

STUDENT WORKS

CLEARING UP THE CONFUSION: AIDING COURT DECISIONS REGARDING TRADEMARK INFRINGEMENT AND THE INTERNET

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Under current trademark law, a trademark owner's job of protecting his [or her] rights merely begins when the trademark is registered. [It is] up to the owner to actively police the market, or world, for that matter, for violations. Once discovered, [it is] up to the trademark owner or licensee to take action against those infringements. The Internet has added a new dimension to the job of policing for trademark infringements, but the law is still the same.¹

–Advertising & Marketing Review

I. INTRODUCTION: THE INTERNET'S IMPACT ON TRADEMARK LAW

You return home from work and immediately go online to search for a new high-definition flat screen television that you have had an interest in purchasing. Specifically, your curiosity has led to a search for a Sony brand television.² Accordingly,

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1. Glen Emerson Morris, *Protecting Your Trademark on the Internet*, *Advert. & Mktg. Rev.*, (Nov. 2001) (available at http://www.ad-mkt-review.com/public_html/air/ai200111.html).

2. Sony Corp., *Televisions*, http://store.sony.com/c/TVs-LED-LCD-3D-TV/en/c/S_Televisions (accessed May 6, 2014).

you decide to type the words “Sony flat screen television” into a search engine and immediately receive a catalogue of sponsored links,³ which appear in a list format on your Internet browser’s main page. You then click on a sponsored link that says “New Flat Screen TVs.” Instead of being directed to Sony Corporation’s main page, however, you are directed to a website that predominately sells Panasonic model televisions,⁴ one of Sony’s main competitors. Despite your confusion as to how your Sony television search led you to a competitor’s brand, you are quickly diverted by the new Panasonic products and eventually forget all about why you even searched for a Sony television in the first place. While this is just a simple example, one main question remains controversial: should pre-sale confusion on the Internet amount to possible trademark infringement?⁵

The above scenario illustrates a relatively new and unsettled area of trademark law, dealing with the use of trademarked property to promote the sale of products on the Internet. Over the past few decades, the Internet has become a conduit of mass communication and commerce, largely financed by advertising dollars.⁶ As a result, widespread use of Internet searching and online shopping has created a colossal effect on commerce and consumer purchasing habits. As of February 2013, our world has accumulated over 2.4 billion Internet users, while North America has recorded over 273 million Internet users alone.⁷ Consequently, the example above is just one possible scenario of how

3. PC Mag., *Sponsored Link Definition from PC Magazine Encyclopedia*, <http://www.pcmag.com/encyclopedia/term/56091/sponsored-link> (accessed May 6, 2014). A sponsored link is defined as “[a] paid advertisement in the form of a hypertext link that shows up on search results pages.” *Id.*

4. Panasonic Corp., *Viera Televisions*, <http://shop.panasonic.com/shop/viera-televisions?selectedTopNavId=nav1> (accessed May 6, 2014).

5. See J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:6, at 23-28 (4th ed., West 1996). “Infringement can be based upon confusion that creates initial customer interest, even though no actual sale is finally completed as a result of the confusion.” *Id.* This is called the initial interest confusion doctrine, which a few circuit courts have adopted as a form of a traditional “likelihood of confusion” test utilized by courts in finding infringement upon trademarked property. *Id.* at 23-28 to 23-29.

6. Paragon Fin. Ltd., *Internet Advertising Revenues in the U.S. Reaches an All-Time High during the First Half of 2012*, <http://finance.yahoo.com/news/internet-advertising-revenues-u-reaches-132000018.html> (posted Nov. 8, 2012, 8:20 a.m. EST).

7. Miniwatts Mktg. Group, *Internet World Stats: Usage and Population Statistics*, <http://www.internetworldstats.com/stats.htm> (last updated Apr. 25, 2014).

complications can arise when trademarks are utilized as search terms in the Internet marketplace.

This Article explores trademark infringement dilemmas specific to pre-purchase or Internet-based claims and a doctrine known as initial interest confusion.⁸ Additionally, this Article suggests that initial interest confusion should not be abolished in its entirety, but modified and applied narrowly by federal courts within the framework of the likelihood of confusion analysis suggested in the Lanham Act.⁹ Acting alone, the Lanham Act does not provide the necessary tools for courts to properly analyze complex Internet claims.¹⁰ In addition, although widely criticized, the initial interest confusion doctrine has significant strength, and when combined within the Lanham Act's multi-factor approach, it may be able to better protect the private and public interests associated with the use of registered and unregistered trademarks on the Internet.

Part II of this Article provides a brief overview of trademark law and common terms associated with its practice, while Part III specifically discusses the development of the initial interest confusion doctrine as well as the rise of Internet trademark claims. Part IV not only draws upon the crucial comparison between the Lanham Act's traditional "likelihood of confusion" analysis and the initial interest confusion doctrine, but also focuses predominately on the current application of the doctrine, including a split among the federal courts. Finally, Part V will provide a detailed proposal aiming to integrate the initial interest confusion doctrine through the incorporation of the doctrine's strengths within the traditional framework of the Lanham Act.

II. TRADEMARK LAW: A BRIEF OVERVIEW

A trademark is defined as "any word, name, symbol, or device, or any combination thereof . . . [a person uses to] identify

8. U.S. Legal, *Initial Interest Confusion (Trademark) Law & Legal Definition*, <http://definitions.uslegal.com/i/initial-interest-confusion-trademark/> (accessed May 6, 2014). This doctrine was developed in order for courts to properly assess the possibility of trademark infringement occurring prior to a purchase, which is now extended to Internet searches. *Id.*

9. 15 U.S.C. § 1051 (2012).

10. Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 *Cardozo L. Rev.* 105, 107 (2005).

and distinguish his or her goods,” including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.¹¹ First established by the Lanham Act of 1946,¹² trademarks are protected and federally regulated through a system in which many trademarks used in United States commerce are registered, allowing trademark owners to bring a cause of action for infringement upon any registered mark.¹³ Accordingly, trademark law serves two main purposes: (1) to safeguard the public by reducing the likelihood of confusion caused by misleading trademark usage; and (2) to protect private trademark owners’ interests in the investment and creation of their marks.¹⁴ Although Section 32 of the Lanham Act provides for protection of trademarks,¹⁵ courts often turn to Section 43¹⁶ as the section requiring plaintiffs to establish three main elements in order to prevail in a trademark action.¹⁷ Section 43 requires: (1) the plaintiff must first show a valid trademark that will benefit from protection under the Lanham Act; (2) the plaintiff must then show that an exact or similar mark to the plaintiff’s was utilized by the defendant in commerce; and (3) the plaintiff must prove that the defendant’s use will create a likelihood of confusion among the public and harm the plaintiff.¹⁸

Among these three elements, a majority of problems often arise in online trademark infringement situations via the second element, which specifically requires a mark be “used in commerce.”¹⁹ A trademark is “used in commerce” when the trademark

11. 15 U.S.C. § 1127; *Brookfield Commc’n, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1051 (9th Cir. 1999).

12. 15 U.S.C. § 1051.

13. Several sections of the statute mention areas ranging from the registration of a mark to recovery of damages in an infringement suit. *Id.* at §§ 1051–1072, 1091–1096, 1111–1127.

14. See Graeme B. Dinwoodie & Mark D. Janis, *Confusion over Use: Contextualism in Trademark Law*, 92 Iowa L. Rev. 1597, 1623 (2007) (explaining the two principal justifications offered in support of protecting registered or unregistered trademarks).

15. 15 U.S.C. § 1114.

16. *Id.* at § 1125. This section documents that “[f]alse designations of origin [and] false descriptions . . . [are] forbidden.” *Id.*

17. *Id.*; *DeCosta v. Viacom Int’l, Inc.*, 981 F.2d 602, 605 (1st Cir. 1992).

18. *DeCosta*, 981 F.2d at 605.

19. See *Brookfield Commc’n, Inc.*, 174 F.3d at 1036–1051 (explaining that the use of a competitor’s trademark in metatags is an actionable trademark use); *Merck & Co., Inc. v. Mediplan Health Consulting, Inc.*, 431 F. Supp. 2d 425, 428 (S.D.N.Y. 2006) (declaring

is used on goods or services.²⁰ When dealing with traditional trademark infringement claims, as in the offline context, infringement occurs when someone sells a product with another's trademark physically attached to the product in some manner²¹ and then uses that product in commerce.²² Online situations, however, are intangible,²³ and courts often struggle in determining whether the use of a competitor's trademark immersed in metatags,²⁴ domain names,²⁵ or keyed advertisements,²⁶ should constitute a valid use of a trademark in commerce.²⁷

Likelihood of consumer confusion lies at the heart of most traditional trademark claims.²⁸ The Lanham Act recognizes eight main factors comprising a multi-factor test known as the traditional "likelihood of confusion" analysis.²⁹ These factors include: (1) "strength of the plaintiff's mark"; (2) "relatedness of the goods or services"; (3) "similarity of the marks"; (4) "evidence of actual confusion"; (5) "marketing channels used"; (6) "likely degree of purchaser care"; (7) "the defendant's intent in selecting its mark";

that a plaintiff's trademark for keyword advertising on Google was not actionable trademark use in commerce).

20. 15 U.S.C. § 1127.

21. See Joe Liu, Berkman Center for Internet & Society, Harvard University, *Overview of Trademark Law*, <http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm#7> (Spring 1998) (describing an example of someone placing the registered trademark "Apple" on a computer to sell a computer product as representative of tangible trademark infringement upon Apple Computer, Inc.'s registered trademark name and symbol).

22. Ed Nunes, *What Does 'Use in Commerce' Mean in Your USPTO Trademark Application?* <http://www.patent-trademark-law.com/trademark-articles/commerce-uspto-trademark-application/> (Jan. 14, 2011). "Before a mark can be registered with the United States Patent and Trademark Office an applicant must demonstrate the mark's 'Use in Commerce.' Simply meeting the evidentiary burdens of the USPTO application, however, does not necessarily mean your registered mark will stand up to an attack of the mark's validity." *Id.*

23. Enrico Schaefer, Trademark Law Radio, *How to Deal with Trademark Infringement on the Internet: One Attorney's Perspective*, <http://tcattorney.typepad.com/ip/2012/09/how-to-deal-with-trademark-infringement-on-the-internet-one-attorneys-perspective.html> (Sept. 4, 2012). Intellectual property is an intangible asset, "which includes all the things that you [cannot] touch or see or feel." *Id.*

24. IT Bus. Edge, *Webopedia, Meta Tag*, http://www.webopedia.com/TERM/M/meta_tag.html (accessed May 6, 2014).

25. *Id.* at *Domain Name*, http://www.webopedia.com/TERM/D/domain_name.html.

26. Bus. Dictionary, *Keyed Advertisement*, <http://www.businessdictionary.com/definition/keyed-advertisement.html> (accessed May 6, 2014).

27. See *PACCAR Inc. v. TeleScan Techs., L.L.C.*, 319 F.3d 243, 258 (6th Cir. 2003).

28. See *McCarthy*, *supra* n. 5, at § 23:1 at 23-10 (explaining that "the test of likelihood of confusion is the touchstone of trademark infringement").

29. See *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-349 (9th Cir. 1979) (portraying the eight factors, known as the *Sleekcraft* factors, looked to by the court in order to determine the "likelihood of confusion").

and (8) “likelihood of expansion of the product lines.”³⁰ Of the eight factors mentioned, the first two appear to carry the most weight because the similarity of the marks is crucial in establishing a likelihood of confusion.³¹ Likewise, “[i]t is possible for the same, identical mark to be used in the same geographic area without any trademark infringement occurring, as long as the goods or services of the parties are sufficiently dissimilar.”³²

In 1962, in what has been viewed as a controversial decision, the Lanham Act was revised to eliminate the word “purchasers” from its statutory language, leaving only the word “consumers,” consequently allowing the possibility for trademark infringement to occur without a single purchase ever being made.³³ This change in the language was significant because a consumer can be anybody, and whether such a consumer takes part in a purchase is now irrelevant to uncover infringement.³⁴ Coupled with the omission of the term “purchasers” from the statute, the pervasive use of Internet shopping eventually led to a widespread return of the doctrine known as initial interest confusion.³⁵ Regularly, courts find a likelihood of confusion at the time of purchase, but sometimes certain “pre-sale” confusion exists before the consumer has made a transaction.³⁶ For example, a consumer might perform an Internet search prior to purchasing a product and later click

30. *Gibson Guitar Corp. v. Paul Reed Smith Guitars, L.P.*, 423 F.3d 539, 548 (6th Cir. 2005) (citing *Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 422 (6th Cir. 1999)). This multi-factor test is very flexible and may be applied differently throughout the federal courts, but the courts’ reasoning is similar in the fact that each focuses on whether an unauthorized use will deceive consumers into relating an infringing product with the original trademark owner’s product. McCarthy, *supra* n. 5, at § 23:6 at 23-28 to 23-29.

