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Online advertising expenditure is expected to reach $39.5 billion in 2012.[1] As more consumers use the Internet to make purchases, businesses increasingly invest in search engine marketing, also known as keyword advertising, to attract and retain customers.[2] Keyword advertising refers to the display of text ads on search engines, in which advertisers pay to show their ads alongside search results for specific "keywords," or search queries.[3] This form of advertising constitutes nearly half of the total spending in online advertising.[4] Even in a stagnant economy, businesses continue to invest in keyword advertising for two main reasons. First, search engines reach a large audience, including new and existing customers. A consumer may search for a type of product for the first time after realizing that she has a need, she may engage in comparison shopping, or she may already know the specific brand that she intends to purchase.[5] Advertisers can attract consumers at these different stages of the buying cycle. Second, advertisers can easily optimize their campaigns to maximize return-on-investment. Optimization, or improvement of ad performance, is easier with keyword advertising than with traditional media, such as print (e.g., newspapers and magazines) and television. Optimizing traditional media ads requires more guesswork because performance metrics are not as easily tracked, making it more difficult to determine which ads and targeting strategies work better than others. For example, a consumer can make a store purchase after

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1. *See US Online Ad Spending to Surpass Print in 2012: Report*, THE ECONOMIC TIMES (Jan. 21, 2012, 5:27 PM) http://economictimes.indiatimes.com/news/politics/nation/us-online-ad-spending-to-surpass-print-in-2012-report/articleshow/11579192.cms.

2. *See*, *What's the Difference Between a Search Query and a Keyword?,* GOOGLE, INC., http://support.google.com/adwords/bin/answer.py?hl=en&answer=68077 (last updated Mar. 20, 2012).

3. *See id.*

4. *See US Online Ad Spending to Surpass Print in 2012, supra* note 1.

5. *See* Bernard J. Janse & Simone Schuster, *Bidding on the Buying Funnel for Sponsored Search and Keyword Advertising*, 12 J. OF ELEC. COMMERCE RESEARCH 1, 1–2 (2011).

viewing a newspaper ad, but unless the ad contains a coupon and the consumer remembers to use it, the viewing of the ad and the purchase cannot be easily correlated. By contrast, with keyword advertising, advertisers can track which ad clicks lead to sales on their sites. Additionally, advertisers can easily modify ad texts and add or remove keywords based on readily available performance metrics[6] like clickthrough rates[7] and conversion rates[8] that are recorded in the advertisers' online accounts.[9]

Although keyword advertising is beneficial to many businesses because of its effectiveness and ease of use, it can also be problematic for trademark owners. Trademark owners have claimed that competitors benefit from their marks' goodwill when competitors' ads show alongside the organic[10] search results for their trademarks.[11] The competitors' ads potentially divert

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6. *Id.*

7. *Clickthrough Rate (CTR)*, GOOGLE, INC., http://adwords.google.com/support/"aw/bin/answer.py?hl=en&answer=107955&from=6305&rd=1 (last updated Dec. 12, 2011) (defining clickthrough rate as "the number of clicks [an] ad receives divided by the number of times [the] ad is shown").

8. *See What is AdWords Conversion Tracking?*, GOOGLE, INC., http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=142348 (last updated Jan. 26, 2012) (defining conversion metrics as statistics used to assess the likelihood that someone who clicks on an ad will make a purchase or engage in some other activity that is the goal of the ad campaign (e.g., viewing a specific video, viewing a specific page, signing up for a mailing list)).

9. *See The AdWords Performance Management Environment,* GOOGLE, INC., http://support.google.com/adwords/certification/bin/answer.py?hl=en&answer=172662 (last visited Dec. 22, 2011).

10. *See Overview of Search Engine Marketing & Online Advertising*, GOOGLE ADWORDS CERTIFICATION PROGRAM HELP, http://support.google.com/adwords/certification/bin/static.py?hl=en&topic=23613&guide=23611&printable=1&page=guide.cs&answer=151864 (last visited Dec. 19, 2011) ("Most search engines provide two types of results listings in response to the same user query: organic, also called "natural" or "free", listings, and paid listings (i.e., advertisements). Google keeps these two types of listings separate."); *see also Search Engine Optimization Starter Guide,* GOOGLE, INC. (2010), http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/webmasters/docs/search-engine-optimization-starter-guide.pdf. Organic search results are the non-paid listings that appear when a user enters a search query into a search engine. They are generally ranked based on algorithms unique to each search engine that detects relevance of a website listing to the search query, in which the more relevant results show higher in the list of results on the page. Organic results are different from the "sponsored" results, such as those in Google AdWords. *Id.*

11. *See* Gregory Shea, *Trademarks and Keyword Banner Advertising*, 75 S. CAL. L. REV. 529, 529 (2002) (noting that "[w]hile consumers can obviously benefit from this practice [of competitor ads appearing next to search results for trademark keywords]—as it allows them to see more choices related to their query and learn about new products—many companies feel this practice violates trademark law because it allows competitors to benefit from their goodwill").

customers interested in the trademarked goods and create interest in the competing products. Trademark owners have also claimed that the competitors' ads create consumer confusion, whereby consumers mistakenly buy a competitor's product because they believe the two brands are affiliated.[12]

In light of these concerns, trademark owners have sued search engines for selling their trademarks as keywords and have also sued competitors for paying to show their ads to consumers searching for those marks. One claim is that the ads create a likelihood of confusion; a secondary claim is that the ads create a likelihood of *initial interest* confusion.[13] Trademark infringement based on a likelihood of confusion is targeted at "prevent[ing] the use of identical or similar marks in a way that confuses the public about the actual source of goods and services."[14] The doctrine of initial interest confusion, however, considers whether the use of a trademark evokes "initial interest" in the competitor's product, even if the initial assumption of affiliation is eventually resolved before the time of purchase.[15] Initial interest confusion has been "likened to getting a 'foot in the door' or a 'free ride' at the trademark owner's expense,"[16] a scenario in which "the alleged-infringer does not escape liability simply because any likely initial confusion will later be rectified."[17]

As the doctrine is relatively new, courts have not come to a consensus on how to assess initial interest confusion. Some courts have found that "initial confusion does not reach actionable levels if it is of sufficiently brief duration, for example, when the alleged infringer's confusing material itself corrects any mistaken impression before any activity by the customer can be based thereon."[18] A recent Ninth Circuit decision, instead, draws the line at

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12. *See id.* at 548 (citing Brookfield Comm'ns, Inc. v. W. Coast Entm't Corp., 174 F. 3d 1036, 1062 (9th Cir. 1999)).

13. *See* Jonathan Pink, *Initial Interest Confusion*, IP FRONTLINE, http://www.ipfrontline.com/depts/article.aspx?id=4697&deptid=4 (last updated Jul. 6, 2005) (arguing that "[t]he Initial Interest Confusion Doctrine has allowed some courts to do away with this traditional analysis, creating a short-cut to infringement").

14. Deborah F. Buckman, *Initial Interest Confusion Doctrine Under Lanham Trademark Act*, 183 A.L.R. FED. 553, 553 (2003).

15. *See* Pink, *supra* note 13.

16. Buckman, *supra* note 14, at 553.

17. LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 22:15 (4th ed. 2011).

18. Jews For Jesus v. Brodsky, 993 F. Supp. 282, 303 (D.N.J. 1998), *judgment aff'd*, 159 F.3d 1351 (3d Cir. 1998); Teletech Customer Care Mgmt. (Cal.), Inc. v. Tele-Tech Co., Inc., 977 F. Supp. 1407, 1410, 1414 (C.D. Cal. 1997)); ALTMAN & POLLACK, *supra* note 17, § 22:15 (citing Savin Corp. v. Savin Group, No. 02 Civ.9377 SAS, 2003 WL 22451731, at

the point at which "mere diversion" becomes "likely confusion," which often depends on evidence of actual confusion, such as from consumer surveys.[19] Although, in the initial interest confusion analysis, courts have applied a lower standard of confusion than for traditional likelihood of confusion, the line between the two is unclear. The point at which courts find "initial interest confusion" is still a moving target. Most courts consider initial interest confusion to be a subset of likelihood of confusion and borrow from that analysis.[20] Some of them have considered split-second, subliminal confusion to meet the initial interest confusion test, even if the confusion is quickly resolved.[21] However, others courts require more than a brief moment of subliminal confusion and examine the duration of the confusion to determine infringement.[22] Although the Second Circuit has found that mere diversion constitutes initial interest confusion,[23] the Ninth Circuit recently held that initial interest confusion is still fundamentally concerned with

*12 (S.D.N.Y. 2003), *judgment aff'd in part, vacated in part on other grounds*, 391 F.3d 439 (2d Cir. 2004).

