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ADVERTISING AND PROGRAMMATIC BIDDING: WHERE FREE SPEECH MEETS TRADEMARK INFRINGEMENT

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ABSTRACT

In the contemporary digital economy, algorithmic search visibility has largely replaced traditional storefronts, rendering search engine keywords prime commercial real estate. Through programmatic platforms like Google Ads, businesses frequently bid on competitors' trademarked names to trigger sponsored advertisements[1025]. While a triumph of targeted marketing, this invisible, backend auction mechanism has precipitated a profound doctrinal collision between modern internet architecture and traditional trademark law. This paper argues that the uncritical application of the Initial Interest Confusion (IIC) doctrine—a framework originally formulated for physical misdirection and early internet illiteracy—to algorithmic keyword bidding is fundamentally flawed.[1026] IIC is ill-equipped to govern sophisticated digital marketplaces where digitally literate consumers actively rely on search engines to present multiple, competitive options.

By conducting a comparative jurisdictional analysis, this paper highlights a fractured global legal landscape. It contrasts India's strict scrutiny, which often interprets backend algorithmic triggers as actionable statutory "use" under the Trade Marks Act, 1999, with the United States' highly permissive "sophisticated consumer" standard, and the European Union's pragmatic "Ad Clarity" middle ground. Furthermore, the paper contextualizes this friction within a broader constitutional framework, arguing that algorithmic keyword advertising serves as a digital form of comparative advertising, protected as commercial speech under Article 19(1)(a) of the Indian Constitution. When courts issue blanket injunctions based on backend keyword overlap, they risk transforming trademark law into an anti-competitive sword that stifles the free flow of commercial information and restricts consumer choice.

Empirically, considering the massive volume of registered trademarks globally, linguistic overlap in programmatic algorithms is mathematically inevitable. Consequently, this paper proposes a paradigm shift toward a novel "Deceptive Diversion" framework. This harmonized legal standard shifts the evaluative focus away from the invisible backend bidding of a trademark and places it strictly on the visible, front-end clarity of the resulting advertisement. By enforcing a three-pronged test—comprising an Ad Clarity Threshold, a Cloning Prohibition, and Landing Page Continuity—the proposed framework ensures that liability attaches only in instances of active deception, thereby restoring the critical balance between brand equity protection and healthy free-market competition.

Keywords: Keyword Advertising, Programmatic Bidding, Trademark Infringement, Commercial Speech, Initial Interest Confusion, Deceptive Diversion, Algorithmic Use, Comparative Jurisprudence

[1025] See Google Ads Help, How Keyword Auctions Work.

[1026] Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036 (9th Cir. 1999).

INTRODUCTION: THE ALGORITHMIC SHIFT IN TRADEMARK USE

THE MODERN DIGITAL ECONOMY

In the modern digital economy, the traditional storefront has been replaced by the search engine, and brand equity is increasingly dictated by algorithmic visibility. For modern enterprises, search engine keywords function as prime commercial real estate. Through programmatic bidding platforms like Google Ads, businesses routinely bid on the trademarked names of their competitors. This invisible, backend auction allows a rival's advertisement to populate precisely when a consumer searches for a specific brand, intercepting the consumer at the exact moment of commercial intent. While this practice is an undeniable triumph of targeted marketing, it has ignited one of the most contentious debates in contemporary intellectual property litigation: the friction between a trademark owner's right to protect their goodwill and a competitor's right to engage in fair, comparative market competition.

TE ROOTS OF THE CONFLICTS

At the heart of this conflict lies the doctrinal collision between modern internet architecture and traditional trademark law. Historically, trademark infringement and the common law tort of passing off were designed to prevent tangible consumer deception at the point of sale. However, keyword advertising does not necessarily involve selling counterfeit goods or cloning a competitor's logo. Instead, it relies on the invisible use of a trademark to trigger a sponsored result[1027]. To combat this, plaintiffs have increasingly weaponized the doctrine of Initial Interest Confusion (IIC)—a legal theory originally formulated to penalize the "fleeting confusion" caused by misleading highway billboards that divert customers before a sale even occurs. By arguing that keyword bidding creates a deceptive digital diversion, brand owners seek to enjoin competitors from referencing their marks entirely.

