# PROTECTING WELL-KNOWN MARKS ONLINE: A COMPARATIVE ANALYSIS OF TRADEMARK DILUTION FRAMEWORKS IN INDIA, THE UNITED STATES AND THE UNITED KINGDOM

Deepika Tripathi, BBA LL.B. (H), Amity Law School, Amity University Madhya Pradesh

**ABSTRACT**

The digital marketplace has dramatically altered the IP landscape from consumer confusion to brand equity erosion. However, when it comes to cross-border digital events like algorithmic keyword advertising, targeted meta-tagging, domain squatting, and decentralized Web3 brand implementation conventional dilution theories, rooted in traditional geographic boundaries, have major systemic problems.

This research work conducts an exhaustive study of an evaluative assessment of the legal and judicial framework relating to trademark dilution in India, United States and the United Kingdom. It focuses specifically on how effective these systems are in dealing with online blurring and tarnishment for digital-native Intellectual property and protecting the commercial value and identity of famous and renowned trademarks in the online environment.

The comparative evaluation reveals some obvious points of friction in the operation of each of the three frameworks. While it provides effective and proactive brand protection for brand owners, the "probability of dilution" standard introduces difficulties to market entry and faces problems with extraterritoriality on decentralised digital platforms in the United States. However, in contrast, the UK's adherence with European theories that require a "change in consumer economic behaviour" imposes an almost irresolvable burden of proof on plaintiffs in a dynamic and rapidly shifting online marketplace. The uncertainty of the enforcement of the hybrid structure of India, under Section 29(4), is dependent largely on the wide judicial interpretation of what constitutes an "unfair advantage", as there are no specific definitions of the 'digital-native' violations.

The paper argues that existing territorial trademark systems are basically incompatible with the non-border digital dilution. The findings of this research offer lawmakers and courts a useful legal balance between robust international brand protection and market competition and online free expression.

## I. Introduction

### Background and Context

The basic framework of the traditional trademark law was designed with the objective of minimizing information costs, from a source-identifying or origin-indicating function.[1] In this traditional setting, as per the common law, trademark infringement was only when the infringing party's trademark, when used in connection with goods or services, caused a *likelihood of consumer confusion* as to the origin, sponsorship, or affiliation of those goods or services.[2]

But the mass marketing of late capitalism and the new electronic commerce have introduced a major paradigm shift: trademarks are not simply placeholders for direction but are active. Instead, they have become complex visual, mental and emotional assets of enormous selfcontained commercial value, "advertising attraction" and corporate goodwill.[3]

For this change to be possible, trademark theory had to be expanded to include the *trademark dilution doctrine.* This principle protects the structural integrity, psychological distinctiveness and commercial goodwill of the famous brand, irrespective of, and beyond, any consumer confusion, competitive proximity, or direct monetary flow of the funds.[4][5][6] As a protection, it operates on two different fronts through various jurisdictions:

**Dilution Through Blurring –** The gradual loss or dilution of the distinctiveness of a mark when it is approved for extension to an unrelated market segment.[5]

**Dilution by Tarnishment:** The unauthorized association of a well-known trademark to undesirable, undesirable, low quality or offensive circumstances that reduce the market value or image of the trademark.[6]

[1] William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 166-168 (2003).
[2] *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412-413 (1916).
[3] *L'Oréal SA v. Bellure NV*, Case C-487/07, [2009] ECR I-5185, para. 58.
[4] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 16(3), Apr. 15, 1994, 1869 U.N.T.S. 299
[5] 15 U.S.C. § 1125(c)(2)(B).
[6] 15 U.S.C. § 1125(c)(2)(C).

**The Digital Disruption: Cutting Territorial Ties**

The anti-dilution principle has lost its traditional physical and geographical roots with the worldwide shift to online trading. In the traditional physical retail business, trademark dilution was an obvious physical phenomenon that required physical, tangible product label, brochures and/or advertisements. Dilution was gradual, geographically limited and easily detected by the traditional enforcement methods in individual court areas, as substantial capital and local infrastructure were required in physical distribution. The modern digital environment, however, is based on dynamic, fast, non-linear and often invisible programming code. Digital dilution is not just physically visible in a website it's also in the web's infrastructure, which can be used to lull, target, and manipulate consumer attention. The unique danger of digital dilution is the automated systems, scalability and total geographic openness. Any digital campaign, automated scraping script, global keyword campaign, or generative AI prompt-injection framework can destroy the commercial uniqueness of a well-known brand in just a few milliseconds, and across several continents. The rapid international erosion bypasses the traditional territorial enforcement of the country's legal system rendering the distinct identity of a brand vulnerable to erosion on a global level prior to the issuing of a preliminary injunction by its domestic court.

The modern online marketplace has implemented different technological systems that actively affect the structure of the internet, creating new forms of digital dilution that challenge the limits of traditional trademarks.

