

LAMPARELLO V. FALWELL & BOSLEY MEDICAL V. KREMER: UNDERCUTTING THE APPLICABILITY OF INITIAL INTEREST CONFUSION TO TRADEMARK-IN-DOMAIN-NAME GRIPE SITES

By Yas Raouf

The availability of web space and the ease with which casual websites can be maintained have transformed the internet into a forum for personal expression where blogs¹ track writers' lives and gripe sites² host rants by dissatisfied customers. The proliferation of same-name gripe sites³ in particular has spawned litigation at the cross section of free speech and trademark rights. While courts have already resolved the fate of gripe sites charged with cybersquatting⁴ by carving out a safe harbor⁵ under the Anti-cybersquatting Consumer Protection Act (ACPA),⁶ the way in which infringement analysis treats such sites is only recently beginning to solidify.

© 2006 Yas Raouf

1. "A blog is a website for which an individual or a group frequently generates text, photographs, video or audio files, and/or links, typically (but not always) on a daily basis. The term is a shortened form of weblog. Authoring a blog, maintaining a blog or adding an article to an existing blog is called 'blogging.' Individual articles on a blog are called 'blog posts,' 'posts,' or 'entries.' The person who posts these entries is called a 'blogger.'" Blog, WIKIPEDIA: THE FREE ENCYCLOPEDIA, <http://en.wikipedia.org/wiki/Blog> (last visited Jan. 26, 2006).

2. A gripe site is a "website at the domain criticizing the mark owner and airing his dissatisfaction with the mark owner's business practices. In contrast to the squatter, the cybergriper's aim is to disparage the mark owner's business, rather than to profit from the domain name or website." Ryan J. Gilfoil, Note, *A Judicial Safe Harbor Under the Anti-Cybersquatting Consumer Protection Act*, 20 BERKELEY TECH. L.J. 185, 185 (2005).

3. *Id.* at 193 ("Same-name griping consists of setting up a complaint site at a domain name identical or confusingly similar to the mark, such as <mayflower-vanline.com> where the service mark is MAYFLOWER and the mark owner is a moving company."). These marks are to be distinguished from pejorative-suffix gripe sites with domain names like <microsoftsucks.com>.

4. "Cybersquatting" is the registering of a trademark as a domain name and offering for sale at extortionate prices to the mark owner. Cybersquatting: What It Is and What Can Be Done About It, <http://www.nolo.com/article.cfm/objectID/60EC3491-B4B5-4A98-BB6E6632A2FA0CB2/111/228/195/ART/> (last visited Jan. 26, 2006).

5. See generally Gilfoil, *supra* note 2.

6. Developed in response to questionable use of the Federal Trademark Dilution Act (FTDA) to pursue cybersquatting, the Anticybersquatting Consumer Protection Act imposes liability on a person only if he, "with a bad faith intent to profit from" a distinctive or famous mark, "registers, traffics in, or uses a domain-name" that is "identical or

In 2005, the Fourth and Ninth Circuits issued decisions in *Lamparello v. Falwell*⁷ and *Bosley Medical Institute, Inc. v. Kremer*⁸ clarifying the contours of commercial use and likelihood of confusion in cases where domain names employ trademarks in an allegedly infringing way. Both cases center on cybergrippers who launched same-name gripe sites about well-known commercial entities.⁹ Although not done explicitly, the courts advanced decisions that, in concert with one another, ultimately undercut both the applicability of initial interest confusion doctrine and courts' past willingness to view domain names as commercial uses under the Lanham Act. This disavowal of the outdated doctrine is appropriate in light of increased internet-user savvy and the negligible cost of internet navigation, and indicates an important shift in judicial analysis of trademark-in-domain-name cases.

Part I provides a brief primer on trademark infringement, and tracks the evolution of initial interest confusion and the accompanying willingness of courts to find that trademarks in domain names constitute a commercial use of that trademark. Part II of this Note reviews the decisions in *Falwell* and *Bosley* while Part III examines the impact of these cases on the applicability of initial interest confusion in future trademark cases and concludes that this shift in analysis is appropriate.

