

No Safe Harbour If Keyword Use Results In Trademark Infringement

A Division Bench (two judge bench) of the Delhi High Court has issued a detailed and nuanced ruling on keywords in *Google LLC v. DRS Logistics (P) Ltd. & Ors.* and *Google India Private Limited v. DRS Logistics (P) Ltd. & Ors.* [2023 SCC OnLine Del 4809, order dated August 10, 2023]. The court's analysis focuses on how Google's use of trademarks as keywords in its Ads programme aligns with the Trade Marks Act, 1999; whether such use constitutes trademark infringement; and if Google is entitled to the defence of an intermediary under the Information Technology Act, 2000 on account of such use. The decision lies at the intersection of intellectual property law and the digital world which makes it noteworthy.



Background

DRS Logistics, the respondents, alleged infringement of their registered trademark 'AGARWAL PACKERS AND MOVERS' on the ground that competitors' use of their trademark as a keyword triggered Google Ads that misled consumers and caused confusion. The single judge concluded that invisible use as a keyword was infringing in the case at hand though in exceptional circumstances use of trademark as a keyword could qualify for fair/ *bona fide* use. Google preferred an appeal to a Division Bench.

Decoding the Decision

The Division Bench's analysis involved:

- 1. Understanding Trademark 'Use':** Section 2(2) of the Trademarks Act, 1999 was interpreted to lend the word 'use' a wide amplitude on account of the following definition: "use in relation to goods shall be construed as a reference to the use of the mark upon, or in any physical or in any other relation whatsoever, to such goods". Also, the court found that the use of a trademark as a keyword is the use of the trademark in advertising and found such use to be both by the advertiser and Google. This finding found support in Google's active role in assisting advertisers in choosing suitable keywords.
- 2. Defining Infringement:** While third party use of trademarks as keywords to trigger display of advertisements (Ads) constitutes use in advertising, it does not inherently infringe unless the Ad leads to confusion, unfair advantage, dilution, or compromise of the trademark in question. Thus, a finding of infringement would turn on the specific facts of each case.
- 3. Consumer Confusion:** The court discussed consumer confusion and asserted that a complaint based on misuse of trademarks as keywords must offer proof of genuine consumer confusion caused by the displayed Ad.
- 4. Fair Use:** Parallels were drawn between digital and physical markets, highlighting the fairness of presenting consumers with alternative choices, akin to placing competing products side by side in physical retail. The court stated that there is, "*nothing illegal if an entity engaged in commerce puts its advertising billboard next to an exclusive store of its competitor. It is also permissible for a competitor to buy shelf space next to competing goods of a well-known brand*".

5. **Initial Interest Confusion Doctrine:** The court distinguished between initial interest and the doctrine of initial interest confusion, noting that the latter requires a *'real likelihood of confusion'* to return a finding of trademark infringement. To quote the Division Bench, "*sponsored links may be relevant to the search query and what the internet user is searching for. It may thus generate interest that would obviously not constitute infringement of a registered trademark...if there is no deception or confusion.*" The test of average consumers with imperfect recollection to adjudge likelihood of confusion would not be applicable here in its rudimentary sense - the test is to be viewed from the perspective of a person who is aware of how search engines function. A typical user does not expect search query results to offer a clear answer; rather, he or she is well aware of the nuances of sponsored ads that outline choices and may, in fact, be looking for alternatives.
6. **Google's Role and Legal Immunity:** The court ruled that Google plays an active role in promoting use of trademarks as keywords, monetises its keyword suggestion tool and effectively, is engaged in selling such trademarks to advertisers in the form of keywords. This is why Google's use of trademarks as keywords constitutes advertising under the Trademarks Act. Given its active involvement in suggesting trademarks as keywords, its claim to safe harbour immunity (offered to intermediaries under Section 79(1) of the Information Technology Act) was compromised. Hence, if there is infringement in a particular case, Google would not be entitled to the defence of an intermediary.

Implications and Progressive Jurisprudence

The verdict's impact lies in assessing the overall effect of an advertisement using trademark keywords, rather than a per se infringement finding. The court's focus on user intent behind search queries and the role of search engines contributes a progressive angle. This ruling reinforces competitive advertising within limits and highlights the evolving nature of trademark jurisprudence in the digital realm.