1. **Concealed Meta-Tags & Search Engine Optimization (SEO):** A hidden inclusion of a competitor's brand name inside a site's hidden HTML keyword phrases, or in the backend code of the site. This is an example of a hidden dilution: the value of the competitor's brand is used to teach search engines that the origin of the brand is a different place from the origin of the competitor, thereby "rewiring" the digital map of the internet and forcing the consumer to follow the competitor's path.

2. **Business auction systems (e.g., Google Ads):** Systems of bidding for the right to have a competitor's trademark appear as a top-ranking result in a search engine and trigger ads from the bidders that do not appear in natural listings. The other brand capitalizes on the first impulse to purchase and cognitive association with the known brand name by taking the consumer's primary route of purchase.

3. **Algorithmic E-Marketplaces and Platform Mediation:** Multi-vendor platforms and major e-commerce aggregators make use of unique search and recommendation algorithms that systematically match the consumer queries.

## II. Literature Review

Global trade goes decentralized and algorithm based in web platforms has exposed the essential flaws of the international trademark anti-dilution systems. This section presents the basic concept and theories of brand equity protection in the context of the three systemic research gaps of digital trademark studies.

The anti-dilution doctrine's theoretical roots are based on the case of Frank I. Schechter, who stated that the "true value" of a modern mark is not in its essential role of source marking, but rather in its independent "selling power" and psychological distinctiveness.[7] Landes and Posner improved on this property-based approach by creating an economic efficiency model which demonstrated that maintaining a mark's distinctiveness lowers cognitive search costs to consumers.[8]

But critics like Mark Lemley argue that over-propertizing trademarks, by removing them from the confusion that consumers experience, results in overly broad monopolies over language and can impede market competition.[9] This theoretical battle is yet to be resolved in how these conflicted values work when physical markets give way to automated software coding.

### 1. The Evidential Paradox in Fluid Interfaces

One of the major missing components in the current literature is empirical measures to establish digital trademark dilution. In the current Anglo-European context, the trademark owner will have to demonstrate, objectively, a "change in the economic behaviour of the consumer" that is measurable to make a claim.[10] However, Ilanah Simon Fhima argues that this standard places an almost irresistible burden on the evidence to be presented before granting the injunction,

[7] Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 Harv. L. Rev. 813, 818-819 (1927).
[8] William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 166-168 (2003).
[9] Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1692-1695 (1999).
[10] *Intel Corporation Inc. v. CPM United Kingdom Ltd.*, Case C-252/07, [2008] ECR I-8823, para. 77.

and requires a huge amount of spending detail in the past to obtain injunctive relief.[11]

This is a big problem in today's web environment. Online consumer interactions are ephemeral, brief, and attention spans are short, observes Martin Senftleben.[12] However, current published research does not link digital user behaviour with the legal rigor of demanding proof of cognitive blurring as required by the Intel standard, and there is no consistent way to convert the real-time digital data associated with click-through redirection into a legal proof of cognitive blurring, according to the Intel standard.[13]

### 2. Legal Ambiguity and Algorithmic Abuse in the Global South

The second big shortfall is the lack of the legal implementation of anti-dilution measures for automated platform structures in emerging economies, particularly in India. Section 29(4) of the Indian Trade Marks Act, 1999, restricts the unauthorized use by third party which is "unfair advantage" to or is "detrimental to" the "distinctive character" or the "reputation" of a trade mark.[14] Despite this modern legal terminology, the Indian courts continue to read into Section 29(4) based on the traditional brick-and-mortar business models, according to Dev S. Gangjee.[15] Raman Mittal agrees with this criticism and notes that Indian courts frequently have conceptual confusion, combining the statutory anti-dilution requirements with standards for confusion arising from common law passing off.[16]

As a result, there is a significant lack of research on the Global South of how the automated, invisible backend digital tools are treated. In the absence of consumer confusion, there is no reliable baseline in existing literature that allows us to understand the practical "unfair advantage" that occurs through non-visible algorithmic features such as content in search boxes, meta tagging, multi-vendor dropdown filters, etc. that do not create any confusion in the

[11] Ilanah Simon Fhima, Trademark Dilution in Europe 114-118 (Oxford University Press 2011); see also Ilanah Simon Fhima, *The Court of Justice's Intel Judgment: Is Trademark Dilution Dead?*, 4 Intellectual Property Quarterly 421, 429-433 (2009).
[12] Martin Senftleben, *The Trademark Dilution Fallacy: Defending the Information Function of Trademarks in the Digital Age*, 12(2) Oxford J. Intell. Prop. L. & Prac. 114, 118-122 (2017).
[13] Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 Tex. L. Rev. 507, 521-525 (2008).
[14] Trade Marks Act, 1999, § 29(4), No. 47, Acts of Parliament, 1999 (India).
[15] Dev S. Gangjee, *The Polarity of Trademark Dilution in India*, 25 E.I.P.R. 412, 414-416 (2019).
[16] Raman Mittal, *Deconstructing Section 29(4) of the Indian Trade Marks Act*, 9 J. Indian L. Inst. 104, 108-111 (2018).

physical world.