31. Daniel A. Tysver, *Trademark Infringement*, <http://www.bitlaw.com/trademark/infringe.html> (accessed May 6, 2014).

32. *Id.*

33. Sen. Rpt. 87-2107 at 2847 (Sept. 18, 1962). Prior to 1962, infringement was found under the Lanham Act when a trademark was “likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services.” *Esercizio v. Roberts*, 944 F.2d 1235, 1244 (6th Cir. 1991) (emphasis added) (quoting the 1946 Lanham Act).

34. McCarthy, *supra* n. 5, at § 23:6 at 23-28.

35. *Brookfield Commc’n, Inc.*, 174 F.3d at 1062. A famous hypothetical example of initial interest confusion was laid out in this case, stating that “[u]sing another’s trademark in one’s metatags is much like posting a sign with another’s trademark in front of one’s store.” *Id.* at 1064. The case also shows that even though confusion was dispelled, a business competitor still misappropriated the goodwill of the registered trademark owner. *Id.* at 1062–1064.

36. See e.g. *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 260 (2d Cir. 1987); *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 365 F. Supp. 707, 717 (S.D.N.Y. 1973).

on an advertisement linked by a keyword containing a competitor's trademark. This could deceive consumers into visiting the incorrect website, but not actually mislead them into purchasing the incorrect product. The traditional likelihood of confusion analysis may not fit well in online situations, leading a minority of courts to look toward the initial interest confusion doctrine to help solve these dilemmas.

Initial interest confusion is a short-term confusion that occurs when a customer is interested in a product because he or she believes it is somehow affiliated or connected with another company, and such confusion is later dispelled before any sort of purchase is made.³⁷ Initial interest confusion is a judicially made doctrine that many critics believe should be abolished completely; yet, others believe the doctrine can be modified to continue to protect the rights of trademark owners, and it can endure as a worthwhile option for courts to utilize.³⁸ The benefits and drawbacks of employing this doctrine will be discussed throughout this Article.

Our world's large retail stores are beginning to shift toward an existence as mere showrooms for the online shopping giants like Amazon.com or similar convenient Internet websites.³⁹ Nevertheless, due to the power of a cyber-marketplace, critics say that any "pre-sale" confusion on the web is just the nature of the Internet today, constantly diverting user attention back and forth between webpages with or without a user's visit ending in a

37. See *Playboy Enters., Inc. v. Netscape Comm'n Corp.*, 354 F.3d 1020, 1025 (9th Cir. 2004) ("[I]nitial interest confusion is customer confusion that creates initial interest in a competitor's product. Although dispelled before an actual sale occurs, initial interest confusion impermissibly capitalizes on the goodwill associated with a mark and is therefore actionable trademark infringement.").

38. Elizabeth S. Ritter & Mark H. Jaffe, *The Uncertain Future of Initial Interest Confusion*, 4 *Landslide* 55, 55 (July–Aug. 2012); see Daniel C. Glazer & Dev R. Dhamija, *Revisiting Initial Interest Confusion on the Internet*, 95 *Trademark Rptr.* 952, 953 (Sept.–Oct. 2005) (available at http://www.shearman.com/files/Publication/bd0a7e5f-d860-419d-b307-28418a5d1ffd/Presentation/PublicationAttachment/53e2d9d9-28f8-4d20-a725-2a6f0fe3a854/IP_102005.pdf) (arguing that a "scaled-back" likelihood of confusion approach would suffice to solve the harm created by initial interest confusion); but see David S. Fleming, *Recognizing Initial Interest Confusion*, *Natl. L. J.* (May 8, 2006) (available at: http://www.brinkshofer.com/news_events/index.php?action=view&publication_id=185) (describing how the Tenth Circuit Court of Appeals has joined other courts in supporting initial interest confusion as a viable form of infringement because it prevents an "unauthorized use of trademarks to divert Internet traffic").

39. Ki Mae Heussner, Gigaom, *Is the Future of Retailing Showrooming?* <http://gigaom.com/2012/07/09/is-the-future-of-retail-showrooming/> (July 9, 2012, 11:31 p.m. PDT).

purchase.⁴⁰ This Article addresses the everyday problems caused by a split among federal circuit courts regarding the proper approach to trademark infringement and pre-sale confusion on the Internet.⁴¹ The traditional “likelihood of confusion” analysis may not prove enough to determine whether trademark infringement has occurred.⁴² Currently, due to the usage of trademarked terms in areas such as domain names, metatags, or keyed advertisements, a more structured approach must be provided to Internet trademark cases as opposed to traditional trademark claims.⁴³

III. THE BIRTH OF INITIAL INTEREST CONFUSION

A. The Pre-Internet Era

As explained previously, there are several other forms of “confusion” that can trigger liability in the trademark law context.⁴⁴ By utilizing a successful company’s symbol, logo, or trademarked term, a usurper exploits the trademark’s goodwill and gives the searched-for-infringing product credibility very early on in a transaction.⁴⁵ Initial interest confusion was first utilized in the trademark law field in the *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*⁴⁶ decision. The

40. Ron Coleman, *Online Retailing and Initial Interest Confusion*, <http://www.likelihoodofconfusion.com/online-trademark-retailing-and-initial-interest-confusion/> (May 21, 2008). The nature of the Internet is viewed through the statement that, “[u]nless it is accurately ‘mapped,’ the [I]nternet is just a vast expanse of uncharted (virtual) territory.” *Id.*

41. Int’l Trademark Ass’n, *Board Resolutions: Initial Interest Confusion*, <http://www.inta.org/Advocacy/Pages/InitialInterestConfusion.aspx> (Sept. 18, 2006).

42. Jaelyn Coronado Sitjar, Student Author, *The “Initial Interest Confusion” Test—Analysis and Proposal for a Sensible Formulation for Use on the Internet*, Nat’l L. Rev. (Mar. 15, 2011), <http://www.natlawreview.com/article/initial-interest-confusion-test-analysis-and-proposal-sensible-formulation-use-internet>.

43. Marcus H.H. Luepke, *Intellectual Asset Management, Trademarks on the Internet—the US Perspective*, <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=54909e25-723f-43bd-a7c0-cea81b02eeda> (Oct.–Nov. 2008). “Whether a legal action concerns the purchase of competitors’ trademarks as keywords to trigger [I]nternet advertisements for competing products or the liability of [I]nternet auction sites for the sale of counterfeit goods by its users, the outcome is often difficult to predict even within the US, let alone on a global basis.” *Id.*

44. See McCarthy, *supra* n. 5, at § 23:5 at 23-20 to 23-27 (listing point-of-sale confusion, post-sale confusion, initial interest confusion, and reverse confusion among the actionable areas of trademark infringement).

45. *Mobil Oil Corp.*, 818 F.2d at 259.

46. 523 F.2d 1331, 1341–1342 (2d Cir. 1975).

plaintiff, a foreign piano manufacturer, sought a declaratory judgment against the defendant, a domestic piano manufacturer, claiming that its company trade name, Grotrian-Steinweg, did not infringe upon the defendant's trademark and that its company had the sole right to use this name without any interference by the defendant, Steinway & Sons.⁴⁷

The *Grotrian* case was deeply complicated because the Grotrian-Steinweg piano company previously had a strong working relationship with Steinway piano company and its founder; upon moving to the United States, Grotrian-Steinweg changed its name by manufacturing pianos under Steinway's name.⁴⁸ Despite several out-of-court agreements, the *Grotrian* court held that despite little or no confusion as to which company manufactured the piano at the time of sale, a rational consumer might initially believe that there was some business relationship between Grotrian-Steinweg and Steinway & Sons.⁴⁹ Initial interest confusion doctrine was born when the court stated that, "actual or potential confusion *at the time of purchase* necessarily must be demonstrated to establish trademark infringement under the circumstances of this case."⁵⁰ In other words, the Second Circuit viewed that the harm to Steinway was not limited to using the Steinway name, but instead found in the possibility that rational consumers would purchase the Grotrian-Steinweg piano solely because they thought there was some connection between the two piano manufacturers, Grotrian-Steinweg and Steinway & Sons.

In the aftermath of *Grotrian*, many courts adopted an initial interest confusion doctrine approach by applying the doctrine to the traditional, "bricks and mortar world" while addressing cases in which a defendant gained customers by taking advantage of an established competitor's name or mark.⁵¹ This method of so-called "free riding" is often termed "credibility transference" or "sponsorship confusion."⁵² Such free riding arises when one company

47. *Id.* at 1336.

48. *Id.* at 1334.

49. *Id.* at 1339-1342.

50. *Id.* at 1342 (emphasis added).

51. See Int'l Trademark Ass'n, *supra* n. 41 (explaining court's application of initial interest confusion to Internet cases as well as to the "bricks and mortar world").

52. Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 Emory L.J. 507, 560 (2005). "[C]redibility transference is problematic because the purchaser may

owner uses his or her resources to build up and create a good or service, while its “competitor trades off the goodwill created by the owner.”⁵³

The application of initial interest confusion was taken one step further by the Second Circuit in the *Mobil Oil Corp. v. Pegasus Petroleum Corp.* decision.⁵⁴ Here, Mobil Oil sued Pegasus Petroleum for infringement upon its trademarked logo representing a Pegasus, which is a flying horse-like creature commonly known from Greek mythology.⁵⁵ The Second Circuit analyzed the claim according to the likelihood of confusion test and discussed the potential for initial interest confusion in addition to the degree of customer care. In the end, the court showed its support for the doctrine when it concluded, “initial [interest] confusion works a sufficient trademark injury.”⁵⁶

Initial interest confusion was brought to life during the pre-Internet age, but cases similar to *Grotrian* or *Mobil Oil* were rare, paving the way for only a handful of published cases relying on initial interest confusion listed prior to the early 1990s.⁵⁷ Since *Grotrian* and *Mobil Oil*, the initial interest confusion doctrine had been applied to trademark infringement cases, but such application was predominantly due to the increasing technology and the rising confusion in the online setting.⁵⁸

believe that the senior user is sponsoring or affiliated with the junior user. While sponsorship confusion is not a crystal-clear doctrine, treating the [initial interest confusion] doctrine as a subset of sponsorship confusion kept [initial interest confusion] from having a huge impact on trademark jurisprudence.” *Id.*

53. Ritter & Jaffe, *supra* n. 38, at 55.

54. 818 F.2d at 254.

55. *Id.* at 255. “Since 1931, Mobil has made extensive use of its well-known ‘flying horse’ symbol—representing Pegasus, the winged horse of Greek mythology—in connection with its petroleum business.” *Id.*

56. *Id.* at 260.

57. Ritter & Jaffe, *supra* n. 38, at 55; see *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 204 (5th Cir. 1998) (applying initial interest confusion to a nightclub’s name); *Dorr-Oliver, Inc. v. Fluid-Quip, Inc.*, 94 F.3d 376, 382–383 (7th Cir. 1996) (applying initial interest confusion to the total image and overall appearance of a product or business).

58. See *PACCAR*, 319 F.3d at 253–254 (applying initial interest confusion to domain names and metatags on the web); *GEICO v. Google, Inc.*, 2005 WL 1903128 at *4 (E.D. Va. Aug. 8, 2005) (stating initial interest confusion is a satisfactory test for claims involving keyed advertising on the web).