I. LEGAL PRIMER ON TRADEMARK INFRINGEMENT AND INITIAL INTEREST CONFUSION

While trademark law provides remedies for three types of illicit mark use—infringement under the Lanham Act,¹⁰ dilution under the Federal Trademark Dilution Act (FTDA),¹¹ and cybersquatting under the ACPA¹²—this Note deals almost exclusively with infringement. This Part outlines the statutory basis for infringement, the history of initial interest

confusingly similar to" the mark. Pub. L. No. 106-113, § 3002 (1999) (codified at 15 U.S.C. § 1125(d)(1)(B)(i)-(ix) (2005)).

7. 420 F.3d 309 (4th Cir. 2005).

8. 403 F.3d 672 (9th Cir. 2005).

9. "Reverend Falwell is a 'nationally known minister who has been active as a commentator on politics and public affairs Jerry Falwell Ministries can be found online at 'www.falwell.com,' a website which receives 9,000 hits (or visits) per day." *Falwell*, 420 F.3d at 311. "Bosley Medical provides surgical hair transplantation, restoration, and replacement services to the public." *Bosley*, 403 F.3d at 674.

10. Pub. L. No. 79-489, § 43(a) (1946) (codified at 15 U.S.C. § 1125(a) (2000)).

11. Pub. L. No. 104-98, § 3 (1996) (codified at 15 U.S.C. § 1125(c) (2000)).

12. Pub. L. No. 106-113, § 3002 (1999) (codified at 15 U.S.C. § 1125(d) (2000)).

confusion, and the application of the commerciality requirement for infringement in trademark-in-domain-name cases.

A. Defining Trademark and Infringement Under the Lanham Act

The Lanham Act defines a “trademark” as

any word, name, symbol, or device, or any combination thereof . . . used by a person, or . . . which a person has a bona fide intention to use in commerce . . . to identify 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.¹³

The Lanham Act prohibits infringement of such marks, defined as any unauthorized use of a mark

on or in connection with any goods or services . . . likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of [the mark user] with another person, or as to the origin, sponsorship, or approval of [the mark user’s] goods, services, or commercial activities by another person.¹⁴

The purpose of restricting the use of trademarks is twofold:¹⁵ by protecting product identification, trademark law provides consumers with information useful in making purchase decisions, and encourages producers to provide quality products and services in order to grow customer goodwill.¹⁶

Drawing from the Lanham Act, there are two basic requirements for a finding of infringement: (1) the trademark is used commercially or in connection with the sale of goods or services and (2) there exists a likelihood of confusion.¹⁷ Whether a potentially infringing mark creates a likelihood of confusion in consumers as to the source of the product is determined by application of a multifactor test. While exact factors vary between federal

13. 15 U.S.C. § 1127 (2000).

14. 15 U.S.C. § 1125(a)(1)(A).

15. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995).

16. “Goodwill” can mean “a consumer’s aggregated positive feelings towards the trademark owner’s products that may facilitate subsequent transactions with the trademark owner.” Eric Goldman, *Deregulating Relevancy In Internet Law*, 54 *EMORY L.J.* 507, 558 (2005).

17. This Note discusses the commerciality requirement in further detail in Section I.C.

circuits, the following set of factors from the *Restatement (Third) of Unfair Competition* is roughly standard:

- (a) the degree of similarity between the respective designations . . . ;
- (b) the degree of similarity in the marketing methods and channels of distribution used for the respective goods or services;
- (c) the characteristics of the prospective purchasers of the goods or services and the degree of care they are likely to exercise in making purchasing decisions;
- (d) the degree of distinctiveness of the other's designation;
- (e) when the goods, services, or business of the actor differ in kind from those of the other, the likelihood that the actor's prospective purchasers would expect a person in the position of the other to expand its marketing or sponsorship into the product, service, or business market of the actor;
- (f) when the actor and the other sell their goods or services or carry on their businesses in different geographic markets, the extent to which the other's designation is identified with the other in the geographic market of the actor.¹⁸

B. The History of Initial Interest Confusion

Though the Lanham Act conditions infringement on likelihood of confusion, a triad of cases gives rise to the doctrine of initial interest confusion,¹⁹ a distinct rule which allows a finding of infringement without application of the multifactor tests.²⁰ The following Section tracks the history of initial interest confusion and illustrates the courts' willingness to find that using a trademark in a domain name is a commercial use.