19. Network Automation Inc. v. Advanced Sys. Concepts, Inc., 638 F. 3d 1137, 1149 (9th Cir. 2011).

20. *See* Kristin Kemnitzer, *Beyond* Rescuecom v. Google*: The Future of Keyword Advertising*, 25 BERKELEY TECH. L.J. 401 (2010).

21. *See, e.g.*, Chi-Ru Jou, *The Perils of a Mental Association Standard of Liability: The Case Against the Subliminal Confusion Cause of Action*, 11 VA. J.L. & TECH., no. 2, 2006, at 8 (citing Suncoast Tours, Inc. v. Lambert Grp., Inc., No. CIV.A.98-5627, 1999 WL 1034683, at *5 (D.N.J. 1999); Resorts Int'l, Inc. v. Greate Bay Hotel & Casino, Inc., 830 F. Supp. 826 (D.N.J. 1992); Verifine Products, Inc., v. Colon Bros., Inc., 799 F. Supp. 240, 251 (D.P.R., 1992); Oxford Indus., Inc. v. JBJ Fabrics, Inc., No. 84 CIV.2505, 1988 WL 9959, at *3 (S.D.N.Y. 1988)).

22. *See, e.g.*, McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC, 511 F.3d 350, 358 (3d Cir. 2007) (holding "that initial interest confusion is an independently sufficient theory that may be used to prove likelihood of confusion" and applying the Third Circuit's Lapp test for initial interest confusion cases); Checkpoint Systems, Inc. v. Check Point Software Technologies, Inc., 269 F.3d 270, 292, 297 (3d Cir. 2001) (holding initial interest confusion to be actionable, but "where confusion has little or no meaningful effect in the marketplace, it is of little or no consequence in our analysis"); Interpace Corp. v. Lapp, Inc., 721 F.2d 460, 463 (3d Cir. 1983) (setting forth the ten factors for the likelihood of confusion analysis).

23. *See* Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway and Sons, 523 F.2d 1331, 1341 (2d Cir. 1975) (finding the subliminal confusion between the two piano brands to be actionable because such confusion "can destroy the value of the trademark which is intended to point to only one company") (quoting Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 365 F. Supp. 707, 717 (S.D.N.Y. 1973)). *But see* Savin Corp. v. Savin Grp., 391 F.3d 439, 462 n. 13 (2d Cir. 2004) (considering initial interest confusion to be a separate factor under the likelihood of confusion analysis and noting that "[b]ecause consumers diverted on the Internet can more readily get back on track than those in actual space, thus minimizing the harm to the owner of the searched-for site from consumers becoming trapped in a competing site, Internet initial interest confusion requires a showing of intentional deception").

consumer confusion, such that diversion without even a minimal amount of confusion should not lead to a finding of infringement.[24]

Although the goal of trademark law is twofold—to protect consumers and also trademark owners—the primary goal is to protect consumers.[25] Protecting trademark owners encourages them to continue investing in the development of trademarks.[26] These marks serve as product identifiers for consumers, helping them find what they want and making the search process more efficient.[27] However, when mere diversion is considered infringement, the doctrine potentially protects trademark owners at the expense of consumers.[28] Competitor ads, when honest and not misleading, can provide good alternatives to consumers and promote healthy competition among businesses. Thus, initial interest confusion should require more than mere diversion to best meet the goal of protecting consumers.

Although courts have sometimes relied on case-specific surveys to determine whether actionable initial interest confusion exists,[29] limited time and money hinder the ability to conduct thorough studies for each case. As case-specific surveys are often difficult to conduct by the preliminary injunction stage,[30] this Note proposes that courts take notice of relevant third-party material, including relevant surveys from prior cases and

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24. *See Network Automation Inc.*, 638 F.3d at 1149 (stating that "because the sine qua non of trademark infringement is consumer confusion, when we examine initial interest confusion, the owner of the mark must demonstrate likely confusion, not mere diversion").

25. *See* J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:5 (4th ed. 2008).

26. *See* David W. Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH. & INTELL. PROP. 22, 29 (2006) ("[T]o encourage investment in trademarking activity, trademark law protects the referential device/product link.").

27. *See* Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427, 436 (2010) ("Consumers use brands to find products and connect to communities with similar interests. Search Engines make it possible to use brands as search terms to find information on the Internet.").

28. *See id.* at 431 ("The expansion of trademark law is resulting in trends that ignore or harm consumer interests. The harm is especially apparent when trademark law is used to deny consumers the opportunity to use trademarks to find information.").

29. *See* Kent D. Van Liere & Sarah Butler, *Emerging Issues in the Use of Surveys in Trademark Infringement on the Web* 4 (Sept. 21, 2007) (unpublished manuscript, on file with NERA Economic Consulting) ("Consumer surveys that provide evidence of confusion are common in trademark litigation.").

30. *See* Mark D. Robins, *Actual Confusion in Trademark Infringement Litigation: Restraining Subjectivity Through A Factor-Based Approach to Valuing Evidence*, 2 NW. J. TECH. & INTELL. PROP. 1, 64 (2004) ("Courts are afforded a wide degree of discretion in granting preliminary injunctions and in what types of procedures should attend their determinations. This discretion can impact both the types of evidence that courts are willing to accept and the types of evidence that parties have an opportunity to present.").

marketing research from reliable sources, and use that information to assess the likelihood of initial interest confusion. Such data provides insight into how consumers perceive text ads and highlights aspects that contribute to initial interest confusion. Furthermore, the doctrine should be clarified as to require an ad to be misleading, rather than merely diverting. Because such an inquiry is fact-specific, use of prior survey results and market research to supplement limited case-specific surveys would allow courts to better assess when the line is crossed from diversion to actionable confusion.

In Part I, this Note explains how keyword advertising works and describes how trademarks are used in that context. In Part II, the Note examines how trademark law, specifically with regard to initial interest confusion, has been applied in keyword advertising cases. As circuits are split on how to approach the analysis, the Note looks at the common elements used in these analyses to show that confusion, rather than diversion, is at the core of this doctrine across the circuits. To provide context for future consumer confusion analyses, Part III analyzes empirical research to examine how consumers perceive search ads. Finally, the Note recommends in Part IV that courts take judicial notice of prior survey results and market research.

I. HOW KEYWORD ADVERTISING WORKS

Keyword advertising is a method of search engine marketing in which advertisers purchase "keywords" in order to show their ads on specific search results pages relevant to their advertised product.[31] When advertisers target their ads to keywords—which can be individual words or phrases—their ads are eligible to appear next to organic search results when consumers search for those keywords.[32]

Companies frequently advertise with the most popular search engines in order to attract as many consumers as possible. The search engines with the largest market shares are Google, Yahoo!, and Microsoft.[33] Their ad delivery mechanisms are similar, with slight variations between Google AdWords and Microsoft adCenter. The latter has delivered ads to both Bing and Yahoo! since the Microsoft and Yahoo! search alliance commenced in October

31. *See Keyword Advertising*, GOOGLE, INC., http://support.google.com/adwords/bin/answer.py?hl=en&answer=10949 (last updated Mar. 20, 2011).

32. *See id.*

33. *See comScore Releases August 2011 U.S. Search Engine Rankings*, COMSCORE (Sept. 13, 2011), http://www.comscore.com/Press_Events/Press_Releases/2011/9/comScore_Releases_August_2011_U.S._Search_Engine_Rankings (finding that "Google Sites led the U.S. explicit core search market in August with 64.8 percent market share, followed by Yahoo! Sites with 16.3 percent . . . and Microsoft Sites with 14.7 percent").