There is no reliable foundation in the existing literature that would help to understand the practical "unfair advantage" under Section 29(4) when it comes to non-visible algorithmic functions like search box enhancement, meta tagging, multi-vendor dropdown filters, etc. that don't cause any physical consumer confusion.[1718]

### 3. Extraterritorial Boundaries in Decentralized and AI Environments

The final major loophole in anti-dilution studies is related to geographical restrictions on the enforcement of trademarks in decentralized networks and automated AI systems. The federal system of the United States under 2006's Trademark Dilution Revision Act (TDRA) requires that a mark be fully known and be a "household name" to the entire country's average consumer.[18]

But *Barton Beebe's* rebuke of this exalted standard has demonstrated that it fails to protect “niche fame” when an item enjoys high prestige and monetary value in niche online communities and/or high-tech subcultures and is ignored by the general store-crowd.[19]

This is a problem area in distributed Web3 structures and automated generative AI training systems. Because the streams of digital data flow across national borders, traditional territorial-based measures are simply of no use for measuring or regulating brand dilution online, as *Rebecca Tushnet* points out.[20]

## III. The Legal Framework: A Comparative study of frameworks in India, the US, and the UK

### 1. The Indian Model: Section 29(4) of The Trade Marks Act, 1999

The doctrine of trademark dilution was first clearly codified in India with Section 29(4) of The Trade Marks Act, 1999.[21] Section 29(4) is far more stringent than the ordinary test on

[17] *Google LLC v. DRS Logistics Pvt. Ltd. & Ors.*, LPA 192/2023 (Del. HC Aug. 10, 2023), para. 141.
[18] U.S.C. § 1125(c)(2)(A); also *Coach Services, Inc. v. Triumph Actuation Systems, LLC*, 668 F.3d 1356, 1373 (Fed. Cir. 2012).
[19] Barton Beebe, *A Property Right in Mere Distinctiveness: A Critique of Trademark Dilution*, 119 Harv. L. Rev. 1139, 1170-1174 (2006).
[20] Tushnet, *supra* note 7, at 542.
[21] Trade Marks Act, 1999, § 29(4), No. 47, Acts of Parliament, 1999 (India).

infringement, providing for a three-part test on dilution.[22] A registered trademark is violated by someone who utilizes a symbol that:

- Is the same or similar to the registered trademark;[23]
- For goods or services which are not similar to the trademarked goods or services;[24] and
- The registered trademark has a reputation in India; and the use of the sign without due cause unfairly takes advantage of or affects the distinctive quality or reputation of the registered trademark.[25]

The Delhi High Court, in *ITC Ltd. v. Philip Morris Products SA (2010)*,[26] has strongly reiterated that the legal framework of Section 29(4) doesn't necessitate proof of consumer confusion. However, the text creates a structural barrier, since it requires the plaintiff's mark to be "registered" under the Act to qualify for anti-dilution remedies. Unauthorized use of famous registered trademarks will rely on a passing off action to find common law remedies, but this action was historically found to be less effective in combatting cases of pure dilution without allegation of misrepresentation or confusion.

**2. The American Framework: The Trademark Dilution Revision Act (TDRA) 2006**

Section 43(c) of the Lanham Act (15 U.S.C. § 1125(c)) governs federal dilution claims in the United States, and it was revamped by the *Trademark Dilution Revision Act of 2006 (TDRA)*.[27] The TDRA was a direct response to the Supreme Court in *Moseley v. V Secret Catalogue, Inc. (2003)*[28] granting a heavy burden to owners of famous marks to show actual economic dilution.

In the TDRA, the proprietor of a famous mark has a right to an injunction to prevent anyone from using a mark or trade name that is "likely to cause dilution by blurring" or "likely to cause dilution by tarnishment," even if there is no actual or probable confusion, competition or real

[22] Id.
[23] *Id.* at § 29(4)(a).
[24] *Id.* at § 29(4)(b).
[25] *Id.* at § 29(4)(c).
[26] *ITC Ltd. v. Philip Morris Products SA*, 2010 (42) PTC 572 (Del.); *Bloomberg Finance LP v. Prafull Saklecha*, 2013 (56) PTC 243 (Del.).
[27] Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730
[28] *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

economic injury.[29]

However, the US system counterbalances this lax evidentiary requirement with a hard one for establishing brand identity. The mark should be "universally renowned", meaning that it is generally recognised by the relevant public in the United States as an indicator of the origin of the goods or the services for which the mark is used by the proprietor of the mark.[30] This "household name" standard clearly sets apart the US approach from its worldwide counterparts and systematically removes trademarks that are recognized outside of technical and niche markets.[31]

### 3. The UK Framework After Brexit: Trade Marks Act 1994, Section 10(3)

The Trade Marks Act 1994 of the United Kingdom tackles dilution via Section 10(3).[32] Section 10(3) of the Directive, which has its origin in Article 5(2) of the European Union Trade Marks Directive, provides that a person infringes an EUTM when the sign is identical or similar to a trademark which is well known in the United Kingdom, and the use of the sign, without good reason, takes unfair advantage of, or adversely affects, the distinctive character or reputation of that trademark.