1. *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf v. Steinway & Sons*

In the first case to introduce initial interest confusion, Steinway & Sons threatened to sue the German company Steinweg for infringement

18. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21 (1995). According to the Restatement, while all eight factors are to be considered in determining likelihood of confusion, "no mechanistic formula or list can set forth in advance the variety of elements that comprise the market context from which likelihood of confusion must be determined." *Id.* This test is similar to the seminal tests used by the Second Circuit in *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) and the Ninth Circuit in *AMF Inc. v. Sleekcraft*, 599 F.2d 341, 348-49 (9th Cir. 1979).

19. Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 114-21 (2005).

20. See *supra* note 18 and accompanying text.

when Steinweg began selling pianos under the “Grotrian-Steinweg” mark in the United States.²¹ The court ultimately decided that, even though any confusion as to the source of the piano would dissipate before the point of sale, the “Grotrian-Steinweg” mark would attract potential customers who, through a subliminal positive association with the mark “Steinway,”²² would give Grotrian-Steinweg credibility for its seeming affiliation with Steinway.²³ The court deemed this projection or transference²⁴ of credibility harmful, termed it “initial confusion,” and held Grotrian liable for trademark infringement.²⁵

2. *Mobile Oil Corp. v. Pegasus Petroleum Corp.*

The Second Circuit reified initial interest confusion as a problem of credibility transference when it found Pegasus Petroleum liable for trademark infringement under circumstances similar to those in *Grotrian*.²⁶ Upon founding of the company Pegasus Petroleum, Greg Callimanopulos sent letters to between 400 and 500 oil traders announcing it as part of the “Callimanopulos groups of companies.”²⁷ Pegasus Petroleum adopted as its symbol a pair of interlocking “P”s, distinct from Mobil Oil’s flying horse trademark.²⁸ The court held that the use of the name “Pegasus Petroleum” infringed Mobile Oil’s flying horse trademark because “Pegasus Petroleum would gain crucial credibility during the initial phases of a deal. For example, an oil trader might listen to a cold phone call from Pegasus

21. *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf v. Steinway & Sons*, 523 F.2d 1331, 1333-35 (2d Cir. 1975).

22. In fact, Grotrian-Steinweg was connected to Steinway & Sons. Heinrich E. Steinweg began selling pianos in Germany under the name “Steinweg.” *Id.* at 1333. When he immigrated to the United States in 1850, he changed his name to Steinway and began selling pianos under the mark “Steinway & Sons.” *Id.* Heinrich’s oldest son remained in Germany for some time operating Steinweg until he sold the business in order to join his father and Steinway & Sons in the United States. *Id.* at 1334. As part of the sale of Steinweg, Heinrich’s son granted his successors the right to use the name “Steinweg.” Steinweg ultimately changed its name to “Grotrian, Helfferich, Schulz, Th. Steinweg Nachf.” *Id.*

23. *Id.* at 1342.

24. Goldman, *supra* note 16, at 559-60 (“[P]otential piano purchasers might transfer their good sentiments towards Steinway pianos to the benefit of Steinway’s competitor. Thus, if piano purchasers considered Steinway a credible choice based on their past interactions with the brand, Grotrian-Steinweg might also be considered a credible choice if the purchasers viewed the two competitors as related.”).

25. *Id.*

26. *Mobile Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 260 (2d Cir. 1987).

27. *Id.* at 256.