STATUTORY LIMITS IN THE INDIAN JURISDICTION

Within the Indian jurisdiction, this conflict directly tests the statutory limits of the Trade Marks Act, 1999. The fundamental prerequisite for infringement under Section 29 is that the contested mark must be "used in the course of trade." However, algorithmic keyword bidding occurs entirely behind the graphical user interface[1028]. The trademark is not affixed to a product, nor is it explicitly printed in the resulting advertisement; it functions merely as a backend trigger. This raises an unprecedented statutory question: does the invisible, algorithmic selection of a competitor's trademark constitute actionable "use" under Section 2(2)(c) read with Section 29, or is it a non-actionable technological function? Answering this requires unpacking the historical boundaries of trademark infringement and passing off, and examining why the Initial Interest Confusion doctrine was imported to bridge the gap.

THE DOCTRINAL COLLISION: INFRINGEMENT, PASSING OFF, AND IIC

The difficulty courts face in regulating programmatic keyword advertising stems from a fundamental anachronism: attempting to govern twenty-first-century algorithmic search engine mechanics using nineteenth- and twentieth-century analog legal frameworks. Traditional trademark infringement and the common law tort of passing off were rigidly constructed around physical commerce—tangible products, clearly affixed labels, and direct consumer interactions where deception visibly occurs at the point of sale.

Keyword advertising, however, does not fit cleanly into these traditional, physical boxes. It operates entirely in the invisible backend of the internet, utilizing metadata, machine learning, and automated bidding systems to trigger dynamic, sponsored advertisements. The

[1027] Mark P. McKenna, The Normative Foundations of Trademark Law, 82 Notre Dame Law Review 1839 (2007)

[1028] The Trade Marks Act, 1999, No. 47 of 1999.

competitor never physically reproduces the trademark or attaches it to their own goods; rather, the trademark is reduced to a mere line of code used to gauge consumer intent.

When a brand owner discovers a competitor covertly bidding on their trademarked name to siphon digital foot traffic, the reaction is often swift and aggressive. Because there is no counterfeit physical product to seize, aggrieved brand owners typically deploy a systematic, three-pronged legal attack. Each of these prongs attempts to force digital behavior into an analog mold, fundamentally colliding with the empirical reality of modern digital marketing:

- First Prong: The Claim of Statutory Infringement (The "Use" Paradigm) Plaintiffs argue that the mere backend entry of a trademark into a search engine's bidding algorithm constitutes an unauthorized "use in the course of trade." This deeply complicates statutory definitions, stretching the concept of trademark "use" beyond visible consumer perception and transforming backend technological optimization into an actionable offense.[1029]
- Second Prong: The Allegation of Passing Off (The Evidentiary Burden) In the absence of clear statutory infringement, brand owners allege passing off. They attempt to prove that the resulting sponsored ad misrepresents the competitor's goods as those of the trademark owner. The collision here is evidentiary: how can a plaintiff prove misrepresentation or a false claim of origin when the resulting digital advertisement usually explicitly bears the competitor's own distinct branding and URL?[1030]
- Third Prong: The Invocation of Initial Interest Confusion (The Misfit Solution) When both statutory infringement and traditional passing off fail—due to a lack of visible deception at the point of purchase—plaintiffs rely on the Initial Interest Confusion (IIC) doctrine. They argue that the mere momentary diversion of a consumer's digital attention is legally actionable, effectively equating the presentation of a competitive alternative with deceptive bait-and-switch tactics.

This three-pronged legal strategy creates a severe doctrinal friction. Digital marketing inherently relies on targeted, comparative visibility to break market monopolies and offer consumers choices. By treating an invisible algorithmic trigger as synonymous with printing a counterfeit logo on a product, this legal attack ignores how modern search engines function as multi-option directories. It forces the judiciary to grapple with an existential question for the digital age: should trademark law insulate a brand from any and all digital distraction, or must it evolve to accommodate an ecosystem where digitally literate consumers actively expect and rely upon algorithmic alternatives?

THE “USE” HURDLE IN STATUTORY INFRINGEMENT

To prove trademark infringement, the plaintiff must first establish that the defendant "used" the mark. Under Section 29(6) of the Trade Marks Act, 1999, a person uses a mark if they affix it to goods, offer goods under the mark, or use the mark in advertising. The doctrinal collision occurs because keyword bidding is an invisible transaction between the advertiser and the search engine (e.g., Google). [1031]The competitor never displays the trademark to the consumer. While recent jurisprudence has started to interpret this backend algorithmic trigger as a "use in advertising," doing so stretches the statutory language considerably. If "use" no longer requires consumer visibility, the boundary between trademark infringement and backend technological optimization becomes dangerously blurred.