The UK has formally left the EU but continued to have this in its domestic law as part of its integrated law. Importantly, the courts in the UK continue to adopt the strict evidentiary requirement laid down by the Court of Justice of the European Union ("CJEU") in Intel Corporation Inc. v. CPM United Kingdom Ltd. (2008).

Unlike the US "likelihood of dilution" system, the UK system relies on a plaintiff's ability to prove that the two marks are "connected or in relation" in the minds of the average consumer and that this connection or relation has caused, or is likely to cause, a "measurable alteration in the economic behaviour of the average consumer.[33]

## IV. Virtual Combat Zones: Keywords, Meta-Tags, and Algorithmic Infractions

Today's online marketplace is no longer a physical storefront, but rather a search engine and

[29] 15 U.S.C. § 1125(c)(1).
[30] 15 U.S.C. § 1125(c)(2)(A); Coach Services, Inc. v. Triumph Actuation Systems, LLC, 668 F.3d 1356, 1373 (Fed. Cir. 2012)
[31] *TCPIP Holding Co. v. Haar Communications, Inc.*, 244 F.3d 88, 93 (2d Cir. 2001)
[32] Trade Marks Act 1994, c. 26, § 10(3) (UK).
[33] *Id.* at para. 77

automated e-commerce website that play host to trademark infringement disputes. Brand dilution rarely means consumers being deceived or getting fake merchandise in the digital world. Instead, it works by opportunistically tweaking the software design, search terms used on the internet, and the backend algorithms that are designed to attract and redirect consumer attention.

### 1. The Keyword Dilemma: A Comparative Study of Attention-Capturing Mechanisms

The most hotly disputed area of digital trademark litigation is the search engine keyword bidding system, such as Google Ads. Here, an online company can buy its competitor's famous trademark as an active "keyword trigger" in these commercial auctions.[34] In this model, if a user types in a recognised brand into a search engine, the search engine's back-end auction site identifies the competing bidder and displays its website prominently at the top of the page as a "sponsored link" often before the actual organic link. It raises an important question in comparative IP law: Does a using a well-known trademark as a backstory (but not misrepresenting it) to display a different, non-asserting ad constitute an "unfair advantage" or reduce the value of the well-known trademark?

In the UK the final approach to keyword dilution was decided by the Court of Appeal in the case of *Interflora Inc. vs Marks and Spencer plc (2014)*[35] following the principles laid down by the Court of Justice of the European Union (CJEU) in *Google France*.[36] The case discussed whether the acquisition of its ‘Interflora' trademark by Mark & Spencer as a ‘Google AdWord' to promote its own flower delivery service damaged the uniqueness and commercial value of Interflora's network. The Court of Appeal ruled that using keyword bidding on a competitor's trademark is not necessarily a breach of the law and is a legitimate way to compete in the market.[37]

A registered trademark owner must prove that a competitor's sponsored ad does not enable a reasonably knowledgeable and attentive internet user to readily determine whether the goods or services advertised are from the trademark owner or from a third party not connected with

[34] David J. Franklyn & David A. Hyman, *Trademarks as Search Engine Keywords: Much Ado About Something?*, 26(2) Harv. J.L. & Tech. 481, 485-489 (2013).
[35] *Interflora Inc. v. Marks and Spencer plc*, [2014] EWCA Civ 1403, [2015] Bus. L.R. 325.
[36] *Google France SARL v. Centre National de Recherche en Propriété Intellectuelle (CNRRH)*, Joint Cases C236/08 to C-238/08, [2010] ECR I-02417.
[37] *Interflora*, [2014] EWCA Civ 1403 at para. 45

the trademark owner in order to maintain a dilution claim under Section 10(3) of the UK Trade Marks Act 1994. If the advertisement by the competitor clearly states that it is not financial or otherwise connected to the well-known brand and does not contain any financial words or phrases indicating a financial affiliation, the claim will not be valid.