B. Evolution: The Online Context

1. Trademark Infringement in Metatags and Domain Names

Support for the initial interest confusion doctrine among federal courts has grown since its creation in *Grotrian* and has been extended to cases involving the Internet marketplace.⁵⁹ This encompasses all areas of infringement in cyberspace including adware,⁶⁰ metatags, domain names, and keyed advertising. The revolutionary case for the doctrine's introduction to the online world is *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*,⁶¹ in which the plaintiff provided an Internet software database for entertainment businesses using the trademarked term "MovieBuff."⁶² Plaintiff Brookfield claimed trademark infringement against the defendant West Coast's use of its domain name entitled "moviebuff.com" and the term "MovieBuff" in metatags for its own searchable database.⁶³ Before exploring the court's analysis in *Brookfield*, however, a brief explanation of metatags and their relationship to search engines is necessary. Today, web programmers use what is called source code⁶⁴ to construct websites. Embedded in source code are

59. See e.g. *Brookfield Commc'n, Inc.*, 174 F.3d at 1062 (stating "West Coast's use of 'moviebuff.com' in metatags will still result in what is known as initial interest confusion"); but see *Playboy*, 354 F.3d at 1030 (describing an exception to initial interest confusion when an advertisement "clearly identifies its source with its sponsor's name" or directly compares its product to the trademark owner's product).

60. See Bus. Dictionary, *Adware*, <http://www.businessdictionary.com/definition/adware.html> (accessed Oct. 30, 2013) (defining adware as "[a] type of software that comes bundled in with other software, which displays advertisements on a user's computer that relate to the type of [I]nternet searches and webpages that the individual has viewed").

61. 174 F.3d at 1036.

62. *Brookfield Commc'n, Inc.*, 174 F.3d at 1042.

63. *Id.* at 1041–1043. Metatags are various lines of code in any website's Hyper Text Mark-Up Language (HTML) that are not viewable by an Internet user, but used by older forms of search engines to organize, compile, and order result listings for relevant searches conducted by users. Ira S. Nathenson, *Internet Infoglut and Invisible Ink: Spamdexing Search Engines with Meta Tags*, 12 Harv. J.L. & Tech. 43, 62–63 (1998). To view and reveal the codes and "view sources" using Internet Explorer, you can go to the "View" menu and select "Source." Microsoft Support, *How to View HTML Source Code for Webpages in Internet Explorer*, <http://support.microsoft.com/kb/176222> (accessed May 6, 2014).

64. Also known as the programming language used in computer programming, source code is translated into what is called object code that a computer uses to execute the source code. Webopedia, *Source Code* http://www.webopedia.com/TERM/s/source_code.html (accessed May 6, 2014).

metatags, which are HTML⁶⁵ commands that define the relevant contents of a webpage. Some of the most common forms of metatags are called keyword metatags, and some search engines use these as a way of indexing their website material online for users to navigate on the Internet.⁶⁶

2. *The Brookfield Decision: Establishing a General Rule*

The questions before the Ninth Circuit in *Brookfield* were whether such use of the term “MovieBuff” qualified as trademark infringement, and whether the court found initial interest confusion applicable.⁶⁷ Such questions arose from evidence that customers who were diverted came upon a website similar enough to Brookfield’s site and would then purchase or contemplate purchasing from West Coast Entertainment instead.⁶⁸ The court held that the doctrine could be used to find infringement even if there was no likelihood of confusion whatsoever, creating an epidemic that spread the doctrine to nearly every federal circuit.⁶⁹ The *Brookfield* court ruled that “West Coast improperly benefit[ted] from the goodwill” established by Brookfield’s mark by using the trademarked term in a domain name and invisible metatags.⁷⁰

65. Hyper Text Mark-Up Language (HTML) is the language computers use to create Web documents. Webopedia, *HTML* <http://www.webopedia.com/TERM/H/HTML.html> (accessed May 6, 2014).

66. Some search engines, like the popular Google, do not use metatags. Google Webmaster C. Blog, *Google Does Not Use the Keywords Meta Tag in Web Ranking*, <http://googlewebmastercentral.blogspot.com/2009/09/google-does-not-use-keywords-meta-tag.html> (Sept. 21, 2009) [hereinafter *Google Web Ranking*]. Instead, Google determines the popularity or PageRank of search results based upon how many sites link to that particular site. Google Webmaster Tools, *Google Basics*, <https://support.google.com/webmasters/answer/70897?hl=en> (accessed May 6, 2014). Given this example, it is likely that fewer Internet search engines use metatags today than when *Brookfield* was decided.

67. *Brookfield*, 174 F.3d at 1062.

68. *Id.*

69. *Id.* at 1062–1063; see e.g. *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 293 (3d Cir. 2001) (citing *Brookfield* to derive court’s conclusion that initial interest confusion is in fact actionable); *Eli Lilly & Co. v. Nat. Ans.*, 233 F.3d 456, 465 (7th Cir. 2000) (citing *Brookfield* to support trademark infringement holding in determining an illegal use of a trademarked term in a website’s metatag); *Comerica Inc. v. Fifth Third Bankcorp*, 282 F. Supp. 2d 557, 573 (E.D. Mich. 2003) (citing *Brookfield* to support the conclusion that there is an increased chance of initial interest confusion on the Internet); *OBH, Inc. v. Spotlight Mag., Inc.*, 86 F. Supp. 2d 176, 190 (W.D.N.Y. 2000) (citing *Brookfield* to support the use of initial interest confusion and its application to a domain name).

70. *Brookfield*, 174 F.3d at 1062.

The common analogy used, known as the “*Brookfield* analogy,”⁷¹ relates this situation to an everyday example of a billboard on the side of a highway that advertises a store. Yet, unbeknownst to the driver, the storeowner’s main competitor is behind the billboard’s purchase as the true sponsor of the billboard.⁷² When a customer takes the exit ramp, he or she is surprised to find that not only is the advertised store nowhere to be seen, but also that a competitor’s business is there in its place.⁷³ Instead of turning around and heading back to the highway to continue his or her search, the driver decides to shop at the competitor’s store instead.⁷⁴ Thus, in the online context, courts have gone on to apply this doctrine beyond trademarks in domain name usage.⁷⁵

With the emergence of the Internet in the business world, a growing number of trademark cases have recognized this phenomenon and have applied the initial interest confusion doctrine.⁷⁶ Although search engines have increasingly turned away from the use of metatags in generating their search results, it was this use of trademarked terms in domain names and metatags that revived the initial interest confusion doctrine in our nation’s courts. In *PACCAR Inc., v. TeleScan Technologies, L.L.C.*,⁷⁷ for example, the plaintiff, PACCAR, made several claims involving TeleScan’s alleged use of PACCAR’s trademarked terms in its domain names, such as its manufactured product “Peterbilt

71. *Id.* at 1064.

72. *Id.*

73. *Id.*

74. *Id.*; see also *Blockbuster Entm’t Group v. Laylco, Inc.*, 869 F. Supp. 505, 513 (E.D. Mich. 1994) (finding trademark infringement where the defendant, a video rental store, attracted customers’ interest by constructing a sign representative of its competitor’s even though confusion would end long before a point of sale or movie rental at the store would occur). The court found that there was a “public interest to prevent consumer confusion between ‘Blockbuster Video’ and ‘Video Busters,’ and to protect Blockbuster’s investment in promoting its name and reputation.” *Id.* at 516.

75. See e.g. *J.G. Wentworth, S.S.C. v. Settle. Funding L.L.C.*, 2007 WL 30115 at *7 (E.D. Pa. Jan. 4, 2007) (describing that J.G. Wentworth alleged the purchase of the keyword “J.G. Wentworth” from Google AdWords for sponsored link advertisements and using J.G. Wentworth’s trademarks as metatags in Settlement Funding L.L.C.’s websites caused initial interest confusion).

76. See e.g. *Brookfield*, 174 F.3d at 1062 (suggesting that cases of trademarked terms used in domain names and metatags, although used differently, should be analyzed separately in terms of any confusion to the customer, whether or not a purchase is made).

77. 319 F.3d at 243. PACCAR is a well-known large truck manufacturer known predominantly by its two main trademarks: “Peterbilt” and “Kenworth.” *Id.* at 247.

Trucks” in its domain name “peterbilttrucks.com” and the use of its registered brands “Kenworth” and “Peterbilt” embedded in metatags.⁷⁸ The district court granted PACCAR’s preliminary injunction and TeleScan appealed the decision.⁷⁹ On appeal, the Sixth Circuit looked closely at the domain name infringement claim apart from the metatag use claim under the framework of initial interest confusion.⁸⁰ Analyzing the usage in domain names, the Sixth Circuit stated that any “disclaimer disavowing affiliation with the trademark owner read by a consumer” on the website occurred too late to prevent any initial interest confusion.⁸¹ Contemplating metatag usage, however, the court remanded the case because the trial court failed to perform a separate likelihood of confusion analysis.⁸² Nevertheless, the initial interest confusion doctrine played a large role in the outcome and decision-making process of PACCAR.⁸³

Following PACCAR, the initial interest confusion doctrine was reinforced in *Horphag Research Ltd. v. Pellegrini*.⁸⁴ The doctrine applied because the defendant, Pellegrini, used Horphag’s trademarked term “Pycnogenol,” which refers to a specific antioxidant supplement derived from pine bark extract, on its website, and Horphag claimed that broadcasting of the product’s name on its website was an unauthorized use.⁸⁵ The defendant admitted to using the trademarked word on the website and in metatags, but asserted a fair-use defense in that the company was merely drawing a comparison to its product and Pycnogenol.⁸⁶ The court ruled that referencing Horphag’s trademarked term “spawn[ed] confusion as to sponsorship and

78. *Id.* at 247–248.

79. *Id.* at 248–249.

80. *Id.* at 249–250.

81. *Id.* at 254.

82. *Id.* at 258. The court held that the “district court’s injunction [was] too broad because the use of PACCAR’s trademarks in TeleScan’s metatags [was not seen as a violation of] the Lanham Act.” *Id.*

83. *See id.* at 253–255 (suggesting that Telescan’s disclaimer was ineffective when comparing the similarity of the domain names).

84. 337 F.3d 1036, 1041 (9th Cir. 2003).

85. *Id.* at 1039.

86. *Id.* at 1039–1041. Fair use is a defense to liability under Lanham Act despite any conduct by the defendant that would otherwise constitute trademark infringement. *Cosmetically Sealed Indus., Inc. v. Chesebrough-Pond’s USA Co.*, 125 F.3d 28, 30 (2d Cir. 1997). A fair-use defense allows competitors the ability to “use protected marks in descriptive ways, but not as marks identifying their own products.” *Id.*

attempt[s] to appropriate the [reputation] of the trademark Pycnogenol to his [or her] product.”⁸⁷ The court therefore used an initial interest confusion theory to find that the defendant did not qualify for a fair-use defense.⁸⁸

Additionally, the Sixth Circuit followed suit in its application and decision in the domain name case *Audi AG v. D’Amato*.⁸⁹ In this decision, D’Amato created the domain name for its website as “www.audisport.com” in order to advertise and sell its products, including apparel, displaying Audi’s commonly known trademarked name and interlocking four-ringed symbol.⁹⁰ The court held that D’Amato’s use of the domain name infringed upon Audi’s trademarks under the eight-factor likelihood of confusion test.⁹¹ Looking to past decisions for guidance, the court stated that D’Amato’s defense that any customer confusion was eliminated via the website’s disclaimer was not effective, because the disclaimer appeared too late to preclude any form of initial interest confusion.⁹²

3. Challenging Brookfield: *The Playboy Exception*

The initial interest confusion doctrine has remained controversial since its first manifestation in *Gotrian* and application in *Brookfield*. Limitations and exceptions to the doctrine first surfaced, however, largely due to the Ninth Circuit’s decision in *Playboy Enterprises, Inc. v. Netscape Communications Corp.*⁹³ This decision involved Netscape’s use of the trademarked words “playboy” and “playmate” to establish keyword banner adver-

87. *Horphag*, 337 F.3d at 1041.

88. *Id.* The classic fair-use defense “applies only to marks that possess both a primary meaning and a secondary meaning—and only when the mark is used in its primary descriptive sense rather than its secondary trademark sense.” *Brother Recs., Inc. v. Jardine*, 318 F.3d 900, 905 (9th Cir. 2003).

89. 469 F.3d 534, 546 (6th Cir. 2006).

90. *Id.* at 539, 544. The website mentioned in this case informed visitors “this page is not associated with Audi GmbH or Audi USA in any way.” *Id.* at 546. See also Carlogos.org, *Audi Logo History and Audi Logo Wallpapers*, <http://www.carlogos.org/Car-Logos/Audi-logo-wallpapers.html> (Aug. 18, 2009).

91. *Audi AG*, 469 F.3d at 542–545.

