Sponsored" link — retains the ability to make an informed choice without being misled about the source. This brings India closer to the European "Global Appreciation Test," which asks courts to consider the overall impression on a reasonably informed consumer rather than fixating on a single moment of potential confusion.

C. The Transformation of Intermediary Liability Perhaps the most practically significant shift in the case law concerns the legal position of search engines themselves. For a long time, platforms like Google were treated as neutral conduits — passive pipes through which advertisers operated, bearing no real responsibility for what those advertisers did with a competitor's trademark. The *DRS Logistics* decision changed that. By actively suggesting competitors' trademarks as bidding options through its Keyword Planner, Google was no longer acting passively — it was "active participation." This has real consequences for how platforms design their advertising systems. The burden is no longer solely on the trademark owner to police misuse — digital platforms now carry a meaningful duty to ensure their own tools do not quietly facilitate infringement.

VI. SUGGESTIONS AND CONCLUSION

A. Suggestions

1. **Codification of Digital Literacy:** The informed user standard has been developed through case law, which is fine — but leaving it entirely to judicial discretion creates uncertainty. Codifying it in the Trade Marks Act itself would reduce that uncertainty, and cut down on litigation brought by trademark owners in cases where consumers were never actually at risk of being deceived.
2. **Regulatory Oversight of Bidding Tools:** A regulatory mandate requiring search platforms to build negative keyword filtering into their advertising tools for registered trademarks is a practical, proportionate fix. Smaller businesses running keyword campaigns without legal advice are the ones most likely to stumble into infringement here. Making the platform responsible for flagging protected marks shifts that burden to the party best placed to handle it.
3. **Transparency in Sponsored Content:** The informed user standard only works if users are actually informed. That means clear, consistent sponsored content labelling — particularly on mobile, where screen size makes it easy to miss the distinction between a paid result and an organic one. Mandating stronger labelling requirements is not anti-competitive; it is simply giving the standard the conditions it needs to function.

B. Conclusion

The journey from *Consim Info* to *DRS Logistics* and *MakeMyTrip* reflects a judiciary working through a genuinely difficult problem: how to apply a statute built around physical, visible signs to a world of invisible algorithmic triggers. What emerges from this study is that Indian trademark law has, on the whole, responded thoughtfully. A trademark in the keyword economy is no longer just a "source identifier" on a product label — it has become a "digital bridge" between a consumer's search intent and a brand's commercial presence online.

The Delhi High Court's finding that keyword bidding constitutes "commercial use" was the right call. But the subsequent move toward the "informed user" standard is equally important — and perhaps more

so. It reflects a mature understanding that trademark law exists to prevent consumer deception, not to give brand owners a monopoly over every competitive use of their name in the digital space. Not every instance of diversion is an instance of deception, and the law should not treat them as the same thing.

In the end, trademark law in the digital age has to hold two things at once: protecting what brand owners have built, and keeping the keyword economy competitive and open. That balance is genuinely hard to get right. But the direction Indian courts have taken — functional use, informed users, accountable platforms — is a solid foundation. The next step is for the legislature to build on it.

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