Notably, the UK court rejected the adoption of the American concept of 'initial interest confusion' which would impose liability on an organisation for causing a momentary or temporary confusion that is completely cleared up by a user clicking on a link.[38] The Court of Appeal concluded that such minor cognitive distraction is not a per se sign of statutory trademark infringement or dilution, unless it can be empirically established that the mark has been adversely affected or harmed in a way that compromises the mark's primary source or investment functions.[39]

In contrast, the judiciary of India has been quite protective and interventionist, preventing brand owners from being exploited through keyword searches on Internet. In *Google LLC v. DRS Logistics Private Limited.* The Delhi High Court's Division Bench in 2023 ruled on Google's Ads platform, where the plaintiff was the proprietor of a well-known trademark 'Agarwal Movers and Packers' and the defendant was bidding against the plaintiff for the trademark.[40] The Division Bench has held that the unauthorised use of a trademark as a back-end keyword trigger is considered "use" under the Indian Trade Marks Act, 1999, in contrast with more relaxed interpretation adopted by the European courts.[41]

This fact that the use of a known mark to trigger a competitor's sponsored placement is a clear interference with web traffic has been acknowledged by the Indian court in its decision. Whether or not the advertisement actually contains any recognizable text mentioning the trademark, and causes no further consumer confusion, this is considered an actionable form of free-riding.

In its view, use of a famous brand name as a website launch pad or a means of driving traffic online amounts to an 'unfair advantage' and would be detrimental to the originality and reputation of the registered trademark, creating a wide toolkit for Indian brand owners to

[38] *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1062-1064 (9th Cir. 1999)
[39] *Interflora*, [2014] EWCA Civ 1403 at para. 104.
[40] *Google LLC v. DRS Logistics Pvt. Ltd.*, 2023:DHC:5615-DB (Del. HC).
[41] Trade Marks Act, 1999, §§ 29(4), 29(6)(d), No. 47, Acts of Parliament, 1999 (India)

combat online traffic diversion.[42]

### 2. Concealed Code, Meta-tagging, and Online Marketplaces: The Emergence of Algorithmic Dilution

In addition to the visible trademarks in the search results, the presence of trademarks in the hidden or back-end source code is a good example of unseen digital dilution. The primary technique involves the use of the unapproved inclusion of a competitor's recognizable domain name, trademark, or distinguishing brand identifier into the hidden HTML metadata and indexing strings found in a website.[43] Meta-tags are not visible to normal Internet users when they are surfing the Web; they only communicate with automated users of search engines and indexing processes.

The Bombay High Court in *People Interactive (India) Pvt. Ltd. v. Gaurav Jerry (2013)* held that the use of a competitor's famous domain name in the back end of the website amounts to online appropriation of the brand value.[44] The rival manipulates the metrics that are relied on by search engine crawlers to boost its search relevance ranking in an unnatural way.

This practice makes it harder for the mark to retain its unique character by directing search algorithms to an unrelated source by design. This changes the organic digital score and redirects consumer traffic but does not make the brand known to the viewer, thus negatively affecting the strong mental association between the recognizable brand and its actual source.

The advantages of this structural exploitation have expanded into contemporary marketplaces for eCommerce and multi-vendor site. Many ecommerce websites customize their internal search, dropdown menus and predictive search tools to help make high-end brands more visible. For example, as a user enters a known luxury brand into a marketplace search bar, the search algorithm usually tries to match the brand name with more affordable items and display a grid listing generic alternatives or ones that are not licensed, often under categories like "Recommendations for You."

In the case of *Puma SE v. IndiaMART InterMESH Ltd. (2024)*,[45] the Delhi High Court explicitly

[42] Dev S. Gangjee, *The Polarity of Trademark Dilution in India*, 25 E.I.P.R. 412, 417-419 (2019)
[43] Mark A. Lemley, *Place and Cipher in Cyberspace*, 91(2) Cal. L. Rev. 521, 534-538 (2003)
[44] *People Interactive (India) Pvt. Ltd. v. Gaurav Jerry*, 2014 SCC OnLine Bom 765, (2014) 59 PTC 613.
[45] *Puma SE v. IndiaMART InterMESH Ltd.*, CS(COMM) 607/2021 (Del. HC Jan. 3, 2024).

considered this interface practice. In this case, the online platform had a "drop-down" list which allowed fake and unauthorised sellers to select the registered trademark Puma as a filter for product categories, automatically relocating people searching for authentic Puma products to less desirable products.

The Delhi HC blocked the platform from giving the registered trademark as a drop-down option for unregistered vendors. The court noted that the use of algorithms to systematically compare and benefit from an established mark without permission reduces the exclusive consumer value of the mark, and that in the digital age, "the systematic use of an algorithm to compare and profit from a well-known mark without permission can result in actionable brand dilution."[46]

## V. The Evidence Stalemate: Establishing Dilution in Rapidly Evolving Online Environments

What has been found in the digital space is that the criteria of the anti-dilution approach, which are evident in a physical market, simply do not capture or measure the progressive erosion of the brand value in dynamic digital user experiences. Conventional standards of proof are abstracted when used in a context of online transactions lasting for milliseconds, automated algorithms and brief user interactions. They result either in over-enforcement which stifles competition in digital markets, or in an almost impossible evidentiary burden, exposing well-known trademarks to sophisticated digital use.