2010.[34] Although some differences exist between these two advertising programs, this Note uses Google AdWords to illustrate the mechanics of search advertising since Google has the largest market share[35] and its advertising program has been the subject of much litigation.[36]

In order to create an ad for a search engine, an advertiser needs to create an account with an advertising program. The advertiser can then create an ad and enter a list of user search queries—called "keywords"—that can "trigger" the ad to be shown on the relevant search engine. For AdWords, ads would show on Google.com. The advertiser inputs a "keyword" into his account to show his ad on the search engine page when a user searches for that term.

Companies in the same industry usually target the same or similar keywords. They compete in an auction and bid to show an ad in one of the available ad spots.[37] If, for example, a search result list for "running shoes" has space available for three ad placements on the search results page, different shoe companies that sell running shoes—for example, Nike, Adidas, Reebok, Saucony, and New Balance—may all bid in the auction to show their ads on the search results page when consumers search for the keyword phrase "running shoes." Only three of the advertisers would be able to win the auction.[38] The ads would be ranked according to an algorithm that considers both the amounts of the bids and the quality or relevance of the ads to the keyword.[39] An ad that has a higher bid and that is also more relevant—for example, an ad text describing the sale of "running shoes" instead of "walking shoes"—would likely rank higher and have a better chance at appearing in one of the three available spots.

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34. *See* David Pann, *Yahoo! and Microsoft Complete Major Search Alliance Milestone in the U.S. and Canada*, ADCENTER BLOG (Oct. 27, 2010), http://community.microsoftadvertising.com/blogs/advertiser/archive/2010/10/27/yahoo-and-microsoft-complete-major-search-alliance-milestone-in-the-u-s-and-canada.aspx.

35. *See US Online Ad Spending to Surpass Print in 2012, supra* note 1.

36. *See* Michael Orey, *Google's Trademark Tussle*, BLOOMBERG BUSINESSWEEK (Apr. 15, 2009, 12:01 AM) http://www.businessweek.com/technology/content/apr2009/tc20090414_278741.htm.

37. *Is There a Bid Requirement to Enter the Ad Auction?*, GOOGLE, INC., http://support.google.com/adwords/bin/answer.py?hl=en&answer=105697 (last updated Mar. 20, 2011) (An auction "is run every time a user enters a search query, which determines which ads show for this query and in what order.").

38. *See Ad Targeting and Previewing: About the Ad Auction*, GOOGLE, INC., http://support.google.com/adsense/bin/answer.py?hl=en&answer=160525#3 (last visited Jan. 22, 2012).

39. *See id.*

On AdWords, advertisers can target keywords in three different ways: (1) "broad-match," (2) "phrase-match," and (3) "exact-match."[40] With broad-match, an ad may show on the search results pages for queries of the keyword, its synonyms, and other related terms.[41] With phrase-match, an ad may show on search results pages for user queries containing the phrase in the exact word order, plus words before or after the phrase.[42] Finally, with exact-match, an ad may show on the search results page only when a user searches for the exact phrase, with the same words in the same order, and no other words before or after.[43]

Because of the flexibility in matching options, competitor ads may appear next to multiple variations of search phrases that include a trademark. Someone targeting the trademark "brand x" can also target "brand x shoes." If the keyword "brand x shoes" was broad-matched, the ad associated with that keyword may enter the auction[44] for search queries of synonyms or related terms, for example, "brand x sneakers" and "brand x running shoes." Hence, these targeting mechanisms allow advertisers to target much more than just the specific words they choose, thereby increasing the competition for various phrases containing trademark terms.

In addition to targeting generic keywords like "running shoes," advertisers may also include branded keywords like "Nike running shoes," even if they are not selling Nike shoes but are selling competitor brands. This keyword strategy is often effective because consumers searching a trademark may be interested in finding related goods or finding running shoes comparable to those made by Nike. An advertiser may target the trademark to capitalize on this interest and provide consumers with the option to choose; alternatively, the advertiser may use a competitor's trademark to confuse consumers into believing that the ad is affiliated with the brand, thereby wrongfully benefiting from the mark's goodwill.

40. *See What are Keyword Matching Options?*, GOOGLE, INC., http://support.google.com/adwords/bin/answer.py?hl=en&answer=6100 (last updated Mar. 20, 2012).

41. *See id.*

42. *See id.*

43. *See id.*

44. Google, Inc., *Ad Auction*, ADWORDS HELP, http://support.google.com/adwords/bin/answer.py?hl=en&answer=142918 (last visited Feb. 18, 2012) (stating that an ad auction "is run every time a user enters a search query, which determines what ads show for this query and in what order").

II. TRADEMARK INFRINGEMENT IN KEYWORD ADVERTISING

In the context of keyword advertising, trademark owners can file complaints for both (1) likelihood of confusion and (2) initial interest confusion. The latter serves as an alternative where the first, which trademark owners generally prefer, is not adequately supported.[45] In the likelihood of confusion analysis,[46] courts look at "whether a consumer is likely to be confused as to whether the products offered by the separate parties are affiliated with one another."[47] By comparison, initial interest confusion concerns merely "subliminal confusion,"[48] in which consumers make just a momentary false affiliation between the competitor and the trademark through the competitor's "unauthorized use of trademarks to divert internet traffic, thereby capitalizing on a trademark holder's goodwill."[49]

Currently, trademarks are protected by federal statute under the Lanham Act.[50] The Act prohibits the "use in commerce" of any reproduction of a registered mark "in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive."[51] Infringement occurs when one (1) "uses in commerce any word, term, name, symbol, or device, or any combination thereof" which (2) "is likely to cause confusion" or "misrepresents the nature, characteristics, qualities, or geographic origins of his or her or another person's goods, services, or commercial activities."[52] Keyword advertising has been considered by most courts to meet the first requirement of "use in commerce."[53] However,

45. *See* Pink, *supra* note 13 (arguing that the initial interest doctrine is a "short-cut" to the traditional likelihood of confusion analysis).

46. MCCARTHY, *supra* note 25, § 2.50 (noting that to show that likelihood of confusion exists, courts rely on "1. [s]urvey evidence; 2. [e]vidence of actual confusion; and/or 3. [a]rgument based on a clear inference arising from a comparison of the conflicting marks and the context of their use").

47. Patrick Ryan Barry, *The Lanham Act's Applicability to the Internet and Keyword Advertising: Likelihood of Confusion v. Initial Interest Confusion*, 47 DUQ. L. REV. 355, 358 (2009).

48. Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway and Sons, 523 F.2d 1331, 1341 (2d Cir. 1975).

49. Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1239 (10th Cir. 2006).

50. *See* Lanham Act, 15 U.S.C. §§ 1051–1141 (2006).

51. 15 U.S.C. § 1114.

52. 15 U.S.C. § 1125.

53. *See* Peter E. Nussbaum & Nancy A. Del Pizzo, *Keyword Advertising "Use in Commerce": A Pro-Plaintiff Trend Emerges*, 20 INTELLECTUAL PROP. LIT., no. 2, 2009, *available at* http://www.wolffsamson.com/news_events/46-keyword-advertising-use-commerce-pro-plaintiff-trend-emerges (citing Hysitron Inc. v. MTS Sys. Corp., No. 07-01533, 2008 WL

circuits are split on how to determine which instances of keyword advertising satisfy the second prong. Circuits are divided, in particular, on when initial interest confusion meets the test of "likely to cause confusion."

Some courts are reluctant to apply this doctrine because it potentially takes trademark rights too far, beyond the fundamental goal of protecting consumers who may not necessarily be confused at the time of purchase under this doctrine.[54] However, incentivizing trademark owners to value their marks is also important because their investment in upholding the value of their marks often leads to better and more consistent quality of goods.[55] This need to incentivize trademark owners suggests that addressing consumer confusion at only the point of purchase may not be sufficient, but a moderate form of trademark protection pre-sale that is aimed at protecting trademark owners may be necessary.