92. *Id.* at 546. The court stated, “any effect [the] disclaimer had in reducing confusion would likely be negated by the statement on the website contending that there was a ‘signed agreement’ with Audi.” *Id.*

93. 354 F.3d at 1025; see *id.* at 1034–1036 (Berzon, J., concurring) (stating in the concurring opinion that the opinion in *Brookfield* was too broad).

tisements via its search engine.⁹⁴ Playboy appealed a summary judgment ruling in favor of Netscape on claims of trademark infringement.⁹⁵ Specifically, the Ninth Circuit stated that Playboy's strongest argument for likelihood of confusion was based upon initial interest confusion.⁹⁶ Nonetheless, the court spelled out a clear exception to the *Brookfield* rule and initial interest confusion by stating that "if a banner advertisement clearly identified its source or, even better, overtly compared [the registered trademark owner's] products to the sponsor's own, no confusion would occur under [an initial interest confusion] theory."⁹⁷ As a result of this decision, the Ninth Circuit ruled that if a defendant chooses to use a competitor's trademark to advertise a product on the Internet, there is no initial interest confusion so long as the advertisement blatantly and deliberately compares both companies or if the advertisement's true source is clearly identified.⁹⁸

The application of the initial confusion doctrine remains in tension in the wake of the conflicting holdings of *Brookfield* and *Playboy*, and courts now must decide whether any trademark use on the Internet should fall within the *Brookfield* general rule or the *Playboy* exception.⁹⁹ Unfortunately, in addition to finding actual confusion under the Lanham Act, courts today invest a

94. *Id.* at 1022–1023. Netscape used over four hundred keyword terms that related to adult entertainment, including the plaintiff's trademark names. *Id.* at 1023.

95. *Id.* at 1022.

96. *See id.* at 1024–1025 (citing *Brookfield*, 174 F.3d at 1062–1063).

97. *Playboy*, 354 F.3d at 1025 n. 16. Judge Berzon's concurring opinion mentioned that when applying the facts in this case, the *Brookfield* decision "might suggest that there could be a Lanham Act violation *even if* the banner advertisements [are] clearly labeled, either by the advertiser or by the search engine." *Id.* at 1034 (Berzon, J., concurring). Judge Berzon, however, does not find it reasonable that there is "initial interest confusion when a consumer is never confused as to source or affiliation, but instead knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the list produced by the search engine so informs [him or her]." *Id.* at 1034–1035. Additionally, Judge Berzon went as far as mentioning whether or not the court should "continue to apply an insupportable rule." *Id.* at 1036.

98. *See id.* at 1030 (stating that "[the court was] not addressing a situation in which a banner advertisement clearly identifies its source with its sponsor's name, or in which a search engine clearly identifies a banner advertisement's source").

99. *See generally* *Picture It Sold, Inc. v. iSOLD IT, L.L.C.*, 199 Fed. Appx. 631, 634 (9th Cir. 2006) (unpublished) (stating that it is a difficult decision involving whether an activity should be analogous to metatag use in *Brookfield* or whether a court should apply the *Playboy* exception).

great deal of time and resources in determining which approach is the most accurate to apply.¹⁰⁰

IV. A NEW ERA: THE CURRENT APPLICATION OF INITIAL INTEREST CONFUSION

When dealing with federal trademark claims specific to the Internet, courts analyze the claim under one of two different doctrines: the doctrine of likelihood of confusion or initial interest confusion.¹⁰¹ In the past, federal courts leaned heavily on the likelihood of confusion doctrine, but a minority of courts now look to initial interest confusion as well.¹⁰² Use of this doctrine has surged as use of trademark terms in metatags began to decline and methods of infringement shifted toward the use of marks within keyed advertisements.¹⁰³

A. New Methods of Infringement: The Use of Trademarks in Keyed Advertising

The initial interest confusion doctrine was first applied to claims involving domain names, banner advertisements, and metatags.¹⁰⁴ Recently, companies have moved away from using trademarked terms in metatags due to heavy policing efforts. Instead, companies have turned to the area of keyed advertising, which raises an issue as to whether this new area is analogous to infringement in domain name and metatag situations or whether the source is likely exempt under the exception spelled out in *Playboy*.¹⁰⁵ With a new way of attracting consumers, unlike

100. See *Rhino Sports, Inc. v. Sport Court, Inc.*, 2007 WL 1302745, at *7 (D. Ariz. May 2, 2007) (discussing the current state of trademark law involving trademark keyword purchasing and the initial interest confusion doctrine, and noting that the most influential of the listed Ninth Circuit cases to date are the *Brookfield* and *Playboy* decisions).

101. Brian E. Banner, Anne M. Sterba & Thomas D. Lyford, *Special Focus Keyword Search Advertising: The Competing Interests of Consumers and Trademark Owners*, 2007 World Trademark Rev. Y.B. 18–21 (copy on file with *Stetson Law Review*).

102. *Id.* at 18–21.

103. *Id.* at 21. Keyed advertising is a “[p]rint ad that carries a code in its advertised address to identify the newspaper or magazine which generated the query or order.” Bus. Dictionary, *Keyed Advertisement*, <http://www.businessdictionary.com/definition/keyed-advertisement.html> (accessed May 6, 2014).

104. See *PACCAR*, 319 F.3d at 247–248 (discussing both unlawful domain names and metatag usage).

105. See *Playboy*, 354 F.3d at 1025, 1034–1035 (majority and concurring opinions); *supra* n. 97 and accompanying text.

domain names and metatags, keyed advertising differs because it “allow[s] an advertiser to place the same ad in different periodicals and, from the response, judge which one is the best means of promoting a particular offer.”¹⁰⁶

The tension and ongoing battle between the *Brookfield* rule and *Playboy* decision was exhibited in the *Picture It Sold, Inc. v. iSOLD IT, L.L.C.* decision.¹⁰⁷ *Picture It Sold!, Inc.* (*Picture It Sold*) appealed from an injunction that aimed to enjoin a company called “iSOLD IT” from purchasing keyword advertising on any version of *Picture It Sold*’s name.¹⁰⁸ The court did not decide the issue due to insufficient evidence that iSOLD IT had purchased or promoted any keyword advertisements on *Picture It Sold*’s trademarked phrase.¹⁰⁹ Later on, however, the Ninth Circuit stated that it had “received a post-argument submission” from *Picture It Sold* that purported to show iSOLD IT actually did “purchas[e] advertising on [the] trademark[ed] [name *Picture It Sold*] at some point in the past.”¹¹⁰ If this were true, the court prefaced that it would then be crucial for the district court to determine the “somewhat difficult question of whether this activity is sufficiently analogous to metatag use” so as to be banned by the *Brookfield* rule or fall under the *Playboy* exception.¹¹¹

Similarly, initial interest confusion was discussed when dealing with a keyed-advertising issue in *Government Employees Insurance Co. v. Google, Inc.*¹¹² In this case, Government Employees Insurance Co. (GEICO) brought a claim against Google for alleged use of GEICO’s trademarks as keywords in Google’s advertising scheme.¹¹³ Specifically, Google was creating sponsored-link ads without any authorization or permission to use GEICO’s trademarked property.¹¹⁴ First, when addressing

106. See Bus. Dictionary, *supra* n. 103 and accompanying text.

107. 199 Fed. Appx. at 634.

108. *Id.* at 633. The injunction sought to enjoin iSOLD IT from “buying keyword advertising on *Picture It Sold*’s own name and colorable limitations thereof.” *Id.* at n. 3.

109. *Id.* The Ninth Circuit rejected *Picture It Sold*’s argument that the court should infer iSOLD IT purchased keyword advertising on *Picture It Sold*’s name based solely on declarations and search engine results. *Id.*

110. *Id.* at 633–634.

111. *Id.* at 634.

112. 330 F. Supp. 2d 700, 703–704 (E.D. Va. 2004).

113. *Id.* at 701–702. The court explained that Google sells sponsored links that link searches to paid advertisers sites as well as websites generated by the search. *Id.* at 702.

114. *Id.*

this claim, the court looked to whether GEICO sufficiently proved a “use in commerce” under Section 43 of the Lanham Act.¹¹⁵ The court found the marks were used in commerce and that the search engine was taking advantage of the goodwill of GEICO’s marks by selling through the use of keyword advertising.¹¹⁶ Second, GEICO was also required to prove likelihood of confusion, so GEICO argued that this doctrine did not apply in this case and that the court should utilize initial interest confusion and the general rule in *Brookfield*, and the court agreed.¹¹⁷ The court did not find trademark infringement due to insufficient evidence, but the Eastern District of Virginia demonstrated in this case that initial interest confusion is recognized and presented as a viable trademark theory when dealing with any particular keyword advertising issue.¹¹⁸

Despite holdings like the one demonstrated in the *GEICO* case, many courts have also held that keyed advertising does not pass the “use in commerce” requirement of the Lanham Act.¹¹⁹ For example, in the *1-800 Contacts, Inc. v. WhenU.com, Inc.* case, the Second Circuit considered whether WhenU.com, an Internet marketing company, infringed upon 1-800 Contacts’ registered mark by using 1-800 Contacts’ trademarked name to prompt specialized pop-up advertisements.¹²⁰ The court established that specific keywords triggering the pop-up ads were not accessible by WhenU.com’s clients, and the court held that an “internal utilization of a trademark in a way that does not communicate it to the public . . . simply does not violate the Lanham Act.”¹²¹

115. See 15 U.S.C. § 1125(a)(1) (declaring “use[] in commerce” as a requirement for a cause of action for trademark infringement); *id.* at § 1127 (defining “use in commerce” as the “bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark”).

116. *GEICO*, 330 F. Supp. 2d at 704.

117. See *GEICO*, 2005 WL 1903128, at *4 (explaining the court’s decision in the preceding *GEICO* case and specifically noting that the likelihood of confusion test varies from case to case and is not applicable to the facts in the case at hand).

118. *Id.* at *4. Initial interest confusion was recognized by the court in *GEICO* when the court stated “[a] user will be satisfied with the second site or sufficiently distracted that he [or she] will not arrive at or return to the site for which he [or she] was originally searching.” *Id.*

119. See *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400, 408–409 (2d Cir. 2005) (holding that the internal use of a trademark does not trigger infringement under the Lanham Act).

120. *Id.* at 402.

121. See *id.* at 409 (ruling that the use of 1-800 Contacts’ website in WhenU.com’s SaveNow directory did not amount to trademark infringement).

Likewise, according to *Merck & Co., Inc. v. Mediplan Health Consulting, Inc.*, an “internal use of [a trademarked name] as a key word to trigger the display of sponsored links [was] not use of the mark in a trademark sense” and was not found to constitute a valid “use in commerce” under the Lanham Act.¹²² In *Merck*, the Southern District of New York looked to the *1-800 Contacts* decision and found that the use of Merck’s trademark in keyed advertising was merely “internal use” and therefore did not infringe upon the trademark.¹²³

It was not until 2007 that the courts really examined the issue dealing with trademarked terms in a keyword advertisement’s “use in commerce.”¹²⁴ One case in particular involved Google’s alleged selling of trademarked terms on its search engine triggering those terms in keyword advertisement use.¹²⁵ After the District Court for the Northern District of California held that the sale of trademarked terms in Google’s AdWords program was sufficient “use in commerce” for the purposes of the Lanham Act, the court shifted its focus to whether the likelihood of confusion test or initial interest confusion doctrine should apply.¹²⁶ Stemming from the court’s rejection of a motion for summary judgment for the “use in commerce” issue, the plaintiff’s claim was eventually tried under an initial interest confusion theory.¹²⁷

B. Confusion in the Courts: Circuit Courts’ Split Decisions Regarding Trademark Keyword Advertising Claims

With use of trademark names in domain names or metatags becoming less widely used, circuit courts are split on how to analyze trademark keyword advertising, not only because this is currently the most common method of infringement, but also

122. 425 F. Supp. 2d at 415–416.

123. *Id.* at 416. The court also specified the significance in the fact that the defendants actually sold Merck’s product called Zocor on their websites. *Id.* at 415–416.

124. *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2007 WL 1159950 at **2–6 (N.D. Cal. Apr. 18, 2007).

125. *Id.* at *1.

126. *Id.* at **7–10.