### 1. Assessing the US "Possibility of Dilution" Criterion: Administrative Effectiveness versus Monopolistic Resistance

*The Trademark Dilution Revision Act (TDRA) of 2006* marked an important change in federal anti-dilution law in the United States, and it introduced a new test: the "likelihood of dilution" standard as opposed to the "actual dilution" test adopted by the Supreme Court in *Moseley*.[47] Under 15 U.S.C. § 1125(c), a plaintiff seeking an injunction need not show damages, lost wages, or any actual change in consumer purchasing habits.[48]

The lenient standard of evidence can be a powerful tool for the owners of well-known

[46] Martin Senftleben, *The Trademark Dilution Fallacy: Defending the Information Function of Trademarks in the Digital Age*, 12(2) Oxford J. Intell. Prop. L. & Prac. 114, 119-123 (2017)
[47] *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 433 (2003)
[48] *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158, 1172 (9th Cir. 2011)

trademarks in digital litigation. Plaintiffs need not delay seeking quick preliminary injunctions against current online infringement of a mark, such as cross-border domain squatting, hidden use of meta-tags and algorithmic source-code clone, until it is rendered irretrievably lost.

However, legal experts argue that this weak evidentiary bar creates a lot of structural tension in the digital attention business. The US system often provides excessive protection to the brand owner through the granting of broad injunctions based on a highly speculative and theoretical "likelihood" of confusion, thus undermining legitimate online competition and freedom of expression.[49] This structural imbalance can make it more difficult to enable and encourage legitimate competitive uses, such as legitimate comparative online search advertising, expressive digital parodies, and consumer review sites.[50] [51]

While the TDRA includes clear exceptions for "fair use" and "news reporting" and "parody" (as defined in § 1125(c)(3)), courts that apply the "likelihood" test often grant overly broad preliminary injunctions against nonconfusing, similar uses, turning a narrow remedy to protect a brand into a broad right to control all references to a brand or icon on the internet.

Furthermore, the main problem with the U.S. model is that it relies entirely on a very stringent "household name" standard. The mark must be known to the general public in the U.S. for it to meet the requirements for federal anti-dilution protection.[51] This higher standard invariably excludes “niche fame” when a brand has a wide, if not almost universal, recognition and monetary value in niche online environments, niche communities and sophisticated B2B markets, but remains unknown to the average consumer in a retail store. Consequently, there's a legal gap for digital-native companies: Businesses are facing more sophisticated and targeted digital exploitation online but are unable to take advantage of federal anti-dilution protections because they're not able to meet the government's strict household fame requirements for traditional physical brands.

### 2. Deconstructing the UK/EU Intelligence Standard: The "Economic Conduct" Misconception

[49] Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 Tex. L. Rev. 507, 542-546 (2008)
[50] *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 439 (S.D.N.Y. 2016), aff'd, 674 F. App'x 16 (2d Cir. 2016)
[51] U.S.C. § 1125(c)(2)(A); see also *Coach Services, Inc. v. Triumph Actuation Systems, LLC*, 668 F.3d 1356, 1373 (Fed. Cir. 2012)

Contrastingly, the United Kingdom applies the legal framework established by the Court of Justice of the European Union (CJEU) in *Intel Corporation Inc. v. CPM United Kingdom Ltd. (2008)* on the side of the evidence. Plaintiff must show that the psychological 'connection' or 'relation' in the 'average' consumer's mind is created by a defendant's online mark, and this is impossible to do under the Trade Marks Act 1994, section 10(3).[52] Instead, the court demands a lot of evidence, in the form of empirical data, that the psychological connection has resulted or has the potential to result in a "change in the economic behavior of the consumer."[53]

The empirical benchmark is evident when injected into contemporary digital environments with a fast scroll, back-end automation, algorithmic matching of products, and a quick consumer focus: it is a misunderstanding of economic behavior. Proving that a consumer's spending behavior has been changed as a result of a brief online engagement is a very challenging proof challenge.

The UK system does not do a particularly good job of protecting well-known marks against the newer and more automated methods of brand misuse, because it doesn't recognize the cumulative cognitive degradation that can occur as a result of digital blurring.[54] Does not grasp the mechanism of digital blending: it causes distraction of the brain's thinking over time. The unique identity and 'magnetism' of the famous brand might have been permanently diluted after a brand owner has collected the empirical economic data required to satisfy the *Intel* standard.