Because likelihood of confusion is difficult to prove in keyword advertising cases, trademark owners may also allege infringement under the initial interest confusion doctrine. If a consumer clicks on an ad and goes to a website for a product different from what he was looking for, he can easily click the back button to return to the search results page and look at other ads or organic listings. As any brief moment of confusion is easily corrected, likelihood of confusion is difficult to prove. Trademark owners therefore turn to the initial interest confusion doctrine as an alternative means of seeking a remedy when competitors target consumers who are searching for the mark.[56] Since trademark owners are increasingly using this doctrine as the basis of infringement in keyword advertising cases, this Part discusses the origin and development of the doctrine and provides examples to illustrate how courts have applied this doctrine.

A. ORIGIN AND DEVELOPMENT OF THE INITIAL INTEREST CONFUSION DOCTRINE

Initial interest confusion is a recently developed concept of pre-sale confusion. It falls within the scope of the 1962 amendments to the Lanham Act that address pre-sale in addition to point-of-sale and post-sale

3161969, at *3 (D. Minn. 2008) (stating that the "majority of courts" hold that using a trademark for keyword advertising is a use in commerce under the Lanham Act)).

54. *See, e.g.*, Checkpoint Sys., Inc. v. Check Point Software Tech., Inc., 269 F.3d 270, 292, 297 (3d Cir. 2001) (holding initial interest confusion to be actionable, but "where confusion has little or no meaningful effect in the marketplace, it is of little or no consequence in our analysis").

55. *See* MCCARTHY, *supra* note 25, § 2.50.

56. *See* Pink, *supra* note 13.

confusion.[57] This concept of initial interest confusion was introduced in *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway and Sons*, which defined it as "subliminal confusion."[58] Consumers had initial interest in Grotrian-Steinweg pianos because of its phonetic and textual similarity to Steinway, a prominent piano brand in the United States.[59] As a result, Grotrian-Steinweg "attract[ed] potential customers based on the reputation built up" by Steinway,[60] in which the injury to the trademark owner is the "likelihood that potential piano purchasers will think that there is some connection between the Grotrian-Steinweg and Steinway pianos."[61] The court found trademark infringement based on subliminal confusion.[62] This concept of initial interest confusion, based on an amorphous notion of *some* connection between the brands, was later applied in *Mobil Oil Corp., v. Pegasus Petroleum Corp.*[63] The *Mobil* court held that even with "sophisticated oil traders, there is still and nevertheless a likelihood of confusion" between "Pegasus Petroleum" and the Pegasus symbol used by Mobil.[64] Even if consumers only momentarily envisioned a connection between the two companies, the brief initial interest confusion was sufficient proof of trademark infringement.[65]

More recently, the doctrine of initial interest confusion has been applied to cases concerning metatags, domain names, and keyword advertising. In *Brookfield*, the Ninth Circuit found that defendant West Coast's use of "moviebuff.com" in its metatags[66] and domain name led to initial interest confusion.[67] Furthermore, West Coast's website contained a database of movies similar to that of MovieBuff, such that consumers might decide to

57. *See* 15 U.S.C. §§ 1114–1127; Anne M. McCarthy, *The Post-Sale Confusion Doctrine: Why the General Public Should Be Included in the Likelihood of Confusion Inquiry*, 67 FORDHAM L. REV. 3337 (1999).

58. Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway and Sons, 523 F.2d 1331, 1341–42 (2d Cir. 1975).

59. *Id.*

60. *Id.* at 1342.

61. *Id.*

62. *See id.*

63. Mobil Oil Corp. v. Pegasus Petroluem Corp., 818 F.2d 254 (2d Cir. 1987).

64. *Id.* at 260.

65. *See id.* at 260 (citing Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway and Sons, 523 F.2d 1331, 1342 (2d Cir. 1975).

66. *See* MCCARTHY, *supra* note 25, § 25:69 (defining "meta tag" as "a list of words normally hidden in a Web site that acts as an index or reference source identifying the content of the Web site for search engines").

67. Brookfield Comm'ns, Inc. v. W. Coast Entm't Corp., 174 F. 3d 1036 (9th Cir. 1999).

use West Coast after having been brought to the site because of the initial connection they drew between West Coast and MovieBuff.[68]

In *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, the Ninth Circuit compared the initial interest created by metatags with the initial interest confusion arising from keyword-targeted advertising.[69] This was one of the first cases in the Ninth Circuit applying the initial interest doctrine to keyword advertising. The court asserted that poorly labeled or unlabeled banner ads appearing on the search results page for Playboy trademarks could create initial interest confusion actionable in court.[70] Thus, the court reversed the summary judgment and remanded the case to the lower court to resolve the factual dispute concerning consumer confusion. In the case of both trademark keywords and metatags, a finding of initial interest confusion was based on other considerations, including the website content and the labeling of the ad, and not just on the mere fact that a trademark was used on the back-end for keyword targeting or metatags.

B. INITIAL INTEREST CONFUSION IN KEYWORD ADVERTISING CASES

Trademark infringement based on the initial interest confusion doctrine has been adopted in the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits,[71] but the analysis of initial interest confusion varies from circuit to circuit. Circuits are split on where to draw the line between actionable initial interest confusion and harmless uses of trademarks that allow for legitimate comparison shopping. Many circuits have suggested that initial interest confusion exists when a consumer is merely diverted by the competitor's use of the trademark, but only if the ad in question references the trademark explicitly. In this scenario, the consumer could be aware that the trademark is not affiliated with the competitor, but the mere act of getting "attracted" or "induced" is sufficient to show that the competitor injured the trademark and capitalized on its goodwill.[72]

However, when the trademark is used as a keyword, the association between the ad and the mark is weaker, and determining initial interest confusion can be more difficult. Courts have therefore looked to a multitude of factors in keyword advertising cases to determine the likelihood of initial

68. *Id.* at 1042.

69. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020 (9th Cir. 2004).

70. *See id.* at 1034.

71. *See* Ian C. Ballon, *Initial Interest Confusion*, 1 E-COMMERCE AND INTERNET LAW 7.08[2] (updated 2010–2011) (providing a summary of the circuits that currently apply the initial interest confusion doctrine).

72. *See, e.g.*, McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC, 511 F.3d 350, 358 (3d Cir. 2007).

interest confusion. These factors mirror those used for the likelihood of confusion analysis.[73] Although the circuits look at different factors, several of the core factors are the same, as illustrated in Figure 1, *infra*. These similarities highlight the fundamental bases of this doctrine shared across circuits. As illustrated in Figure 1, these main factors are: (1) similarity of the marks, (2) similarity of the products, (3) intent of the defendant, and (4) evidence of actual confusion.

73. *See, e.g.*, AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 348–49 (9th Cir. 1979) (holding that "[i]n determining whether confusion between related goods is likely, the following factors are relevant: 1. strength of the mark; 2. proximity of the goods; 3. similarity of the marks; 4. evidence of actual confusion; 5. marketing channels used; 6. type of goods and the degree of care likely to be exercised by the purchaser; 7. defendant's intent in selecting the mark; and 8. likelihood of expansion of the product lines"); Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (holding that likelihood of confusion "is a function of . . . the strength of [the senior user's mark], the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers").

Figure 1: Factors Used by Circuits, with Similar Factors in the Same Row

	Second Circuit[74]	Third Circuit[75]	Fifth Circuit[76]	Seventh Circuit[77]	Ninth Circuit[78]	Tenth Circuit[79]
Similarity of the marks	X	X	X	X	X	X
Strength of trademark	X	X		X	X	X
Consumer sophistication and other factors indicative of consumer care and attention in making purchase	X	X		X	X	X
Duration of trademark use without evidence of actual consumer confusion	X	X				
Intent of defendant in using the trademark or a similar mark	X	X	X	X	X	X
Evidence of actual	X	X	X	X	X	X

74. Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 260 (2d Cir. 1987).

75. Interpace Corp. v. Lapp, Inc., 721 F.2d 460, 463 (3d Cir.1983) (setting forth the ten factors for the likelihood of confusion analysis); *see also* McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC, 511 F.3d 350, 358 (3d Cir. 2007) (holding "that initial interest confusion is an independently sufficient theory that may be used to prove likelihood of confusion" and applying the Third Circuit's *Lapp* test for initial interest confusion cases); Checkpoint Sys., Inc. v. Check Point Software Tech., Inc., 269 F.3d 270, 292, 297 (3d Cir. 2001) (holding initial interest confusion to be actionable, but "where confusion has little or no meaningful effect in the marketplace, it is of little or no consequence in our analysis").