127. *Id.* at *6. “[W]hile Google’s analogies to trademark infringements outside the digital realm [were] attractive, the Court [denied] Google’s motion for summary judgment to the extent that it [was] brought on the basis of an asserted absence of trademark use.” *Id.*

because a keyword ad does not appear to create infringement in the traditional sense.¹²⁸ Despite the fact that a business' trademark is included in an advertisement, a consumer observes the competitor's business and many courts view that there is no traditional likelihood of confusion as to the ownership of the name or products directed by the website link.¹²⁹ A minority of circuit courts look to the initial interest confusion doctrine as a way to locate trademark infringement because a business purchasing the advertisement has relied on the goodwill of the trademarked keyword to help its product get a "foot in the door" with consumers.¹³⁰ The following sections will briefly describe the nature of the many issues involved in Internet trademark law specific to keyword advertising and how various circuit courts differ in their methods of addressing such issues. Specifically, the subsequent sections of this Article will match the circuits that have similar analysis to Internet trademark issues, as well as provide crucial decisions of each circuit's position on the application of initial interest confusion.¹³¹

1. First and Eighth Circuits

Despite the fact that the First and Eighth Circuits have not specifically ruled on initial interest confusion in the Internet trademark and keyword advertising context, it is probable that "neither circuit would apply an initial interest confusion analysis

128. See Adwords Help, *How Keywords Work*, <https://support.google.com/adwords/answer/1704371?hl=en> (accessed May 6, 2014). "Google is nearly 80% of the keyword ad market." Eric Goldman, Tech. and Mktg. L. Blog, *Microsoft Adopts Google-style Trademark Policy for Keyword Advertising*, http://blog.ericgoldman.org/archives/2011/02/microsoft_adopt.htm (Feb. 15, 2011).

129. See Eric Goldman, Tech. & Mktg. L. Blog, *Fourth Circuit's Rosetta Stone v. Google Opinion Pushes Back Resolution of Keyword Advertising Legality Another 5-10 Years*, http://blog.ericgoldman.org/archives/2012/04/fourth_circuits.htm (Apr. 10, 2012) (stating that courts looking to find likelihood of confusion in these keyword advertising cases must realize that they are fact-specific inquiries, and require evidence that consumers are likely to become confused due to the method in which a trademark has been used as a keyword to generate lists of sponsored links).

130. See *Dorr-Oliver, Inc.*, 94 F.3d at 382 (stating that "[t]his 'bait and switch' of producers, also known as 'initial interest' confusion, will affect the buying decisions of consumers in the market for the goods, effectively allowing the competitor to get its foot in the door by confusing consumers").

131. In particular, the courts in the Second, Third, Sixth, and Ninth Circuits are among those that have chosen to utilize the initial interest confusion doctrine independently from the Lanham Act's traditional eight-factor analysis. See *infra* n. 216.

and that both would apply the standard likelihood of confusion analysis to the claim.¹³² In the popular case of *Hasbro, Inc. v. Clue Computing, Inc.*,¹³³ the First Circuit was presented with a case dealing with trademark infringement specific to the use of a game manufacturer's trademarked name "Clue" within the name of a defendant's domain name listed as "www.clue.com."¹³⁴ Here, the First Circuit looked to precedent to determine whether the court would or would not adopt the initial interest confusion doctrine, since it did not seem to lead to a "legally significant' confusion" as required under the Lanham Act.¹³⁵

Similarly, the court for the District of Minnesota, within the jurisdiction of the Eighth Circuit, discussed that, although the Eighth Circuit has not directly ruled on whether or not to accept initial interest confusion, it is not likely that the Eighth Circuit would adopt the doctrine if the issue were present before the court.¹³⁶ This is based on the fact that since the Eighth Circuit's holding "allows customers to see the true owner of the website representing the sponsored link advertisement" the court would not rely on an application of initial interest confusion.¹³⁷ The Eighth Circuit dealt with another case factually similar to *Hasbro* from the First Circuit involving trademark infringement located in a web address and did not apply an initial interest confusion analysis; however, the court did state that the doctrine could be applied if "the defendant stood to materially or financially gain from said initial confusion by trading in on the value of plaintiff's mark to initially attract customers."¹³⁸ In *Sensient Technologies Corp. v. SensoryEffects Flavor Co.*,¹³⁹ the Eighth Circuit's most recent decision involving this area of the law, the court quoted *Checkpoint Systems* by stating that when an issue in which an initial interest argument arises, "[i]ts significance will vary, and must be determined on a case-by-case basis."¹⁴⁰ Even though

132. Patrick Ryan Barry, Student Author, *The Lanham Act's Applicability to the Internet and Keyword Advertising: Likelihood of Confusion v. Initial Interest Confusion*, 47 Duq. L. Rev. 355, 367 (2009).

133. 232 F.3d 1, 1 (1st Cir. 2000).

134. *Id.*

135. *Id.* at 2.

136. *Northland Ins. Co. v. Blaylock*, 115 F. Supp. 2d 1108, 1120–1122 (D. Minn. 2000).

137. Barry, *supra* n. 132, at 368.

138. *Northland Ins. Co.*, 115 F. Supp. 2d at 1120.

139. 613 F.3d 754 (8th Cir. 2010).

140. *Sensient Techs. Corp.*, 613 F.3d at 773 (quoting *Checkpoint Sys.*, 269 F.3d at 297).

there is no clear ruling from these two courts with regard to keyword advertising, it is not likely that either the First or Eighth Circuits would apply the initial interest confusion doctrine to this area.

2. Second and Eleventh Circuits

Likewise, the Second and Eleventh Circuits fail to directly adopt an appropriate approach to keyword advertising or Internet trademark claims in general. Unlike the First and Eighth Circuits, however, each circuit has discussed and mentioned the use of a competitor's mark in metatags of a defendant's website in a number of cases.¹⁴¹ Even though the Second and Eleventh Circuits have decided cases involving Internet trademark infringement, it may still remain a mystery as to whether either circuit would apply initial interest confusion or turn to the standard likelihood of confusion analysis. For example, the district courts within the Second Circuit have dealt with the use of trademarks in metatags in a defendant's website on various occasions.¹⁴² In several cases, district courts applied an initial interest confusion analysis while another court specifically mentioned its refusal to apply an initial interest confusion analysis.¹⁴³ It is difficult to predict how the Second Circuit would choose to analyze a claim involving keyword advertising, but the court may lean towards using initial interest confusion since it was among the first to develop a use for the doctrine after its mentioning of the doctrine in the *Steinway* decision.¹⁴⁴

The Eleventh Circuit has declined to rule on whether to adopt the doctrine when dealing with the use of trademarks in metatags embedded in a website.¹⁴⁵ While it is unsettled as to how the Eleventh Circuit would approach a keyword advertising

141. *1-800 Contacts, Inc.*, 414 F.3d at 411; *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1221 (11th Cir. 2008).

142. *Bihari v. Gross*, 119 F. Supp. 2d 309, 319 (S.D.N.Y. 2000).

143. *Id.* The courts that looked toward an application of initial interest confusion include: *Bihari*, 119 F. Supp. 2d at 309; *OBH, Inc.*, 86 F. Supp. 2d at 191; *N.Y. St. Soc'y of Certified Pub. Accountants v. Eric Louis Assoc Inc.*, 79 F. Supp. 2d 331, 342 (S.D.N.Y. 1999). However, the Southern District of New York declined to apply the initial interest confusion doctrine in *BigStar Entm't, Inc. v. Next Big Star, Inc.*, 105 F. Supp. 2d 185 (S.D.N.Y. 2000).

144. *Steinway*, 523 F.2d at 1331.

145. *N. Am. Med. Corp.*, 522 F.3d at 1228.

issue, the court did mention in dicta that initial interest confusion may prove useful if the court was “faced with a situation where the trademarks are used without being [broadcasted, disclaimed, or] displayed to consumers.”¹⁴⁶ Recently, the Eleventh Circuit mentioned initial interest confusion in a 2012 case, *Suntree Technologies, Inc. v. Ecosense International, Inc.*, when it affirmed a district court decision. Although the district court did not suggest whether initial interest confusion could satisfy the elements of the likelihood of confusion test, the court did suggest that when claims arise in which initial interest confusion has been remedied before a sale has been made, this type of consumer diversion is not sufficient to satisfy the likelihood of confusion test.¹⁴⁷ The issue of whether to use initial interest confusion in keyword advertising claims has not yet been settled in the Eleventh Circuit. Since sponsored link advertisements with the trademark are included and displayed to the consumer, the Eleventh Circuit may utilize a standard likelihood of confusion analysis in deriving its ruling.¹⁴⁸

3. Third Circuit

The Third Circuit has declined to apply the initial interest confusion doctrine in claims involving issues like keyword advertising.¹⁴⁹ As mentioned in the *J.G. Wentworth* case, the Eastern District Court of Pennsylvania found that there was no likelihood of confusion and no trademark infringement because the defendant’s website link was “separate and distinct” from J.G. Wentworth’s website link, and “potential consumers have no opportunity to confuse defendant’s services, goods, adver-

146. *Id.* at 1222. The court stated that the company “demonstrated a likelihood of actual source confusion, [and did] not decide, as those courts did, whether initial interest confusion alone may provide a viable method of establishing a likelihood of confusion.” *Id.*

147. *Suntree Techs., Inc. v. Ecosense Int’l, Inc.*, 802 F. Supp. 2d 1273, 1280–1281 (M.D. Fla. 2011). See *Vital Pharms., Inc. v. Am. Body Bldg. Prods., LLC*, 511 F. Supp. 2d 1303, 1318 (S.D. Fla. 2007) (stating that “[t]he Eleventh Circuit has not embraced [initial interest confusion], and I find it unpersuasive. When the bottom line is sales of a particular product, initial confusion prior to and concluding before the point of purchase does not seem dispositive in a likelihood of confusion analysis”).

148. *Suntree Techs., Inc.*, 693 F.3d at 1347. Since Suntree did not present evidence of an “intent to mislead or confuse, or of actual confusion, [the court did] not reach the question whether initial interest confusion is actionable in the Eleventh Circuit.” *Id.*

149. *J.G. Wentworth*, 2007 WL 30115 at *2.

tisements, links or websites for those of plaintiff.”¹⁵⁰ The district court’s decision seems to indicate that the Third Circuit may not provide an initial interest confusion analysis to trademark keyword advertising on the Internet as long as consumers are sophisticated enough to know that an advertisement of the sponsored link website is not somehow connected with the trademark used in that same advertisement. The sophistication of potential consumers, however, may not “foreclose a finding of initial interest confusion if products and [the trademarks associated with them] are sufficiently similar.”¹⁵¹

4. Fourth Circuit

Along the same lines of the Third Circuit, the Fourth Circuit has used a similar analysis, but it also decided that trademark infringement could exist if a business’ trademark was used in a sponsored link.¹⁵² In 2005, the court in *Lamparello v. Falwell*¹⁵³ made it clear that the Fourth Circuit has no interest in applying the doctrine and explicitly stated that it has “never adopted the initial interest confusion theory” in the past.¹⁵⁴ This is evidenced by the Eastern District of Virginia’s decision in *GEICO v. Google, Inc.*,¹⁵⁵ where GEICO filed an action for preliminary and permanent injunctions against Google to prevent Google from selling its GEICO trademark name as a keyword.¹⁵⁶ Google then filed a motion to dismiss the Lanham Act claims, and the court denied the motion.¹⁵⁷ The court only applied a likelihood of confusion analysis and did not address the issue according to an initial interest confusion theory.¹⁵⁸ Unlike the decision laid out in *J.G. Wentworth*, the court in *GEICO* stated in dicta that if Google had agreed to the GEICO name being used in the text or heading of the sponsored link advertisement, a violation of the Lanham

150. *Id.* at *8.

151. *John Crane Prod. Solutions, Inc. v. R2R AND D, LLC*, 861 F. Supp. 2d 792, 799 (N.D. Tex. 2012).

152. Jonathan Pink, *Initial Interest Confusion Doctrine*, IPFrontline (July 6, 2005), <http://www.ipfrontline.com/depts/article.aspx?id=4697&deptid=4>.

153. 420 F.3d 309 (4th Cir. 2005).

154. *Id.* at 316.

155. 2005 WL 1903128.

156. *Id.* at **1–3.

157. *Id.*

158. Pink, *supra* n. 152. The court stated that GEICO did not prove that the Google AdWords program caused initial interest confusion among consumers. *Id.*

Act may have occurred.¹⁵⁹ Thus, it is possible that the Fourth Circuit would likely cling to a standard likelihood of confusion analysis and merely attribute only a small portion of its analysis to initial interest confusion, since the court has disavowed initial interest confusion and has failed to adopt the doctrine in the past.