### 3. Indian Perspective: Erratic Judicial Discretion and Conceptual Overlap

However, one of the structural problems encountered by anti-dilution measures under Section 29(4) of the Indian Trade Marks Act, 1999 is rather different, in that it is inherent jurisprudential unpredictability. Because of the lack of clarity in the statute text as to what constitutes an "unfair advantage" or "detriment to distinctive character" on digital platforms, the courts have filled in that legislative space with wide and generous judicial discretion.[55]

This flexibility has allowed Indian High Courts to step in to protect the brand owners from

[52] Trade Marks Act 1994, c. 26, § 10(3) (UK).
[53] *Id.* at para. 77; see also Ilanah Simon Fhima, Trademark Dilution in Europe 114-118 (2011).
[54] Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 Tex. L. Rev. 507, 521-524 (2008).
[55] Trade Marks Act, 1999, § 29(4), No. 47, Acts of Parliament, 1999 (India).

modern day methods like ‘keyword stuffing' and ‘metatags' and has also led to an inconsistent body of case law that lacks any coherent meaning and understanding.

The primary problem in the Indian approach is that it mixes in an ongoing way the statutory anti-dilution provision contained in Section 29(4) with the common-law tort of passing off.[56] Traditional trademark law theory requires proof of misrepresentation causing a likelihood of consumer confusion for a passing-off claim; an anti-dilution claim is designed to protect mark’s uniqueness without confusion.[57]

However, in cases of digital-native conflicts, Indian courts tend to frame their issues as dilution and attempt to draw their reasoning from confusion, as is seen in the Delhi High Court's single-bench decisions on search engine keyword bidding, which have different confusions.[58]

The combination of concepts creates a murky and less certain legal framework for both brand owners and digital innovators. Under the current standards of evidence, foreign owners are not able to know with precision what the odds are of successfully enforcing under section 29(4) – because the standards of evidence are left to the discretion of the judge.

Meanwhile, e-commerce sites, search engines, and digital marketing firms remain liable for potential liability; they can't predict whether the typical features of websites such as algorithmic recommendation systems and search indexes will be deemed acceptable technical practices or subject to legal brand dilution.

## VI. Jurisdictional synergy and policy suggestions

### 1. Harmonizing Territorial Legal Systems with Transnational Online Structures

One core element in global IP management is territoriality, a concept that was originally laid down by the Paris Convention and further strengthened by the TRIPS Agreement.[59] This traditional architecture is based on the notion that the sovereignty of a state and its capacity to

[56] Dev S. Gangjee, *The Polarity of Trademark Dilution in India*, 25 E.I.P.R. 412, 415-416 (2019).
[57] Raman Mittal, *Deconstructing Section 29(4) of the Indian Trade Marks Act*, 9 J. Indian L. Inst. 104, 108-110 (2018).
[58] *Google LLC v. DRS Logistics Pvt. Ltd. & Ors.*, LPA 192/2023 (Del. HC Aug. 10, 2023), para. 151
[59] Paris Convention for the Protection of Industrial Property art. 6bis, Mar. 20, 1883, 21 U.N.T.S. 305; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 16(1), Apr. 15, 1994, 1869 U.N.T.S. 299

establish and enforce sign systems of ownership is determined by its geographical borders.[60] However, as trade becomes increasingly global and moves to decentralized, internet-based networks, territorial trademark principles are now at odds with a borderless Internet.[61] This tension represents the major institutional dilemma of modern anti-dilution law.

An infringing action cannot be easily tied to a specific geographic area in an ecosystem where the Internet is used as a global platform, automated bidding is taking place in the back-end and user interfaces are readily available. For example, a U.S.-based e-commerce competitor can buy an index-optimised keyword promotion which targets a popular Indian brand, from search nodes in Germany, thus reducing the brand's uniqueness for an internet user browsing from a terminal in London.

This no-border scenario sheds light on the weaknesses of the traditional approach to defining markets locally and assessing consumer perceptions regionally when measuring a brand's reputation and dilution.[62] The data connected with internet key word marketing and automatic search engine optimization (search engine optimization) (SEO) crosses borders, so it is becoming harder and harder to maintain strictly localized court requirements. International value of a well-known trademark is damaged if neighbouring areas allow the digital use of a trademark, while local territories do not. If the domestic trademark limits the rights of the trademark owner in one area while the neighbouring areas permit digital use, the international value of the renowned trademark is damaged.

India, the United States, and the United Kingdom must shift to a coordinated, multijurisdictional approach to addressing digital-native crimes in order to bridge this gap. Recognizing the global Internet as a single marketplace requires that the national legal perceptions of physical presence need to be adapted, and that a new paradigm of digital fairness must be established.

### 2. The "Digital Attention-Diversion" Model: A Suggested Unified Standard

This paper suggests a new analytical framework, the Digital Attention-Diversion Standard, as a compromise between the US "likelihood of dilution" framework that may result in overly

[60] Graeme B. Dinwoodie, *Trademarks and Territory Detached*, 41(3) Houston L. Rev. 885, 889-893 (2004)
[61] Mark A. Lemley, *Place and Cipher in Cyberspace*, 91(2) Cal. L. Rev. 521, 526-531 (2003)
[62] Annette Kur, *Strategic Employment of Trademark Law Beyond Core Functions: A European Perspective*, 4(1) Utah L. Rev. 931, 937-941 (2014)

general language monopolies and the UK's Intel standard which would require an almost impractical empirical showing of "continuing economic changes in consumer behaviour" to establish a monopoly.[63] This process moves a judicial assessment from hypothetical future harm or economic evaluation of past events to concrete, measurable, real-time digital indicators.

