



I The Viewpoint

Confusing application of the Initial Interest Confusion doctrine in trade mark cases

The Initial Interest Confusion doctrine has been inconsistently interpreted across jurisdictions, risking overreach and underscoring the need for clearer, harmonised guidelines.

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Meaning and genesis of the doctrine

The doctrine of 'Initial Interest Confusion' holds infringers liable for infringement of trade marks when the use of the offending trade mark is done in a way that temporarily or momentarily misleads the customers' attention, even if the confusion is resolved before the actual transaction. Despite confusion getting dispelled prior to the purchase, the same is considered actionable, owing to the competitive edge that the infringer receives to lure customers based on someone else's reputation.



The conceptual origin of the doctrine can be traced to the 1970's US trade mark jurisprudence. In *Grotrian v. Steinway*, where the competing marks were *Steinway* and *Steinweg* for pianos, the Second Circuit recognized that despite there being a substantial price difference between the competing products, a customer '*may satisfy himself that the less expensive Grotrian-Steinweg is at least as good, if not better, than a Steinway*', based on confusion that is caused before the actual purchase.

One of the most seminal authorities evincing application of this doctrine in the internet era was through *Brookfield v. West Coast*, a case concerning infringement of trade marks through meta tags. The court noted that use of meta tags might lead to misappropriation of acquired goodwill by the traffic gathered by the infringer on its platform, even when the customers are not confused and are fully aware that they are purchasing from the defendant and have no reason to believe that defendant is related to, or in any way sponsored by, the plaintiff.

Divergent views in application of the doctrine

The doctrine has not, however, found universal acceptance. In the US itself, the doctrine is sometimes applied broadly, i.e., it is sufficient to show that the consumer was *drawn* to the defendant's goods based on its ostensible association with the plaintiff's mark, irrespective of whether there is a real risk that the customer will eventually purchase the product; and sometimes restrictively, i.e. that the doctrine is made applicable only if it *gives rise to a real risk* that the potential consumer will actually purchase the defendant's goods even upon knowing that they are not the plaintiff's goods.

In light of this, Courts in jurisdictions such as Singapore and the United Kingdom have rejected the application of this doctrine. In *Staywell v. Starwood* and *Interflora v. Marks & Spencer*, the courts have shown a reluctance to treat mere initial diversion, absent actionable confusion, as trade mark infringement, holding that the doctrine would be incompatible with the traditional similarity of marks and goods tests.

In fact, in a committee report issued by INTA (International Trade Mark Association), it was discussed that the application of the doctrine in case law in the US had developed in an inconsistent fashion, with no definitive test for determining initial interest confusion, and no clarity on the factors a court should consider in deciding such cases. The committee found a dozen different holdings that expanded the doctrine in its rulings with no limits or boundaries. Based on this, the committee recommended that to streamline the application of the doctrine, it should not be considered separate from the likelihood of confusion doctrine, since the only difference between the two is a question of timing. Believing that '*confusion is confusion is confusion*', whether it is prior to or at the point of sale, the committee recommended that the traditional likelihood of confusion factors should be applied while gauging initial interest as well i.e. strength of the complainant's mark, degree of similarity between the marks, competitive proximity of the products, intent behind accused's adoption of the mark etc.

Inconsistent application of the doctrine in India

In India, the doctrine has gained considerable traction and momentum in the recent years. On a perusal of the case laws, it appears that even in India, the application of the doctrine is not streamlined. For instance, in the recent [*Lotus Herbals case*](#), a Division Bench of the Delhi High Court held that between the marks *Lotus* and *Lotus Splash*, Lotus is the common feature and applying the anti-dissection rule, the defendant's mark will *surely* cause initial interest confusion. Therefore, initial interest confusion appears to have been applied using the same tests as likelihood of confusion.

Similarly, in [*DRS Logistics*](#), while the Division Bench acknowledged that the doctrine has not been accepted universally, it ultimately held that initial interest confusion would amount to infringement under Section 29 if there is a *real likelihood of confusion*. In [*Forest Essentials*](#), however, a single judge held that the doctrine would not apply to the facts, since the initial state of 'wonderment' would dissipate owing to the sophisticated customer base and the resources and data available to the informed customers that formed the targeted audiences of the products – an argument accepted in many jurisdictions to reject the applicability of the doctrine. The decision was taken in appeal, where the Division Bench, relying on an earlier judgment in [*Under Armour*](#), clarified that 'transient wonderment' caused, even for a brief period, would amount to infringement. Though the appeal rulings rightly clarify that sophisticated customers are not immune to confusion, no elaborate discussion is offered on whether the degree of sophistication should affect the application of initial interest confusion doctrine, and if so, how.

In the absence of a consensus on when and how the doctrine should apply, its incoherent application may result in its expansion way beyond the original intent, leading to it being weaponized by complainants that are otherwise unable to satisfy the traditional likelihood of confusion factors. It remains to be seen whether the courts will establish a more uniform set of guidelines to harmonize the application of the doctrine of initial interest confusion and resolve its current inconsistencies.

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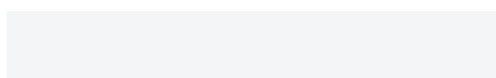
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