5. Fifth, Seventh, and Tenth Circuits

The Fifth, Seventh, and Tenth Circuits have had limited experience with trademark keyword advertising issues, but from recent rulings in other trademark infringement cases leaning favorably towards its application, these circuit courts may apply initial interest confusion in some form. Specifically, the Fifth Circuit made its analysis known through the famous *Elvis Presley* case,¹⁶⁰ where this court stated that it could apply initial interest confusion within the “actual confusion” element of the traditional analysis when encountering a claim of keyword advertising on the Internet.¹⁶¹

Lately, the Seventh Circuit has also adopted the initial interest confusion analysis in some form in certain trademark infringement cases. In particular, the court in *Morningware, Inc. v. Hearthware Home Products, Inc.*¹⁶² mentioned that the Seventh Circuit falls among the courts that view initial interest confusion as a viable doctrine actionable under current trademark law.¹⁶³ Further, according to the same court in *Promatek Industries v. Equitrac Corp.*,¹⁶⁴ initial interest confusion was still viewed as an actionable doctrine even when a purchaser recognizes the correct source of the product before the sale occurs.¹⁶⁵ Although this issue dealt with trademark infringement use in metatags, the Seventh Circuit did look to initial interest confusion to uphold the district court’s granting of a preliminary injunction against Equitrac Corp.¹⁶⁶

159. *GEICO*, 2005 WL 1903128 at *7.

160. *Elvis Presley Enters., Inc.*, 141 F.3d at 188.

161. *Id.* at 195.

162. 2012 WL 3721350 at *1 (N.D. Ill. Aug. 27, 2012).

163. *Id.* at *9.

164. 300 F.3d 808, 808 (7th Cir. 2002).

165. *Id.* at 812.

166. *See id.* (stating that “[t]he degree of care exercised by consumers could lead to initial interest confusion”).

Similarly, the Tenth Circuit discussed a situation involving the misuse of a trademark in metatags and adopted the initial interest confusion doctrine. In *Australian Gold, Inc. v. Hatfield*,¹⁶⁷ the court explained that metatags may cause a consumer to come upon a product not originally sought and consequently choose to stay with that competitor's product; thus, the competitor has stolen the trademark holder's potential visitors or customers through capitalization upon the goodwill of its mark.¹⁶⁸ It appears clear from the Fifth, Seventh, and Tenth Circuits' decisions to adopt initial interest confusion analysis regarding certain Internet trademark claims, that each circuit may be open to possibly applying a similar analysis to keyword advertising along with a likelihood of confusion analysis. What is unclear is whether these circuits would in fact allow the doctrine even if the true source of an advertisement is broadcasted or displayed within the advertisement.

6. Sixth Circuit

It is highly likely that the Sixth Circuit would remain loyal to the traditional analysis of likelihood of confusion when analyzing keyword-advertising claims.¹⁶⁹ Dealing with initial interest confusion in the keyword-advertising context, however, should not be likened to use of the doctrine in domain name circumstances, which the Sixth Circuit applied in *Audi AG* in 2006.¹⁷⁰ Previously, when the Sixth Circuit was presented with a chance to apply the initial interest confusion doctrine in *Gibson*¹⁷¹ to a trademark dispute involving the trademarked shape of a guitar, the court simply refused to apply the doctrine altogether.¹⁷² The *PACCAR* court based its decision on the Lanham Act factors and not on initial interest confusion.¹⁷³ Thus, the court's decision still

167. 436 F.3d 1228 (10th Cir. 2006).

168. *Id.* at 1238–1239.

169. Daniel Diskin, Copy. & Trademark Blog, *The Development of Case Law in the Area of Initial Interest Confusion and Keyword Advertising*, <http://copymarkblog.com/2011/08/30/the-development-of-case-law-in-the-area-of-initial-interest-confusion-and-keyword-advertising/> (Aug. 30, 2011).

170. *Audi AG*, 469 F.3d at 545.

171. 423 F.3d at 539.

172. *Id.* at 549.

173. *PACCAR*, 319 F.3d at 253.

reflected a heavy deference toward the standard likelihood of confusion doctrine.¹⁷⁴

Since the Sixth Circuit will analyze all eight elements of the Lanham Act's likelihood of confusion, the court has no set approach as to how many elements are necessary, or their importance, for a plaintiff to succeed in its claim. When dealing with Internet trademark infringement claims, the Sixth Circuit has placed more emphasis on the relatedness of the goods or service, the simultaneous use of the Internet as a marketing channel, and the similarity of the marks in general.¹⁷⁵ From the decisions made in *Gibson* and *PACCAR*, it can be hypothesized that the Sixth Circuit does not believe that the initial interest confusion can exist as its own doctrine separate from likelihood of confusion.

7. Ninth Circuit

Lastly, the Ninth Circuit has arguably had its fair share of Internet trademark infringement claims and it continues to apply an initial interest confusion analysis when dealing with trademark keyword advertising on the Internet. In *Storus Corp. v. Aroa Marketing, Inc.*,¹⁷⁶ the Northern District of California applied the initial interest confusion doctrine analysis and held that Aroa Marketing, Inc. violated Storus Corp.'s trademark.¹⁷⁷ The violation occurred when Aroa bought the keyword "Smart Money Clip," one of Storus Corp.'s products, from Google as a sponsored-link advertisement to appear anytime an Internet user would search for "Smart Money Clip" in Google's search engine.¹⁷⁸ The *Storus* decision deviated from the *Playboy* decision and exception, in which the court stated in dicta that if the Internet advertisement clearly showed the source of the advertisement, no confusion would exist.¹⁷⁹ The court in *Storus*, however, ignored this dicta and ruled in favor of infringement using initial interest confusion.¹⁸⁰ It remains unclear whether future Ninth Circuit

174. *Gibson*, 423 F.3d at 550–551.

175. *PACCAR*, 319 F.3d at 254–255.

176. 2008 WL 449835 (N.D. Cal. Feb. 15, 2008).

177. *Id.* at *4.

178. *Id.*

179. *Playboy*, 354 F.3d at 1025 n. 16.

180. *Storus Corp.*, 2008 WL 449835 at *4. The court states that the "Smart Money Clip" was underlined and was clearly noticeable and set apart from the rest of the text in the sponsored link advertisement. *Id.*

decisions will use *Storus* or *Playboy* for their analyses. Based on *Storus*, the Ninth Circuit is committed to applying some form of initial interest confusion to Internet trademark claims and keyword advertising.¹⁸¹ At first, if the Ninth Circuit found any initial interest confusion, it would likely have ruled in favor of infringement whether or not a form of post-sale confusion occurred. In 2011, however, the Ninth Circuit in *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*,¹⁸² raised eyebrows by stating, “it would be wrong to expand the initial interest confusion theory of infringement beyond the realm of the misleading and deceptive to the context of legitimate comparative and contextual advertising.”¹⁸³

Hence, because of the various approaches to trademark infringement and the Internet, combined with an increase in keyword advertisements and Internet users, a more consistent and universal approach must be implemented to better regulate the misuse of the goodwill of trademarked names and products nationwide.

C. Have Courts Forgotten about Initial Interest Confusion?

Keyed advertising is just one area in which a competitor can capitalize upon the goodwill of a trademark using the Internet.¹⁸⁴ The usage of a trademarked name in a keyword advertisement creates a problem, mainly because a consumer may not even know he or she is being guided to a different product until he or she eventually stumbles onto a competitor’s website and starts browsing for a similar, yet distinctive, product.¹⁸⁵ So, if trademark infringement is still alive on the web, why have the courts cited initial interest confusion so infrequently?¹⁸⁶ Likewise, when the doctrine is cited, why do court opinions simply reference the

181. *Id.*

182. 638 F.3d 1137, 1137 (9th Cir. 2011).

183. *Id.* at 1148.

184. *See supra* pt. III(B).

185. *See generally* Banner, *supra* n. 101 (explaining the significance of trademark name usage in keyword advertising).

186. Eric Goldman, Tech. & Mktg. L. Blog, *Talk Notes: Death of the Initial Interest Confusion Doctrine?* http://blog.ericgoldman.org/archives/2012/02/talk_notes_deat.htm (Feb. 14, 2012, 1:33 p.m.).

doctrine and leave plaintiffs with very little strength to support their initial interest confusion arguments?¹⁸⁷

The disappearance of initial interest confusion in many courts' analyses is likely because Internet users are becoming more advanced and conditioned to the confusing nature of the Internet, and "a search engine's listing of multiple hyperlinks in response to a search engine query should not, by itself, create actionable confusion."¹⁸⁸ While this assertion is partly valid, it does not take into account the situations where a hyperlink creates identifiable harm by sending a consumer to a website he or she did not intend to support, which can be done through the use of a trademark brand name in metatags or keyword advertisements, and which creates confusion as to a product's affiliation or dilutes a well-known trademark.¹⁸⁹

Lately, proclamations against initial interest confusion have been undermined because of decisions made within the Second Circuit, specifically the Eastern District of New York's decision in *CJ Products LLC v. Snuggly Plushez LLC*.¹⁹⁰ This case represents the damaging effects of the use of trademark terms for a popular children's toy known as a "Pillow Pet."¹⁹¹ Specifically, the court leapt into a discussion regarding the trademark infringement implications of the defendants' keyword-advertising campaign.¹⁹² To help sell their product, the defendants used the terms "Pillow Pets" and "My Pillow Pets" in the Google AdWords program to trigger sponsored links.¹⁹³ Together with evidence that consumers had mistakenly transacted with the defendants and that defendants' products were seen as impermissible knockoffs sold through the aid of aggressive marketing tactics, the court granted the injunction without looking to traditional likelihood of confusion analysis, but instead looking at evidence of actual confu-

187. *Id.*

188. David M. Klein & Daniel C. Glazer, *Reconsidering Initial Interest Confusion on the Internet*, 93 Trademark Rptr. 1035, 1064 (2003) (available at http://www.shearman.com/files/Publication/195562a5-2a2c-4bd0-bb2c-5fce1eb83b82/Presentation/PublicationAttachment/81e363db-0ad1-427b-9555-6441a3ca0340/IP_092003.pdf).

189. *Id.* at 1064–1065.

190. 809 F. Supp. 2d 127, 127 (E.D.N.Y. 2011).

191. *Id.*

192. *Id.* at 157.

193. *Id.* The Second Circuit defined the AdWords program as "Google's program through which advertisers purchase terms (or keywords)." *Id.*

sion.¹⁹⁴ The court's decision helps prove that, in certain situations, confusion still endures on the Internet today, and the Second Circuit may still find the initial interest confusion doctrine as valid as it did in *Steinway*.

V. PROPOSED SOLUTIONS

A. The Purchasing of Keyword Advertising on a Competitor's Trademark Should Be Considered Infringement under Initial Interest Confusion

Although many critics believe that consumer confusion is merely the nature of the Internet and less regulation is required,¹⁹⁵ in reality trademark law should provide even greater protection to trademark owners on the Internet than in the traditional sense. With our world shifting more and more to an online marketplace, search engines have become more in tune to the needs of personal shoppers, with keyword advertising becoming the crux of navigation on the Internet.¹⁹⁶ One way to provide greater protection to trademark owners is through the adoption of the initial interest confusion doctrine in some minor form.¹⁹⁷ With all the advancements in technology, including online advertising and e-commerce, America's judicial systems must adapt to an analysis that can better fit society's changes.¹⁹⁸

As explained earlier, metatags and the use of marks in domain names, which were once the primary method for competitors to capitalize on trademarks in the Internet medium, are now on the decline.¹⁹⁹ Currently, companies such as Google, Bing, and Yahoo use keyed advertising that generates revenue to continu-

194. *Id.* at 147–150, 163.

195. See Klein, *supra* n. 188, at 1064–1065 (stating that Internet users have become more sophisticated and that confusion on the Internet has become more expected).

196. *Google Inc.*, 2007 WL 1159950 at *1. The court stated that “[t]he crux of [the] dispute [was] whether Google infringed [upon] ABWF’s trademarks by refusing to disable [their] trademarked keywords.” *Id.*

197. Gregory Shea, Student Author, *Trademarks and Keyword Banner Advertising*, 75 S. Cal. L. Rev. 529, 538 (2002).

198. *Id.* at 529–530. “As companies vigorously compete for consumer attention and money, they have discovered new techniques to exploit their competitors’ goodwill to attract new consumers to their websites and products.” *Id.* at 529.