76. S. Co. v. Dauben Inc., No. 08-10248 (5th Cir. Apr. 15, 2009) (setting forth the seven factors for the likelihood of confusion analysis); *see also* Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 204 (5th Cir. 1998) (holding that "all five digits of confusion that we considered de novo weigh in favor of a likelihood of confusion").

77. Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 812 (7th Cir. 2002) (holding that trademark use in metatags diverts consumers to defendant's site and allows it to benefit from the goodwill of the plaintiff's mark).

78. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348–49 (9th Cir.1979). (setting forth the eight factors for the likelihood of confusion analysis); *see also* Perfumebay.com, Inc. v. eBay, Inc., 506 F.3d 1165 (9th Cir. 2007); Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002 (9th Cir. 2004), cert. denied, 544 U.S. 974 (2005); Playboy Enters., Inc. v. Netscape Commc'ns Corp., 354 F.3d 1020 (9th Cir. 2004); Interstellar Starship Servs., Ltd. v. Epix, Inc., 304 F.3d 936 (9th Cir. 2002); Interstellar Starship Servs., Ltd. v. Epix, Inc., 184 F.3d 1107 (9th Cir. 1999); Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp., 174 F.3d 1036 (9th Cir. 1999).

79. Sally Beauty Co., Inc. v. Beautyco, Inc., 304 F.3d 964, 972 (10th Cir. 2002) (setting forth the six factors for the likelihood of confusion analysis); *see also* Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1238–39 (10th Cir. 2006) (finding initial interest confusing based on the defendant's use of plaintiff's mark on its website and in metatags, in which "[i]nitial interest confusion in the Internet context derives from the unauthorized use of trademarks to divert internet traffic, thereby capitalizing on a trademark holder's goodwill").

	Second Circuit[74]	Third Circuit[75]	Fifth Circuit[76]	Seventh Circuit[77]	Ninth Circuit[78]	Tenth Circuit[79]
confusion						
Same marketing channels used	X	X			X	X
Similarity of target audience	X	X				
Proximity/relationship of the goods	X	X	X	X	X	X
Likelihood of product line expansion	X	X			X	
Parody			X			

Among the four common factors, the most relevant one to any consumer confusion analysis should be evidence of actual confusion. Circuits are split, however, on what level of confusion is actionable. Some consider diversion to be a form of subliminal confusion that is sufficient to prove infringement.[80] Others require a longer duration of initial confusion or even actual confusion at time of purchase, which essentially collapses the initial interest confusion doctrine into the likelihood of confusion analysis.[81]

Even if initial interest confusion may be manifested in different ways depending on the situation, some courts have attempted to create more uniform boundaries to limit the scope of analysis for this doctrine. For example, the Fifth Circuit has held that some "minimal" amount of actual confusion needs to be shown in order for the initial interest confusion to be actionable.[82] The court acknowledged that a slight piquing of interest is insufficient to constitute injury to the trademark owner.[83] The Fifth Circuit's holding suggests that this vague doctrine should be limited;[84] otherwise, it

80. *See, e.g.*, *Promatek Indus.*, 300 F.3d 808, 812–13 (finding that "what is important is not the duration of the confusion, it is the misappropriation of Promatek's goodwill").

81. *See, e.g.*, McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC, 511 F.3d 350, 358 (3d Cir. 2007) (applying the Third Circuit's *Lapp* test to an initial interest confusion analysis); Checkpoint Sys., Inc. v. Check Point Software Tech., Inc., 269 F.3d 270, 292, 297 (3d Cir. 2001) (finding that "where confusion has little or no meaningful effect in the marketplace, it is of little or no consequence" in the initial interest confusion analysis); Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 260 (2d Cir. 1987) (considering as a factor in the analysis the "probability that potential purchasers would be misled" rather than merely diverted).

82. *Elvis Presley Enters., Inc.*, 141 F.3d at 204 (noting that "[a]n absence of, or minimal, actual confusion . . . weighs against a likelihood of confusion").

83. *See id.*

84. *See id.* at 204 (examining the likelihood of initial interest confusion in the context of the likelihood of confusion analysis, and noting that "infringement can be based upon

may be overused by trademark owners to reduce competition and eliminate legitimate opportunities for comparison shopping that could be beneficial to consumers.[85] The Fifth Circuit's application of the initial interest confusion doctrine, along the spectrum of how initial interest confusion is assessed, lies on the cusp and mimics the traditional likelihood of confusion analysis, in which mere diversion is not considered confusion.[86]

Further evidence that actionable consumer confusion should involve more than just diversion can be seen in the way courts interchangeably use the term "likelihood of initial interest confusion" and "likelihood of confusion." In fact, in *Network Automation*, the Ninth Circuit stated that the *Sleekcraft*[87] court "found a likelihood of initial interest confusion by applying the eight factors we established more than three decades ago."[88] However, *Sleekcraft* discussed the likelihood of confusion and does not once mention "initial interest confusion."[89] In applying the *Sleekcraft* factors to the initial interest confusion analysis, the Ninth Circuit suggests that elements demonstrating confusion, and not just diversion, are at the core of this doctrine. Initial interest confusion, as a subset of likelihood of confusion, essentially reduces the standard for proving actual confusion. While some courts find that this protection is necessary to protect trademark owners' rights, others find that this excessively protects marks without clear benefits for consumers.

On the contrary, having alternatives readily accessible is a notable characteristic of e-commerce. Thus, the presence of a competitor's ad, without any false affiliation with the trademark, should not be actionable trademark infringement. The initial interest confusion doctrine should

confusion that creates initial consumer interest," in which "an absence of, or minimal, actual confusion . . . over an extended period of time of concurrent sales weighs against a likelihood of confusion").

85. *See* Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 710–711 (2009) (critiquing the expansive doctrine of initial interest confusion and noting that "to the extent that the defendant is using the plaintiff's mark for its persuasive value—either as a lure to attract consumers, with the hope that the consumers will, once attracted, choose the defendant's product instead, or to provide relevant information about the plaintiff (e.g., a trademark used as a keyword in a search engine)—that use seems consistent with the consumer's autonomy interest").

86. *Elvis Presley Enters., Inc.*, 141 F.3d at 204.

87. *Sleekcraft*, 599 F.2d 341.

88. Network Automation Inc. v. Advanced Sys. Concepts, Inc., 638 F. 3d 1137, 1142 (9th Cir. 2011) (citing *Sleekcraft*, 599 F.2d at 348–49 (reversing the district court's ruling that the defendant Network's use of plaintiff System's trademark "ActiveBatch" as a keyword created likelihood of consumer confusion and finding that the district court erred in how it weighed the *Sleekcraft* factors).

89. *See Sleekcraft*, 599 F.2d 341.

require confusion beyond just a subliminal association. While proof of confusion at the time of purchase may not be necessary, actual confusion about the sources, even if no purchase is made, would be an appropriate level of actual confusion that should be considered in the likelihood of initial interest confusion, since the source confusion affects both trademark owners and consumers when they ultimately make their purchase decisions.

III. IDENTIFYING ADS THAT CREATE CONSUMER CONFUSION

Search ads often provide useful alternatives for the consumer interested in comparison shopping. The availability of options encourages different brands to improve their products to stay competitive, thereby promoting the fundamental goal of trademark law: to improve the quality and legitimacy of goods for consumers. However, there are instances when ads can be misleading, attracting customers through deception and false association with a well-known trademark. Case-specific surveys, as discussed in Section III.A, *infra*, have traditionally been used to assess the likelihood of confusion. In assessing likelihood of confusion in internet advertising, some surveys inquire not only into confusion at time of purchase but look at the change in likelihood of initial confusion based on variations in the ad text or in the targeted keyword. These findings of the different aspects that lead to consumer confusion would be useful in an initial interest confusion analysis. As such research is expensive and difficult to acquire by the preliminary injunction stage, previous surveys as well as third-party marketing and consumer research should be used to establish a more uniform basis for analysis. Use of empirical research would allow for a more consistent analysis and potentially less variation among different circuits.