[1029] Rescuecom Corp. v. Google Inc., 562 F.3d 123 (2d Cir. 2009)
[1030] . Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 25:70.25 (5th ed. 2019).
[1031] Trademark Act,1999 [8] Reckitt & Colman

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THE EVIDENTIARY BURDEN OF PASSING OFF

When statutory infringement is difficult to prove, plaintiffs turn to the common law tort of passing off. Passing off relies on the classic "Classical Trinity" established in Reckitt & Colman: goodwill, misrepresentation, and damage. [8]The collision here lies in

misrepresentation. In a standard passing off case, the defendant packages their product to look identical to the plaintiff's, tricking the consumer into a purchase. In keyword advertising, however, the resulting sponsored ad usually displays the competitor's own distinct brand name and URL. If the ad clearly identifies the competitor (e.g., searching for "Brand X" yields an ad that explicitly says "Try Brand Y"), there is no misrepresentation. Without a false claim of origin, traditional passing off fails, leaving brand owners frustrated by the diversion of their traffic.

INITIAL INTEREST CONFUSION (ICC): THE MISFIT SOLUTION

Because backend bidding struggles to meet the thresholds for statutory infringement (due to visibility) and passing off (due to lack of misrepresentation), courts imported the doctrine of Initial Interest Confusion. Originally popularized in the US, IIC penalizes "fleeting confusion" that occurs before a transaction takes place. The classic analogy is a deceptive highway billboard that tricks a driver into taking an exit for a specific restaurant, only to find a competitor's restaurant instead. Even though the driver realizes the mistake before buying anything, the competitor illegally benefited from the initial diversion. Plaintiffs argue that keyword bidding is the digital equivalent of that deceptive billboard.

However, applying IIC to modern search engines is a fundamental mismatch. A search engine is not a single highway exit; it is a directory designed to present multiple options. Presuming that a digitally literate consumer is "confused" simply because a search for one brand yields alternatives fundamentally misunderstands how consumers interact with algorithmic search results today.

GLOBAL JURISPRUDENTIAL DIVERGENCE

Because the mechanics of algorithmic keyword advertising do not fit squarely within classical trademark statutes, courts globally have been forced to interpret statutory language through the lens of modern internet behavior. The resulting jurisprudence is deeply fractured. A comparative analysis reveals a spectrum of liability: from India's strict scrutiny of backend "use" and intermediary liability, to the European Union's middle-ground focus on ad clarity, culminating in the United States' highly permissive "sophisticated consumer" standard.

THE INDIAN APPROACH: STRICT SCRUTINY AND INTERMEDIARY LIABILTY

The Indian judiciary has taken one of the most stringent stances globally, characterized by a willingness to interpret backend algorithmic triggers as statutory "use" and a refusal to grant search engines blanket intermediary immunity.

The cornerstone of the current Indian approach is the Delhi High Court's Division Bench judgment in Google LLC v. DRS Logistics (P) Ltd. (2023). The Court made two profound rulings: First, the invisible bidding of a trademark as a keyword amount to "use" under the Trade Marks Act, 1999. Second, it struck down Google's defense of "safe harbor" under Section 79 of the Information Technology Act, 2000, reasoning that by actively suggesting trademarked keywords through its Keyword Planner tool and directly profiting from the auction, Google acts as an active commercial participant.[1032]

The tension is further illustrated by MakeMyTrip (India) Pvt. Ltd. v. Booking.com B.V. While a

Single Judge initially granted an injunction against Booking.com, ruling that bidding on the "MakeMyTrip" keyword amounted to taking an "unfair advantage" under Section 29(8) of the Act, the Division Bench later set aside the blanket

[1032] Google LLC v. DRS Logistics (P) Ltd. (2023)

injunction. However, the overarching Indian jurisprudential trend remains highly protective of the trademark owner.[1033]

THE UNITED STATES APPROACH: THE "SOPHISTICATED CONSUMER" STANDARD

In stark contrast to India, the United States has spent the last decade aggressively walking back the IIC doctrine in the context of digital advertising. US courts increasingly prioritize market competition, arguing that internet users are highly digitally literate.

The pivot point occurred in Network Automation, Inc. v. Advanced Systems Concepts, Inc. (9th Cir. 2011), where the Ninth Circuit explicitly rejected a rigid application of IIC to keyword advertising. The Court noted that consumers understand the fundamental mechanics of search engines and expect to be presented with competitive alternatives. Therefore, distraction or diversion does not equate to actionable legal confusion[1034]. This standard was cemented in Multi Time Machine, Inc. (MTM) v. Amazon.com, Inc. (9th Cir. 2015), effectively shifting the burden away from the backend algorithmic trigger and placing it squarely on the cognitive ability of the "sophisticated consumer" to read and differentiate clearly labeled choices.