199. See McCarthy, *supra* n. 5, at § 25:69 at 25-198:1 (stating that “[s]earch engines in the early days of Internet relied heavily on metatags to find Web sites”). Today, the engines have evolved and rarely use metatags for navigation. *Id.*

ously power their search engine websites.²⁰⁰ With the growth of Internet business models replacing metatag use with keyed advertising, the courts must evolve and begin to recognize that, just like litigation involving metatag use, the purchasing of keyword advertising on another's trademark should also be considered a form of trademark infringement.²⁰¹

As evidenced through caselaw involving trademark infringement and the Internet, most critics argue against an application of initial interest confusion and believe its extension into Internet cases has been "reflexive."²⁰² This means that there is a viewpoint that trademark infringement cases involving metatags and search-engine-sponsored links should be evaluated using the traditional likelihood of confusion analysis and not initial interest confusion because some believe trademarks currently experience greater protection online than offline.²⁰³ This is far from the truth; however, due to the constant growth of Internet advertising, heightened protection for online businesses would only serve as a positive improvement.

The purpose of this Article is not to propose a replacement for the Lanham Act's traditional likelihood of confusion analysis, but rather to suggest that courts analyze initial interest confusion within the contexts of traditional analysis.²⁰⁴ Courts should not stray from the traditional sense, nor should they turn a blind eye to the initial interest confusion test that may bring uniformity to divided courts.²⁰⁵ The Internet is worldwide and infinitely operating, and its operation stretches across our nation's borders.

200. *Id.* Around the year 2003, a large majority of Internet searches used Google or similar sites that used Google's search results. *Id.* See also The Search Engine List, *Comprehensive List of Search Engines*, <http://www.thesearchenginelist.com/> (2010) (portraying the most popular search engines and Internet navigation sites used today).

201. See Shea, *supra* n. 197, at 530 (explaining that the courts have struggled to keep up and comprehend the Internet technology and legal arguments are manipulated as courts struggle to find an appropriate result).

202. Zachary J. Zweihorn, Student Author, *Searching for Confusion: The Initial Interest Confusion Doctrine and Its Misapplication to Search Engine Sponsored Links*, 91 Cornell L. Rev. 1343, 1381 (2006).

203. *Id.*; see also Niki R. Woods, *Initial Interest Confusion in Metatag Cases: The Move from Confusion to Diversion*, 22 Berkeley Tech. L.J. 393, 417-418 (2007) (proposing that courts should apply the Lanham Act's traditional likelihood of confusion test to Internet cases).

204. See *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1110 (9th Cir. 1999) (explaining the importance of initial interest confusion working alongside the traditional factors used in likelihood of confusion).

205. *Id.*

Consequently, many courts have correctly used initial interest confusion analysis as an additional factor in the traditional analysis, and it is up to the rest of the circuit courts to follow suit.²⁰⁶

Evidenced by the Sixth Circuit in *Gibson*, initial interest confusion can be viewed as an addition or extension to the “evidence of actual confusion” factor under traditional analysis.²⁰⁷ This factor should be read broadly to cover all types of confusion including reverse, post-sale, and initial interest confusion.²⁰⁸ After all, initial interest confusion is actual confusion that is dispersed more rapidly;²⁰⁹ however, the potential for infringement is still the same.²¹⁰

As stated above in Part IV(A), the United States District Court for the Eastern District of New York cited to the *Merck* case to rule that the purchasing of another’s trademark in keyed advertising should be a lawful act.²¹¹ The *Merck* decision, however, is flawed largely because a usurper’s intent should be the predominant factor in any traditional likelihood of confusion analysis.²¹² Whether a court accepts initial interest confusion or not, courts should see that the intentional purchase of another’s trademark as a keyed advertisement is extremely probative of

206. *Id.*; see also *Savin Corp. v. Savin Group*, 391 F.3d 439, 462 n. 13 (2d Cir. 2004) (stating that the district court included an initial interest confusion factor within the traditional likelihood of confusion balancing test); *Gibson*, 423 F.3d at 550–551 n. 15 (disallowing the use of initial interest confusion extending to claims of infringement on company’s guitar product shape, but suggesting that the doctrine may be useful in the “eight-factor *Frisch* test as a substitute for evidence of actual confusion”); *Tdata Inc. v. Aircraft Technical Publishers*, 2008 WL 2169353 at **1–2 (S.D. Ohio May 21, 2008) (explaining the court’s use of initial interest confusion in the likelihood of confusion analysis).

207. 423 F.3d at 550–551 n. 15; see also *Sleekcraft*, 599 F.2d at 348–349 (laying out evidence of actual confusion as one factor of the likelihood of confusion test).

208. See McCarthy, *supra* n. 5, at § 23:5 at 23-20 to 23-21 (listing the various types of confusion).

209. *Interstellar Starship*, 184 F.3d at 1110.

210. *Steinway*, 365 F. Supp. at 717.

211. *S&L Vitamins, Inc. v. Australian Gold, Inc.*, 521 F. Supp. 2d 188, 201–202 (E.D.N.Y. 2007) (citing *Merck & Co., Inc. v. Mediplan Health Consulting, Inc.*, 425 F. Supp. 2d 402 (S.D.N.Y. 2006)).

212. See *Brookfield*, 174 F.3d at 1059 (noting “[t]he law has long been established that if an infringer ‘adopts his designation with the intent of deriving benefit from the reputation of the trade-mark or trade name, its intent may be sufficient to justify the inference that there are confusing similarities’”) (quoting *Pac. Telesis v. Int’l Telesis Comm’n.*, 994 F.2d 1364, 1369 (9th Cir.1993)).

likelihood of confusion, and should therefore consider it a violation of the Lanham Act.²¹³

Regulation of trademarks as keyed advertisements is just one critical use of initial interest confusion that should continue to be applied. Without initial interest confusion, keyword advertising poses a significant threat to the goodwill that trademark law serves to protect.²¹⁴ Thus, a competitor who intentionally purchases a keyed advertisement on another's trademark should be held liable for trademark infringement under the initial interest confusion standard. As a matter of policy, courts should recognize that the mere use of another's trademark in Internet advertising could lead to infringement despite any actual sales ever occurring.

B. Initial Interest Confusion Is Still Relevant among Today's Internet Trademark Cases

The Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits have each implemented the initial interest confusion doctrine in some form, yet they each apply the doctrine in different ways.²¹⁵ Courts vary widely as to whether judges should apply the initial interest confusion doctrine or simply get rid of the doctrine altogether. This Part examines the importance of the doctrine and dives into two main options for incorporating the doctrine: (1) the use of an entirely distinct initial interest confusion analysis prior or subsequent to a court's traditional test; or (2) an incorporation of initial interest within key elements of the traditional factors. The subsequent analysis discusses the first method, addresses the limitations of using initial interest confusion as a separate analysis, and ultimately delivers a proposal for an overall adoption of the second option among federal courts.

213. *Id.* When "a mark is adopted with the intent to deceive the public," courts often find confusion appropriate. *Id.*

214. See McCarthy, *supra* n. 5, at § 3:2 at 3-3 to 3-4; see also *Horphag*, 337 F.3d at 1040 (stating that trademark law serves to protect consumers, and the law addresses "the dual purposes of infringement law: ensuring that owners of trademarks can benefit from the goodwill associated with their marks and that consumers can distinguish among competing producers.") (quoting *Thane Int'l v. Trek Bicycle Corp.*, 305 F.3d 894, 900-901 (9th Cir. 2002)).

215. *Supra* pts. IV(B)(2), (3), (5), (7).

1. Initial Interest Confusion as a Separate Analysis

As noted in Part III of this Article, the courts in the Second, Third, Sixth, and Ninth Circuits are among those utilizing initial interest confusion independently from the Lanham Act's traditional eight-factor analysis.²¹⁶ In the *Savin* decision, the Second Circuit utilized traditional factors, which are known within courts in this area as the *Polaroid* factors²¹⁷ from the *Polaroid Corp. v. Polarad Electronics Corp.* decision,²¹⁸ consisting of the eight elements used to decide whether there is a traditional likelihood of confusion before or after a likelihood of confusion analysis. The Southern District of New York, in *Savin Corp. v. The Savin Group*,²¹⁹ looked to initial interest confusion separately subsequent to its incorporation of the *Polaroid* factors because the court found that the doctrine could not fit into any of the eight factors listed.²²⁰ This same court stated that there must be a presence of initial deception before it is possible to find initial interest confusion.²²¹ Nevertheless, the court did acknowledge the use of initial interest confusion within Internet cases, but failed to notice that the doctrine could be used to find evidence of "actual confusion," and when analyzed separately, did not prove as useful.²²²

Other recent examples of a sole initial interest confusion approach appeared in the Third Circuit decisions of *Checkpoint Systems* and *800-JR Cigar, Inc. v. GoTo.com, Inc.*²²³ Like the Second Circuit, the Third Circuit utilizes its traditional factors, known as the *Lapp* factors from the *Interpace Corp. v. Lapp*,

216. *Savin*, 391 F.3d at 462 n. 13; *Checkpoint Sys.*, 269 F.3d at 297–298; *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 945 (9th Cir. 2002).

217. See *Savin*, 391 F.3d at 456 (listing "the eight principal factors, known as the *Polaroid* factors, [which] are as follows: (1) the strength of the senior mark; (2) the degree of similarity between the two marks; (3) the proximity of the products; (4) the likelihood that the prior owner will 'bridge the gap'; (5) actual confusion; (6) the defendant's good faith (or bad faith) in adopting its own mark; (7) the quality of defendant's product; and (8) the sophistication of the buyers.") (quoting *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961)).

218. 287 F.2d 492.

219. 2003 WL 22451731 (S.D.N.Y. Oct. 24, 2003), *aff'd in part and vacated in part*, 391 F.3d 439 (2d Cir. 2004).

220. *Id.* at *12.

221. *Id.* at **12–13.

222. *Id.*

223. 437 F. Supp. 2d 273, 290–292 (D.N.J. 2006).

*Inc.*²²⁴ decision, to determine likelihood of confusion.²²⁵ All ten *Lapp* factors are considered, whether a plaintiff alleges initial interest confusion or point-of-sale confusion.²²⁶ The court in *800-JR Cigar, Inc.* followed the guidance set out in *Checkpoint Systems* by engaging in a full initial interest confusion analysis directly after applying the necessary *Lapp* factors.²²⁷ Ultimately, the court looked at: (1) “product relatedness”; (2) “the level of care exercised by consumers in making purchasing decisions”; (3) “the sophistication of the purchaser/consumer”; and (4) “the intent of the alleged infringer in adopting the [trade]mark.”²²⁸ The court acknowledged that initial interest confusion could be applied in the situation and denied both parties’ motions for summary judgment.²²⁹

The Third Circuit is not the only court that has considered its own separate analysis of Internet trademark infringement cases. Similarly, the Sixth and Ninth Circuits have each applied separately what are known as the “Internet trinity” factors,²³⁰ consisting of: (1) the similarity of the trademarks; (2) the relatedness of their goods or services; and (3) the parties’ concurrent use of the Internet as a marketing channel.²³¹ Specifically, the court in *Interstellar Starship* analyzed a plaintiff’s claim that a defendant’s domain name was the source of a likelihood of initial interest confusion.²³² Although the initial interest confusion doctrine likely would have been utilized separately in this case, a separate analysis was not needed because the court already found evidence of a likelihood of confusion.²³³

The above are just a few examples of how courts have mentioned the thought of analyzing infringement claims before or after utilizing their jurisdiction’s traditional likelihood of confusion factors. Courts analyzing initial interest confusion separately, however, will find that this is not a valid solution to new problems like trademark use in keyed advertisements. This sep-

224. 721 F.2d 460, 463 (3d Cir. 1983).

225. *Checkpoint Sys.*, 269 F.3d at 280.

226. *Id.* at 297.

227. *800-JR Cigar, Inc.*, 437 F. Supp. 2d at 290.

228. *Id.*

229. *Id.* at 292, 296.

230. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000).

231. *PACCAR*, 319 F.3d at 254–255; *GoTo.com*, 202 F.3d at 1205.

232. 184 F.3d at 1109–1110.