Below, Section III.A discusses the potential use of case-specific survey results in future initial interest confusion analyses. Section III.B examines market research that may also be relevant to determining initial interest confusion. Section III.C–D discusses the increased consumer sophistication with regard to online activity, which further emphasizes why a mere diversion is unlikely to have enough impact on consumers to be actionable under the initial interest confusion doctrine.

A. Using Case-Specific Consumer Surveys

Courts can apply survey results to find evidence of actual confusion in specific cases and then extrapolate those results to estimate confusion among the larger population of search engine users. Empirical studies and fact-finding conducted at the district court level provide insight into consumer behavior that informs appellate courts in their legal analysis of initial interest

confusion. For instance, if a high percentage of surveyed individuals was uncertain if there was some association between the ad and the trademark and, therefore, decided to click on it, the data may suggest an overall high likelihood of initial interest confusion.

However, hiring an expert to conduct a survey study is very expensive and may also lead to biased results. For example, in a case involving alleged infringement of the Nike trademark, the design and implementation of the survey cost $75,000.[90] Furthermore, trial testimony and depositions of experts hired to analyze these survey results can cost $7,000 per day, plus expenses.[91] Additionally, the accuracy of the surveys is frequently criticized.[92] Because experts are paid for their work, there is pressure to develop their research in a way consistent with what their clients wants in hopes of developing a favorable reputation and attracting more clients. The Federal Judicial Center surveyed district court judges in 1991 and 1998, and in both instances, judges claimed that the most common problem with expert testimony was experts who "abandon objectivity and become advocates for the side that hired them."[93]

Despite the potential bias in the survey in any individual case, some results from these expert reports can shed light on related cases. The data can be viewed in light of broader marketing research that may be more objective because the third-party marketing research is not tied to any one party in a litigation proceeding. Use of case-specific research, however, should be limited based on the methodology of the survey and whether or not the specific survey is relevant to an action before the court. Furthermore, case-specific findings should be considered in conjunction with larger marketing trends to make sure that the case-specific survey results are not outliers resulting from case-specific factors that may not be relevant to other keyword advertising cases.

Although case-specific statistics may not be transferable from case to case because of variations in consumer sophistication and involvement, the relative statistics within a case may provide insight into how variations within an ad format or targeting mechanism may affect consumer perception. For example, in *True & Dorin Medical Group, P.C. v. Leavitt Medical Associates*,

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90. Michael G. Atkins et al., *Sample Survey Expert Report*, *in* EXPERT WITNESSES: INTELLECTUAL PROPERTY CASES § 2:43 (2006) (citing Nike, Inc. v. Nikepal Int'l Inc., No. 2:05-cv-1468-GEB-JFM, 2006 WL 3826750 (E.D. Cal. Dec. 28, 2006)).

91. *Id.*

92. *See* Molly Treadway Johnson et al., *Testimony in Federal Civil Trials: A Preliminary Analysis*, FEDERAL JUDICIAL CENTER (2000), http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/$file/ExpTesti.pdf.

93. *Id.* at 5.

surveys were conducted to see how variations in the ad text next to search engine results affected consumer perception of the ad's affiliation with the trademark being searched.[94] According to the expert report, "[a]n extremely high percentage of more than ninety-one percent (91.2%) said they believed that the sponsored link designated as ELLIOTT AND TRUE was sponsored by, affiliated with, or associated with Elliott and True even though the URL was www.MedHairRestoration.com."[95] However, the percentage of people who believed there was an affiliation dropped significantly when the ad text no longer mentioned "Elliot and True."[96] When the text ad used "medical hair restoration" instead of "Elliot and True," the percentage of consumers who believed the ad was associated with the brand dropped from 91.2% down to 60.1%.[97] Another variation that used "hair transplant recovery" in the ad text was perceived as being affiliated by only 48.6% of surveyed consumers, suggesting that differences in description of the service can significantly affect consumers' belief that the companies are related.[98] The findings suggest that the ad text itself has a significant impact on the likelihood of confusion, as they provide more tangible points of comparison to the trademarked product or service. The above survey results are useful in showing how the description of the product in the text of the ad can reduce likelihood of confusion, which also sheds light on factors that may contribute to initial interest confusion. Where the ad text clearly describes the service or distinguishes it from the competitor, consumers are less likely to be confused even when initially viewing the ad.[99]

B. USING MARKET RESEARCH TO SUPPLEMENT SURVEYS

While case-specific survey results may be applied to other cases, market research that illustrates broader consumer trends may provide insight into consumer behavior beyond what may be drawn from narrower case-specific surveys. The use of this more readily available third-party information would be helpful for assessing the likelihood of initial interest confusion, especially since this inquiry is usually made at the preliminary injunction stage. This limits the time available for case-specific research and inevitably leaves inferential gaps, which may be appropriately filled with relevant

94. Declaration of James T. Berger, M.S., M.B.A., True & Dorin Medical Grp., P.C. v. Leavitt Med. Assocs. (S.D.N.Y. 2005), No. 06CV00092, 2005 WL 3964710 [hereinafter Berger Declaration].

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.*

generalizations of consumer behavior from reputable third-party research. Specifically, research on consumer perceptions of ad position and ad content, as well as empirical studies on consumer beliefs as to the relevance of organic versus sponsored results provide insight into the likelihood of initial interest confusion. Increased familiarity with search engines and the relationship of ads to the organic results reduces the chance that consumers would be misled merely by the presence of ads. For example, some users may already assume that ads are irrelevant to the search results. Therefore, they would not make even a split-second association between the trademark they key into the search engine and the ads they see next to the organic results. Using third-party market research to understand general trends in consumer perception would aid in the analysis of initial interest confusion.

1. *Consumer Engagement Dependent on Ad Rank*

An understanding of how consumers perceive the results following a search query will likely shed light on the likelihood of confusion and the more abstract initial interest confusion analysis. For instance, forty-nine percent of consumers only examine the first page of results before abandoning the search; eighty-two percent of those who abandon the search then conduct searches on additional terms.[100] These statistics suggest that a large percentage of consumers are savvy enough to refine their searches, perhaps because they understand that not all searches will produce the most relevant results. Supporting this theory is the fact that a majority of consumers "expect leading brands to appear in the top results of every search."[101]

However, since ad rank is determined by a combination of relevance as well as the amount the advertiser is willing to pay to show his ad on the search results page for a keyword,[102] a less relevant ad may appear in a higher position than a more relevant ad if the bid is significantly higher. A consumer may be more likely to notice a higher ranked ad even if it is less relevant, but such awareness does not necessarily divert interest from the original brand. In fact, even if a consumer initially thinks the ad is affiliated with the trademark, a view of the website can resolve any brief moment of confusion. Since the consumer can simply click the back button on his browser to return to the original search results page, the cost to him for the diversion is minimal and should not be actionable.

100. *See id.*
101. *See id.*
102. *See supra* Part I.

2. Content of Ads Affecting Perceptions of Relevancy

How consumers view ads is shaped by existing perceptions. In fact, "[a]ny ad campaign is most likely to lead to advertising failure if the message is inconsistent with [the consumers'] existing beliefs. . . . Advertisers have to strive to put forward a position that is credible, or at least is not inconsistent with what we as consumers already know and think."[103] Unless the ad conveys to the consumers that the advertised product or service is in line with what they are looking for, the ad will have a "weaker influence compared to what they already know or have in [their] minds."[104] For instance, if an ad is keyword-targeted to a search for "Nike shoes" but the ad text has no relationship to Nike shoes, then the consumer will likely find the ad less relevant. Even if the ad is for a warehouse that sells different brands of shoes, a consumer would likely pay less attention to that ad compared to an organic listing or another ad that specifically mentions that the store stocks Nike shoes.

Although advertisers have played with the concept of subliminal messages to subconsciously create recognition and desire for their products or services, such subliminal messages are generally less effective than direct messages.[105] The covert message is "not processed deeply enough. Its content is not retrievable after more than a few seconds unless we are induced to process it further by having our attention directed to it or by repetition."[106] As subliminal messages are easily overlooked, the mere presence of an ad next to search results for a trademark query may not necessarily lead consumers to believe that an affiliation exists between the advertised product and the trademark.