THE EUROPEAN UNION APPROACH: THE "AD CLARITY" STANDARD

The European Union has carved out a pragmatic middle ground. Rather than attempting to divine the psychological state of the consumer or strictly policing the backend algorithmic infrastructure, the Court of Justice of the European Union (CJEU) evaluates liability based purely on the front-end presentation of the advertisement.

In the landmark consolidated cases of Google France SARL v. Louis Vuitton (2010) and Interflora v. Marks & Spencer (2011), the CJEU established the "Ad Clarity" standard. The Court ruled that keyword bidding on a competitor's trademark is a lawful, competitive practice unless the resulting ad copy is drafted so ambiguously that it makes it impossible (or very difficult) for a reasonably well-informed and reasonably observant internet user to tell whether the goods originate from the trademark owner or a third party.[1035]

TABLE 1: COMPARATIVE ANALYSIS OF GLOBAL KEYWORD ADVERTISING JURISPRUDENCE

Jurisdiction	Approach	Key Precedents	Core Standard
India	Strict Protection	Google LLC v. DRS Logistics; MakeMyTrip v. Booking.com	Leans toward holding intermediaries liable and treating diverted traffic via backend triggers as a near per se trademark violation.
United States	Sophisticated Consumer	Network Automation; MTM v. Amazon	Views modern consumers as digitally literate and not easily confused by clearly labeled sponsored ads; distraction is not deception.
European Union	Ad Clarity	Google France; Interflora	Liability depends entirely on whether the

[1033] MakeMyTrip (India) Pvt. Ltd. v. Booking.com B.V
[1034] Network Automation, Inc. v. Advanced Systems Concepts, Inc. (9th Cir. 2011)
[1035] Google France SARL v. Louis Vuitton (2010)

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	Standard		visible ad text itself is misleading or obfuscated, rather than the act of backend bidding.

THE INTERSECTION OF COMMERCIAL SPEECH AND TRADEMARK

To fully understand the legal friction generated by keyword advertising, the analysis must step beyond the rigid boundaries of the Trade Marks Act, 1999, and address the broader constitutional implications. Trademarks fundamentally grant a negative monopoly—the right to exclude others from using a specific signifier. However, when applied to algorithmic search engines, this monopoly directly intersects with the fundamental right to freedom of speech and expression enshrined in Article 19(1)(a) of the Indian Constitution, specifically the protections afforded to commercial speech[1036].

THE CONSTITUTIONAL PROTECTION OF COMMERCIAL SPEECH

In the landmark judgment of Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd. (1995), the Supreme Court of India definitively ruled that "commercial speech" is a part of the freedom of speech and expression guaranteed under Article 19(1)(a). Advertising is essential for the "free flow of commercial information" in a democratic, free-market economy. The public has a constitutional right to receive information about product alternatives to make informed economic choices. Algorithmic keyword advertising serves as a highly efficient mechanism for disseminating comparative commercial speech precisely when the consumer's intent to purchase is highest[1037].

KEYWORD ADVERTISING AS DIGITAL COMPARATIVE ADVERTISING

Traditional comparative advertising—where a brand explicitly names a competitor to highlight superior features or lower costs—is widely recognized as lawful in India, provided it does not denigrate the rival's product. Programmatic keyword bidding is the modern, digital equivalent of this practice. When a new entrant bids on a dominant market player's trademarked name, they are communicating: "If you are searching for Brand X, you might also be interested in our alternative, Brand Y." If the ad clearly identifies Brand Y and makes no false claims of affiliation, it actively serves the consumer's right to receive information under Article 19(1)(a).

THE CHILLING EFFECT OF RIGID TRADEMARK MONOPOLIES

The primary danger of applying the IIC doctrine to keyword advertising is that it transforms a trademark from a shield against deception into a sword against competition. Blanket injunctions preventing competitors from using trademarks as invisible backend triggers effectively blindfold the consumer. If a dominant brand can sanitize search engine results, they artificially restrict the free flow of commercial information. Restricting the invisible algorithmic use of a trademark is only constitutionally justified if the front-end result actively deceives the consumer, not merely because it distracts them with a viable alternative.