233. *Id.* at 1110.

arate analysis is burdensome because it is time-consuming and therefore can be very inefficient for courts with an overwhelmed docket.²³⁴ By moving through a separate initial interest confusion analysis, courts may waste valuable time going through traditional likelihood of confusion analysis, only to find out that they need to address initial interest confusion analysis as well.²³⁵ As a solution, the incorporation of initial interest confusion into traditional factors will likely allow the court to apply a new and improved likelihood of confusion analysis that does not waiver when dealing with a complex Internet issue. Such incorporation will essentially amend the traditional factors by protecting trademarks as technology continues to progress.

Courts that use initial interest confusion as a separate doctrine without looking to traditional factors may appear to provide too easy of a path to litigation.²³⁶ The doctrine seems to “lack[] any vigorous evaluative standard” and appears to provide “a short-cut to infringement, like a judicial game of ‘[Chutes] and Ladders.’”²³⁷ In other words, courts risk turning toward initial interest confusion alone, completely overlooking traditional analysis, and ultimately jumping straight to initial interest confusion. Avoiding any multi-factor tests, like the step-by-step *Polaroid*, *Lapp*, or *Sleekcraft* tests used by circuit courts, puts plaintiffs at an advantage because all that is required is to show evidence that initial interest confusion exists.²³⁸ By increasing the ease of plaintiffs’ ability to prove harm, the judicial system may overflow with claims of alleged infringement and cause those defendants susceptible to trademark infringement claims to rush toward piling up their resources to maintain a valid defense in court.

Similarly, the argument against circuit courts solely using an initial interest confusion analysis ignores the sole purpose of the

234. Jason Allen Cody, Student Author, *Initial Interest Confusion: What Ever Happened to Traditional Likelihood of Confusion Analysis?* 12 Fed. Cir. B.J. 643, 676–677 (2003) (available at <http://www.oblon.com/sites/default/files/news/35.pdf>).

235. A critic argues that traditional likelihood of confusion analysis is the starting point for initial interest confusion analysis and “meets only one of the goals of trademark law.” *Id.* at 672.

236. Pink, *supra* n. 152.

237. *Id.*; see also Tommy Christopher, Mediaite, *Politico Bent on World Domination*, <http://www.mediaite.com/online/politico-bent-on-world-domination/> (Feb. 12, 2010) (discussing actions of website Politico sending cease and desist letters to bloggers using the name “politico”).

238. Woods, *supra* n. 203, at 406–407.

protections the Lanham Act provides.²³⁹ The Lanham Act has not been amended to include the fact that trademark infringement could be actionable based on initial interest confusion alone.²⁴⁰ Since the Lanham Act fails to recognize pre-sale confusion as an actionable form of infringement, federal courts will likely extend initial interest confusion incorrectly to cover Internet users searching the web who become initially confused and deceived into visiting a competitor's website.²⁴¹

Therefore, without any traditional factor test for courts to use as guidance, an exclusive and separate use of the initial interest confusion analysis could allow courts to run wild by applying the doctrine to any defendant's use of a keyed advertisement, and thus impeding consumers' interests.²⁴² Consequently, although the initial interest confusion doctrine has its limitations when courts apply it individually, an incorporation of the doctrine's strengths into the traditional framework is an option that must not be disregarded.

2. *Analyzing Initial Interest Confusion within the Factors "Degree of Customer Care" or "Evidence of Actual Confusion"*

Rather than accentuating a separate initial interest confusion analysis, courts may be better equipped to handle challenging Internet trademark claims by formulating an approach that merges the two analyses. Much like the Sixth Circuit mentioned in *Gibson*, the initial interest confusion doctrine should not be seen as a separate type of confusion at all, but instead as more of a supplement to traditional factors, amending such factors to deal with the complexities of Internet claims.²⁴³ Consequently, as a start, courts should analyze initial interest confusion within the "degree of customer care" or "evidence of actual confusion" factors

239. See Elliot B. Staffin, *The Dilution Doctrine: Towards a Reconciliation with the Lanham Act*, 6 Fordham Intell. Prop. Media & Ent. L.J. 105, 106 (1995) (explaining that the primary purpose of the Lanham Act "is to protect the public from deceptive and misleading trademark practices, without fostering unnecessary monopolization of language that would impede free competition").

240. 15 U.S.C. § 1051.

241. Barry, *supra* n. 132, at 370.

242. *Id.* at 371.

243. See *Tdata Inc.*, 2008 WL 2169353 at *1 n. 2 (describing that the *Gibson* court appears to describe the initial interest confusion analysis as being one part of an eight-factor test).

of the likelihood of confusion test. These are, respectively, the sixth and fourth elements of the eight-factor, traditional likelihood of confusion analysis mentioned throughout cases like *Sleekcraft* and *Gibson*.²⁴⁴ The addition of initial interest confusion as part of the traditional framework is valid under the Lanham Act's "likely to cause confusion" standard for trademark infringement.²⁴⁵ Encompassing the initial interest confusion doctrine amid the eight factors also silences criticisms that initial interest confusion improperly expands trademark infringement.²⁴⁶

The Second and Seventh Circuits have already integrated the initial interest into the "degree of customer care" factor. For example, in *Promatek*, the Seventh Circuit stressed the importance of customer care by mentioning that "[t]he degree of [customer] care exercised by consumers could lead to initial interest confusion."²⁴⁷ The court mentioned initial interest confusion before finding any likelihood of confusion. Similarly, in *Network Automation, Inc.*, the Ninth Circuit found that the district court erred in its decision that the degree of consumer care likely exercised by the purchaser was in System's favor by following the *Brookfield* analysis that Internet users exercised a low degree of care.²⁴⁸ The Ninth Circuit concluded that the type and cost of the product directly affect the degree of care exercised by an Internet user.²⁴⁹ Thus, an Internet search of high-end computer software may yield a consumer who is more likely to understand the goals of search engines and sponsored-link advertisements, and therefore less likely to become confused. The bottom line is, since the degree of customer care is one of the main factors that allows courts to uncover a likelihood of confusion, a presence of initial interest may help decide the appropriate degree of care on a case-by-case basis.

Looking back to the fourth factor of traditional analysis, known as "evidence of actual confusion," courts can also apply initial interest confusion among various infringement claims. In

244. See e.g. *Gibson*, 423 F.3d at 548; *Sleekcraft*, 599 F.2d at 341.

245. 15 U.S.C. § 1125.

246. See Woods, *supra* n. 203, at 411–413 (arguing that courts have been broadening the scope of initial interest to include diversion by stressing goodwill in protecting trademarks rather than searching for confusion).

247. 300 F.3d at 812.

248. 638 F.3d at 1153.

249. *Id.* at 1152.

Elvis Presley, the Fifth Circuit discussed initial interest confusion within its seven-factor analysis and specifically mentioned it within the factor “evidence of actual confusion.”²⁵⁰ Just as the *Elvis Presley* court found a likelihood of confusion based on both actual confusion and initial interest confusion, other circuits have also drawn similar conclusions.²⁵¹ The Sixth Circuit stated, “evidence of initial-interest confusion comes into the eight factor *Frisch*²⁵² test as a substitute for evidence of actual confusion.”²⁵³ In other words, initial interest confusion was substituted into the “actual confusion” factor despite a lack of evidence of actual confusion; absent such actual misperception, a court can properly analyze the other factors and find a likelihood of confusion.²⁵⁴ However, the concept has very seldom been mentioned in Internet cases concerning metatags, and the introduction of initial interest confusion into elements of courts’ multi-factor tests, such as “degree of care” or “evidence of actual confusion,” has not been universally contemplated.

C. Courts Should Absorb Initial Interest Confusion within the Traditional Framework of Likelihood of Confusion Analysis

The best course of action for federal courts to improve upon Internet trademark infringement analysis is through an integration of initial interest analysis into the traditional framework of likelihood of confusion analysis. A glimpse of this approach in the offline context was seen in 1997, when the court in *Dr. Seuss Enterprises, L.P. v. Penguin Books U.S.A., Inc.*,²⁵⁵ considered placing initial interest confusion analysis within the “degree of consumer care” factor.²⁵⁶ Since this time, advantages of applying this approach to web-based claims have emerged, yet they fail to

250. *Elvis*, 141 F.3d at 203–204.

251. See *Trans Union LLC v. Credit Research, Inc.*, 142 F. Supp. 2d 1029, 1043–1044 (N.D. Ill. 2001); *Tdata Inc. v. Aircraft Technical Publishers*, 411 F. Supp. 2d 901, 908 (S.D. Ohio 2006).

252. See *Frisch Rest., Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1264 (6th Cir. 1985) (listing the *Frisch* factors followed by the Sixth Circuit, which are identical to the eight factors listed under likelihood of confusion).

253. *Tdata*, 411 F. Supp. 2d at 908 (quoting *Gibson*, 423 F.3d at 550 n. 15).

254. *Id.* at 908–912.

255. 109 F.3d 1394 (9th Cir. 1997).

256. *Id.* at 1405. When analyzing the degree of customer care under the traditional factors, the court suggested that, “even though no actual sale is finally completed as a result of the confusion, [the use of the trademark] may be still an infringement.” *Id.*

receive recognition. For example, the Middle District of Pennsylvania, in *Babyage.com, Inc. v. Leachco, Inc.*, highlights the advantages in using this approach.²⁵⁷ Unlike the cases before, this case described a scenario in which a company lured customers to its website by displaying its competitor's trademarked product, placed links to its own version of the product at a lower price, and displayed access to the product through hyperlinks.²⁵⁸ The court applied its traditional *Lapp* factors and incorporated initial interest confusion analysis within "evidence of actual confusion" and "degree of customer care" factors.²⁵⁹ Under the customer care factor, initial interest allowed the court to decide more accurately that merely showing a lower price was insufficient to rule on the proper level of care.²⁶⁰

Additionally, looking to any evidence of actual confusion, the court required more information from the plaintiff regarding point of sale and Internet traffic to show evidence of initial interest confusion.²⁶¹ As mentioned, whether incorporated into the "degree of customer care" or "evidence of actual confusion" factors, both analyses provide a clear-cut change to the inconsistent and ambiguous trademark infringement claims, like the purchase of trademarks as keyword advertisements.

Using the traditional framework, federal courts can decide what factors to give the most consideration or which of the eight factors to leave out of their analyses. Suitably, analyzing the initial interest confusion doctrine within this traditional framework does not violate the Lanham Act because courts may still engage in likelihood of confusion analysis without running the risk of solely turning to initial interest as a quick route to find infringement. By using this approach, federal judges and courts across the nation will simultaneously maintain their individual discretion, retain the power to allocate which factor deserves the most attention, and protect against trademarks violations on the Internet.

This approach allows for a more effortless, yet efficient, transition from past analyses among "bricks and mortar" cases to

257. 2009 WL 82552 at **8-12 (M.D. Pa. Jan. 12, 2009).

258. *Id.* at **1-2.

259. *Id.* at **8-11.

260. *Id.* at *10.

261. *Id.* at *11. "The existence or nonexistence of this type of evidence was the subject of an ongoing discovery dispute between the parties." *Id.*

decisions involving technology and Internet trademark violations at their highest level. Federal judges will become better equipped to handle complex Internet trademark disputes through a simple incorporation of initial interest confusion within the pre-existing factors like the “degree of customer care” or “evidence of actual confusion” in their courts’ extant likelihood of confusion test.

Lastly, the incorporation of initial interest confusion in this manner will not be burdensome on the court system. This approach will serve trademark goals of protecting trademark owners’ interests, and will benefit consumers by maintaining a focus on consumer confusion instead of consumer diversion. The initial interest confusion doctrine can continue to help regulate the ever-growing mass Internet marketplace and continue to protect the private interests of trademark owners alongside the interests of the consumers, who continue to browse the web for answers to the frequent questions in their everyday lives.

VI. CONCLUSION

Ultimately, turning toward a separate analysis of initial interest confusion may be seen as a waste of time. Keyword advertising and the use of trademarks within sponsored links, however, are just some of the recent methods in which trademark rights are continuously violated. Incorporating some of initial interest confusion’s main strengths into the court’s traditional factors will amend frameworks like the Lanham Act, making these frameworks better able to address future Internet issues that surface. One resolution may be the combining of initial interest confusion within the “degree of customer care” or “evidence of actual confusion” factors. Nevertheless, courts should look toward a modernized approach to clear up uncertainty faced by courts applying initial interest confusion to the Internet. Whatever this test may be, one thing remains certain: as technology in the business world continues to grow, so does its ability to infringe upon trademarked property beyond the traditional means.