3. Consumers Prioritizing Organic Results over Ads

Additionally, organic search results are perceived to be more relevant to a search query than sponsored listings. In the results of an eyeball tracker study,[107] consumers were found to look at the first couple of organic results before looking at the ads. Consumers are likely to assume that the most relevant sites will appear near the top of the organic search listings since their

103. MAX SUTHERLAND, ADVERTISING AND THE MIND OF THE CONSUMER: WHAT WORKS, WHAT DOESN'T, AND WHY 154 (rev. 3d ed. 2008).

104. *Id.*

105. *See id.*

106. *Id.* at 44.

107. *See* Anne Aula & Kerry Rodden, *Eye-Tracking Studies: More than Meets the Eye*, THE OFFICIAL GOOGLE BLOG (Feb. 6, 2009, 9:45 AM), http://googleblog.blogspot.com/2009/02/eye-tracking-studies-more-than-meets.html.

relevance qualifies them for a top spot in an unpaid ranking system.[108] In fact, "banner blindness can occur with text items that do not look like advertisements."[109] Consumers tend to pay less attention to ads as a result of prior experiences with ad clutter, prior negative experiences with ads, and perceived goal impediment, where ads are perceived to get in the way of the consumer getting to purchase a product in the most direct path.[110] However, among the more experienced consumers, ninety to ninety-one percent do look at the sponsored links that appear at the top, above the organic results.[111] Despite this behavior, they are less likely to be confused because they are more sophisticated than the average user.

C. EASE OF ONLINE SEARCH REDUCES LIKELIHOOD OF CONFUSION

Unlike visiting a brick and mortar store, consumers engaged in online shopping can easily click on a sponsored link, assess a site within a few seconds, and click back, creating, if anything, only a negligible diversion that may not have any harms sufficient for a court to issue a preliminary injunction.[112] Because "customers don't passively receive commercials [but] actively point and click their way to a brand's website," online consumers are more empowered to resist a marketer's attempt to capture their attention.[113] Consumers are more likely to resist capture because they can quickly scroll past the ad if they do not find it to be relevant upon a quick skim, compared to a television ad that automatically plays for thirty seconds. In this sense, the cost to the trademark owner of a competitor bidding on a keyword and gaining some awareness for their product is not significantly harmful to either the trademark owner or to consumers because they are able to quickly return to the plethora of information related to the trademark that is available in the search results. The negligible diversion and the ease with which consumers can quickly get back on track reduces any adverse impact on the

108. *See id.*

109. Yu-Chen Hsieh & Kuo-Hsiang Chen, *How Different Information Types Affect Viewer's Attention on Internet Advertising*, 27 COMPUTERS IN HUM. BEHAV. 935, 937 (2011).

110. *See* Oliver J. Rutz & Randolph E. Bucklin, *A Model of Individual Keyword Performance in Paid Search Advertising* (2007) (unpublished manuscript) (on file with the Yale School of Management), *available at* http://mba.yale.edu/news_events/pdf/rutzkeywords.pdf.

111. *See* Matt McGee, *Eye-Tracking Study: Everybody Looks At Organic Listings, But Most Ignore Paid Ads On Right,* SEARCH ENGINE LAND (Mar. 10, 2011, 10:09 AM), http://searchengineland.com/eye-tracking-study-everybody-looks-at-organic-listings-but-most-ignore-paid-ads-on-right-67698.

112. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 911 (1975) (finding that to be granted a preliminary injunction, a plaintiff must show that he is likely to prevail on the merits and that in the absence of its issuance he will suffer irreparable injury); *see also* FED. R. CIV. P. 65.

113. DEBORAH KANIA, BRANDING.COM 81–82 (NTC Business Books 2001).

trademark owner, whose site is likely to be displayed in the organic search results and easily within reach of the consumer.[114] Although diversion may be common because of the availability of information all in one place, consumers can also easily find information directly related to the trademark and any diversion may be fleeting.

Additionally, when a consumer searches for a specific trademark, his search is usually the result of previous, non-brand-specific research that has made him a more sophisticated consumer, even if he was not familiar with industry brands prior to the research.[115] Among search engine users, seventy percent start with a generic keyword and proceed to more specifics, like branded keywords.[116] By going through this search funnel, users are generally more familiar with the products available to them by the time they search for a specific brand,[117] and thus, less likely to be confused. As a result, consumers are less likely to even be initially confused as to the affiliation of the ad to the trademark because they probably have a clearer sense of what products and websites are related to the trademark. Upon viewing the text of the ad and the website underneath the text, consumers would less likely believe that product to be affiliated with the brand if the description and the website do not fall within the scope of what they have encountered during their prior research into the mark.

D. CHANGES IN MARKETING STRATEGIES ALSO REFLECT INCREASED CONSUMER SOPHISTICATION

The fact that marketers are increasingly fragmenting their ads to reach smaller, niche groups is a response to, and further evidence of, an increasingly sophisticated online consumer base that is able to differentiate between products because of the ease of research on the Internet.[118] The presence of ads therefore provides consumers with opportunities for comparison shopping and, furthermore, encourages competition between businesses that will spur continued improvements in the quality and production of the goods. Because consumers are easily able to search for

114. *See id.*

115. *See* Oliver J. Rutz, Three Essays on Paid Search Advertising (2007) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with ProQuest Information and Learning Company).

116. *See id.* at 10.

117. *See id.* at 26–27 (discussing the move from the "awareness" stage, when a consumer is conducting research, to the "conversion" stage, when the consumer searches for a specific brand name).

118. JUDY STRAUSS & RAYMOND FROST, E-MARKETING 163 (Prentice Hall 5th ed. 2009).

alternatives online, "[t]hirty-six percent of all online shoppers are price conscious and willing to buy from an unknown online retailer if the price is low."[119] This suggests that many consumers are aware of the multitude of options available and are willing and able to sort through choices rather than stick to one brand. In this context, a consumer searching for a trademark may not be looking just to purchase a product or service of that specific brand; rather, the consumer may be looking for a class of products and using the brand as a door-opener for finding related products that may be cheaper or can act as a viable substitute for the branded product.[120] Limiting comparison shopping by increasing trademark protections with an expansive interpretation of initial interest confusion would act contrary to trademark law's primary goal of consumer protection.

Additionally, consumers often examine online reviews before committing to a purchase, thus reducing the chance that consumers would develop an initial interest in a product because of a false belief that it is affiliated with the trademark. Specifically, "[c]onsumers trust each other more than they trust advertising or companies online. The increase in user-generated content in special interest communities has consumers looking to each other for advice."[121] Since online reviews are so readily accessible and frequently visited, it is unlikely for consumers to consider any product, especially those that are greater investments, without examining various information sources available to them. In light of this, ads serve merely as options that are no more diverting than review sites and other related sites present in the search results page. Ultimately, the availability of options, from ads to review sites, increases consumer sophistication and reduces the chance of initial interest confusion while creating healthy competition in the online consumer market.

IV. TAKING JUDICIAL NOTICE OF SURVEYS AND CONSUMER RESEARCH

Given the vast body of consumer research related to e-commerce, parties to a trademark infringement case would likely be able to find relevant research to support their arguments at the preliminary injunction stage, without having to seek an expert to conduct and analyze time-intensive and costly surveys. Requesting that courts take judicial notice of existing consumer research from reliable sources would increase judicial efficiency,

119. *Id.*
120. *See id.*
121. *Id.* at 159–60.

reduce costs for the parties, and provide an empirical basis for analysis where comprehensive case-specific surveys may not be complete or available.

Evidence admitted under judicial notice is accepted without formal introduction by a witness and is frequently used for obvious facts, such as which day of the week corresponded to a particular calendar date or facts that are found in reference books.[122] According to Rule 201 of the Federal Rules of Evidence, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[123] Because initial interest confusion is a relatively new concept when applied to keyword advertising, the parties would unlikely be able to convince a court that market research on consumer confusion would be "generally known within the . . . jurisdiction." General trends on marketing and consumer behavior would unlikely be considered "generally known" because most people outside of advertising and marketing departments would not be attuned to this research. Survey results and market research are usually not as obvious and require expert testimony. However, when such consumer research—whether they are case-specific surveys or broad marketing studies—has been vetted by an expert in one case, taking judicial notice of that research in future cases would be a cost-effective and efficient way to support claims of initial interest confusion or to support defenses against them. Section IV.A, *infra*, proposes taking judicial notice of case-specific surveys from related cases, and Section IV.B, *infra*, proposes taking judicial notice of third-party market research to assist in the analysis of initial interest confusion at the preliminary injunction stage.