[1036] Trade Marks Act, 1999

[1037] Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd. (1995)

EMPIRICAL REALITIES AND THE "DECEPTIVE DIVERSION" TEST

Theoretical legal doctrines often collapse under the weight of empirical data. To understand why a strict, pro-plaintiff application of the IIC doctrine is fundamentally unsustainable in the digital economy, one must look at the sheer volume of trademarks currently active in the marketplace.

THE STATISTICAL INEVITABILITY OF KEYWORD OVERLAP

Evaluating a month-wise breakdown of the total number of trademark applications filed with the Indian Trade Marks Registry reveals a staggering reality: the Registry consistently processes nearly half a million new applications annually. As the intellectual property ecosystem expands, linguistic overlap becomes mathematically inevitable. In programmatic advertising, search engines utilize "broad match" and "phrase match" algorithms, meaning a single generic search query can trigger ads for dozens of distinct but vaguely related brands. If courts treat every invisible, backend keyword overlap as a prima facie trademark infringement under the IIC doctrine, they risk flooding the judiciary with frivolous litigation and granting a few dominant players a monopoly over common commercial vocabulary.

FORMULATING THE "DECEPTIVE DIVERSION" TEST

Given the inadequacies of the IIC doctrine in the context of sophisticated internet users and the constitutional protections afforded to comparative commercial speech, this paper proposes the adoption of a harmonized "Deceptive Diversion" framework. Under this proposed test, courts should presume that algorithmic keyword bidding on a competitor's trademark is a lawful, competitive practice, unless the plaintiff can satisfy a three-pronged threshold of active deception.

TABLE 2: PROPOSED "DECEPTIVE DIVERSION" FRAMEWORK COMPONENTS

Threshold	Description	Objective
1. The Ad Clarity Threshold	Does the resulting sponsored advertisement explicitly and prominently display the competitor's own brand name? (e.g., "Looking for Brand X? Try Brand Y instead").	Ensures the consumer is presented with a choice, not a deception.
Threshold	Description	Objective
2. The Cloning Prohibition	Does the ad text mimic the trademark owner's specific slogans, or does the display URL masquerade as the plaintiff's domain?	Prevents traditional passing off from occurring within the visible ad copy itself.
3. Landing Page Continuity	If a consumer clicks the sponsored link, does the resulting landing page attempt to impersonate the	Prevents the continuation of a false illusion of affiliation post-click.

	trademark owner's visual trade dress (colors, layouts)?	

CONCLUSION

The migration of commerce from the physical storefront to the algorithmic search engine has fundamentally altered how consumers discover, interact with, and select brands. The attempt to govern this digital architecture using analog trademark doctrines has resulted in a deep global jurisprudential fracture. While the doctrine of Initial Interest Confusion once served a vital, pragmatic role in preventing physical misdirection and bait-and-switch tactics, its uncritical application to invisible keyword bidding transforms trademark law from a shield against consumer deception into a sword for corporate monopoly.

The core friction lies in a misunderstanding of both modern technology and the modern consumer. Treating the invisible, backend triggering of a search algorithm as actionable statutory infringement fails to acknowledge the sheer volume of the global trademark registry. Linguistic overlap in a crowded commercial ecosystem is an empirical inevitability. Penalizing businesses for this backend overlap guarantees a deluge of frivolous litigation and effectively sanitizes search engines, stripping them of their utility as comparative directories. Furthermore, the presumption that a digitally literate consumer is legally "confused" simply because a search for a dominant brand yields alternative options deeply underestimate the sophistication of today's internet users. Distraction is not deception; providing an alternative is not passing off.

To resolve this doctrinal collision, courts must reconcile the statutory boundaries of the Trade Marks Act, 1999, with the constitutional imperatives of Article 19(1)(a). The "Deceptive Diversion" framework proposed in this paper offers a necessary course correction. By shifting the legal inquiry away from the invisible mechanics of the algorithm and focusing strictly on the visible clarity of the resulting advertisement, this test restores the balance between brand protection and free-market competition. It mandates that liability should only attach when a competitor actively obfuscates their identity, clones a rival's trade dress, or explicitly misrepresents an affiliation.

Ultimately, trademark law was designed to protect the consumer's right to know exactly who they are buying from, not to guarantee a brand owner absolute immunity from competition. If a search engine user types in a trademarked query, is clearly presented with a rival's advertisement, and makes an informed, conscious decision to explore that alternative, the legal system should not intervene. That is not trademark infringement—that is the very definition of a free, competitive, and informed market.