This model is based on two separate digital metrics to evaluate “unfair advantage” or “harm” of the law:

**1) Algorithmic Bias**

This criterion evaluates whether a defendant knowingly used a famous trade mark in hidden source code, hidden meta-tags or predictive prompt models to alter the natural search results or machine-learning indices.[64] It considers whether the brand's earned market reputation has been hijacked to prompt an automated system to link a high-profile brand to a competitor that does not match the products that the brand is known for.

**2) Volume of Impressions**

This measure is used to test immediate consumer exposure, tracking digital impressions, clickthrough rates (CTRs), and traffic redirection resulting from unauthorized keyword bidding or interface prompts. The court can then get a good idea from the reliable platform data on how effectively a competitor used the visual and commercial impact of a popular brand to capture user attention at the moment the search began.

Within this framework, where it can be shown that the competitor has consistently used a recognisable trademark as part of their marketing approach on the internet to capture and mislead the attention of users a rebuttable legal presumption of “unfair advantage” should be implemented. This approach works without requiring the impossible proof of permanent change in consumer spending habits, as in a digital economy, attention is a valuable resource. If it happens through unpermitted brand misuse, it's actionable trademark dilution.

[63] Ilanah Simon Fhima, *The Court of Justice's Intel Judgment: Is Trademark Dilution Dead?* 4 Intellectual Property Quarterly 421, 434 (2009).
[64] Dev S. Gangjee, *The Polarity of Trademark Dilution in India*, 25 E.I.P.R. 412, 417 (2019)

### 3. Maintaining the Equilibrium: Safeguarding Free Expression and Online Competition

While anti-dilution strategies must adapt to protect the brand in the digital age, they should also include transparent and reliable safeguards for public debate, fair competition in the market, and consumer choice. Digital media is built on the premise of information being freely exchanged and shared, and excessive trademark protection can lead to the creation of a tool for suppression and exclusion in the online market. Thus, a single international standard should establish clear boundaries to prevent anti-dilution policies from being used to limit genuine digital creations and choices.

Digital anti-dilution enforcement should not be used to prevent the ability to engage in legitimate comparative advertising. Ecommerce websites and search engines should have full and free access to make accurate comparisons of features, specifications and price between generic products and brands. If the interface design does not mislead the consumer about the origin of the product and does not use deceptive methods of metadata, then the provision of alternative options promotes fair competition and saves consumers search costs as long as the interface design doesn't obscure the origin of the product in a misleading way and doesn't use a misleading method of metadata.

Secondly, consistent fair use provisions should be upheld to protect the use of recognizable trademarks in online meme culture, inventive digital parody and non-profit public criticism. Familiar corporate logos can be powerful cultural metaphors, integral to current public debates, corporate ethics campaigns, and artistic commentary.

Enforcement of anti-dilution injunctions on expressive digital communication (such as an online parody or one of the consumer review platforms) is automatic, allowing giant corporations to use IP law to effectively suppress public criticism. Courts must distinguish between anti-dilution law as a tool for fair trade, and commercial free riding taking away consumers' traffic.

## VII. Conclusion

By comparing the discussions of digital trademark dilution in India, the USA and the UK, it can be seen that the issues of digital trademark dilution are recognized across the globe, but the

responses from law and judicial bodies vary and are not synchronised with the present internet framework. Under the U.S. framework, based on the TDRA's "likelihood of dilution" test, there are good preventative provisions for well-known brands and ongoing problems of overmonopolization, yet a stumbling block is the rigid household name requirement.

The UK approach, which ties into European legislation requiring consumers to change their economic habits, prioritizes competition in open markets, but sets an almost impossible burden on proof that lets old brands bleed into the new for an extended period. The Indian model lodged between requires broad discretion from the courts to decide the issue but is plagued with uncertainty on a systemic level, compounded by the conceptual overlap between dilution and common-law passing off.

In the end, these regional disparities make it clear that attempting to adhere to established, strictly territorial trademark principles in order to govern a borderless digital marketplace is fundamentally unsuccessful. It is important for international intellectual property systems to move beyond the outdated territorial approach to safeguard the integrity of well-known trademarks while not obstructing e-commerce.

A single, analytics-driven Digital Attention-Diversion Standard will enable courts and legislators to establish a clear and defensible legal standard. It is a fair approach, which protects critical corporate assets globally and ensures digital competition, consumer independence and freedom of speech are essential for a progressive global economy.