A. JUDICIAL NOTICE OF CASE-SPECIFIC SURVEYS

Judicial notice should be taken of survey results conducted for cases pertaining to similar industries and consumer demographics. Under 39 C.F.R. § 3001.31(k)(2)(ii), survey evidence may be used when the party provides

> (a) [a] clear description of the survey design, including the definition of the universe under study, the sampling frame and units, and the validity and confidence limits than can be placed on major estimates; and (b) [a]n explanation of the method of selecting the sample and the characteristics measured or counted.[124]

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122. *See* Hiram C. Barksdale, *The Use of Marketing Data in Courts of Law*, 23 J. OF MARKETING 381 (1959).

123. FED. R. EVID. 201(b).

124. 39 C.F.R. § 3001.31(k)(2)(ii) (2007).

If the expert witness in the prior case provided clear descriptions and explanations of the survey design and method of sampling, such that the evidence was considered reliable, then it would be reasonable for courts presiding over related cases, even in different circuits, to take judicial notice of those factual findings and consider them as factors in determining likelihood of initial interest confusion.[125] Although researching and identifying relevant prior surveys would require some work by the parties, this work would likely be less costly and time-consuming than for the parties to hire an expert to conduct and analyze a completely new survey involving a similar industry and consumer base.

Among the different types of consumer research, surveys are generally the most useful in likelihood of confusion cases because "surveys seem to offer objective evidence of consumer perceptions, measured with scientific controls, projectable with statistical accuracy."[126] As evidence of actual confusion is often difficult to find, survey results that provide such evidence is received with "substantial weight."[127] Although surveys do not capture all of the relevant consumers, they provide a "statistical means of predicting the likelihood that actual consumers will [be] confuse[d]."[128] Since likelihood of initial interest confusion requires only some evidence suggesting that there was confusion before purchase or other substantial consumer response, prior survey data showing confusion sufficient to meet the higher standard for the likelihood of confusion analysis would also indicate there was a likelihood of initial interest confusion.

For instance, a hypothetical case of ads promoting hair restoration products or other cosmetic or surgical care for that consumer demographic may benefit from using survey data collected for *True & Dorin Medical Group, P.C. v. Leavitt Medical Associates*.[129] In that case, surveys were conducted to assess the impact on consumer perception when trademarks were used in ad text and as keywords.[130] Taking judicial notice of this survey data would allow the parties to use the survey results as a point of comparison, especially in a related industry where the consumer base may use search engines and

125. *See* St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1172 (10th Cir. 1979) (noting that "[j]udicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it").

126. RICHARD L. KIRKPATRICK, LIKELIHOOD CONFUSION TRADEMARK LAW § 7:10 (2012).

127. *Id.*

128. *Id.* (citing Pfizer, Inc. v. Astra Pharm. Prods., Inc., 858 F. Supp. 1305 (S.D.N.Y. 1994)).

129. *See* Berger Declaration, *supra* note 94.

130. *See id.*

perceive them similarly. Statistics such as 91.2% of survey subjects believing that an ad containing the words "Elliot and True" was promoting a product associated with Elliott and True is compelling and could be considered, along with facts specific to the hypothetical case, as evidence of likelihood of confusion when ad text is used in addition to keyword-targeting.[131] Furthermore, the significant decline in initial interest confusion when the trademark is not used in the ad text but only as a keyword, down to 48.6% of surveyed consumers, suggests that consumers in a similar industry may likewise be more impacted by the ad text than the use of the keyword alone.[132] Although these statistics are specific to the case involving Elliot and True, the general trend that ads not containing the trademark are less likely to be seen as affiliated with the trademark could be applied to other keyword advertising cases. Such findings can assist accused infringers in showing that use of trademark keywords, alone, is not necessarily sufficient to create a likelihood of initial interest confusion.

B. JUDICIAL NOTICE OF MARKET RESEARCH

Unlike case-specific survey results, general trends may more likely be disputed because of their broad reach and the potential assumptions built into them. Therefore, the scope of what is granted judicial notice may be more limited, but nonetheless, should still be considered. Given the breadth of market research that is available, taking judicial notice of consumer research that expert witnesses have deemed valid in related cases would assist in the analysis of initial interest confusion in later cases concerning similar products and consumers. Using this already-available information, as with case-specific surveys, would make the judicial process more efficient.

According to 39 C.F.R. § 3001.31(k)(2)(i), market research may be considered as long as information validating the research results is provided.[133] Rather than having to conduct new surveys and requiring new

131. *Id.*

132. *Id.*

133. 39 C.F.R. § 3001.31(k)(2)(i) (requiring "(1) A clear and detailed description of the sample, observational, and data preparation designs, including definitions of the target population, sampling frame, units of analysis, and survey variables; (2) An explanation of methodology for the production and analysis of the major survey estimates and associated sampling errors; (3) A presentation of response, coverage and editing rates, and any other potential sources of error associated with the survey's quality assurance procedures; (4) A discussion of data comparability over time and with other data sources; (5) An assessment of the effects of editing and imputation; (6) Identification of applicable statistical models, when model-based procedures are employed; and (7) An explanation of all statistical tests performed and an appropriate set of summary statistics summarizing the results of each test").

experts to go through the whole vetting process again, parties can look to existing empirical studies that have already been considered valid by other courts.[134] If the evidence had previously been vetted and used in a similar proceeding, judicial notice should be taken of the market research. This information would be useful where comprehensive studies may otherwise not be feasible at the preliminary injunction stage.

Based on existing empirical studies, accused infringers may gain a new litigation advantage if courts take notice of the recent research that indicates an increasingly more sophisticated consumer base. Market research showing that consumer engagement depends on ad position, that their perceptions of the ad are shaped by the ad content, and that their perceptions of the credibility differ between organic results and ads, could be used as evidence to support the defendant's claim that targeting a keyword does not lead to initial interest confusion. Rather, other factors like the text of the ad and the content of the website linked to the ad are more relevant in determining if such confusion exists. Given the increased consumer sophistication, the initial interest confusion doctrine should be clarified so as to require actual confusion from reading the text of the ad or from visiting the website, rather than mere diversion from the presence of the ad next to search results. Allowing use of prior survey results and market research would allow courts to better assess when actionable confusion exists.

V. CONCLUSION

Although mere diversion has been considered infringing in cases where the trademark was explicitly used in a competitor's ad or website, diversion based on keyword-targeting, alone, seems insufficient to support a claim of initial interest confusion. By taking consumer research into account at the preliminary injunction stage, courts would likely find that targeting a keyword does not create confusion without explicit references to the trademark in the ad text or website, or without at least some parallels between the websites of the competitor and the trademark owner. Confusion is more likely influenced by other factors, such as a consumer's level of interest in the good and their consequent degree of care. A consumer is also likely affected by the content of the ads and whether or not there is any ambiguity in language to suggest a relationship with the trademark.

When courts take notice of third-party surveys and market research, which show that various factors impact consumer confusion, trademark owners may have a more difficult time proving that the use of the keyword,

134. *See* Rutz, *supra* note 110.

without more, causes actionable confusion. While such consumer studies may reduce the likelihood of trademark owner's succeeding on the initial interest confusion claim, only a narrow range of third-party research would be considered relevant in each case, such that the litigation advantage to the accused infringer is not unreasonable.

To the contrary, allowing accused infringers to use such data to support their claims evens the playing field against trademark owners, who may, in some instances, have more financial resources to conduct case-specific surveys in their favor. By taking notice of such evidence, courts can better assess the likelihood of confusion where expert surveys leave holes, given the time-constraints at the preliminary injunction stage in the proceedings. Furthermore, the use of third-party surveys and research would provide a more consistent empirical basis for determining initial interest confusion across different cases and across different circuits, offsetting potentially biased expert testimony and thereby creating a more uniform understanding of how initial interest confusion applies to keyword advertising.