28. *Id.*

Petroleum . . . when otherwise he might not, because of the possibility that Pegasus Petroleum is related to Mobil.”²⁹

3. *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*

Departing from the Second Circuit’s focus on perceived sponsorship of goods for initial interest confusion, the Ninth Circuit in *Brookfield* redefined initial interest confusion as solving a problem of diversion. The plaintiff in *Brookfield* created MovieBuff, a software suite including searchable databases of movie credits, box office receipts, film development and release schedules, entertainment news, and contact lists of industry professionals.³⁰ Plaintiff sold the product and provided a searchable online database for its subscribers at the sites, <moviebuffonline.com> and <brookfieldcomm.com>.³¹ Defendant West Coast Entertainment Corporation—one of the nation’s largest video rental chains—also offered a searchable database at <westcoastvideo.com>, although its database aimed to help customers find movies to rent.³² Because West Coast used the term “moviebuff”³³ in the keyword and description metatags³⁴ for its site, some search engines returned the <westcoastvideo.com> link as a result for a search query on the term “moviebuff.”³⁵ Although the court conceded that consumers were never likely to be *confused*, it held West Coast had infringed Brookfield’s “Moviebuff” mark because consumers might be diverted to West Coast’s site and be satisfied with West Coast’s free database; Brookfield would thus lose potential customers and so suffer a financial detriment.³⁶ In other words, where *Grotrian* and *Mobil Oil* defined initial interest confusion as requiring actual consumer confusion—albeit confusion that dissipated before the point-of-sale—*Brookfield* cut likelihood of confusion entirely out of its infringement analysis.³⁷ According to *Brookfield*, then, any use of a mark that simply distracts or diverts a poten-

29. *Id.* at 259.

30. *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1041 (9th Cir. 1999).

31. *Id.* at 1042.

32. *Id.* at 1042-43.

33. West Coast claimed it used the metatag “moviebuff” because its slogan was, “The Movie Buff’s Movie Store.” *Id.* at 1042.

34. “Meta tags are HTML elements used to provide structured metadata about a webpage. Such elements are placed as tags in the head section of an HTML document.” Meta tags, WIKIPEDIA: THE FREE ENCYCLOPEDIA, <http://en.wikipedia.org/wiki/Metatags> (last visited Feb. 17, 2006).

35. *Brookfield*, 174 F.3d at 1064.

36. *Id.* at 1062-64.

37. *See id.*

tial customer by presenting a similar but clearly distinct choice of product or producer should, in total disregard of the cornerstone of infringement analysis, be pronounced an infringement.³⁸

The evolution of initial interest confusion can be summarized as defining initial interest confusion first as confusion that occurs prior to the point of sale, and then initial interest regardless of any likely confusion.³⁹ While one may argue that initial interest confusion, especially in its latter incarnation, increases the likelihood of infringement findings,⁴⁰ the doctrine still requires the commercial requirement of any infringement or dilution claim to be met. Unfortunately for cybergrippers, courts have been quick to see this commercial threshold cleared in trademark-in-domain-name cases.

C. Trademarks in Domain Names as a Commercial Use

To the extent that mark owners bringing suits against cybergrippers usually claim confusion under both infringement and dilution⁴¹ theories,

38. "Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using 'moviebuff.com' or 'MovieBuff' to divert people looking for 'MovieBuff' to its website, West Coast improperly benefits from the goodwill that Brookfield developed in its mark. Recently in *Dr. Seuss*, we explicitly recognized that the use of another's trademark in a manner calculated 'to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion, may be still an infringement.'" *Id.* at 1062.

39. Rothman argues that while allowing trademark infringement actions on the basis of confusion occurring prior to the time of sale is sometimes justifiable under the Lanham Act and the principles behind trademark law; however, allowing a finding of trademark infringement when there is no likely confusion has no basis in the law or policies that support trademark protection. . . . Allowing trademark infringement or unfair competition actions in such circumstances violates the plain language of the Lanham Act, contravenes the goals and logic behind protecting trademarks, harms free and fair competition, limits public information and consumer choices, and violates the First Amendment.

Rothman, *supra* note 19, at 121-22.

40. Rothman explains that because (1) initial interest confusion has been used as a test separate and apart from traditional likelihood of confusion analysis, and (2) discount the sophistication of purchasers, and (3) count initial interest confusion as evidence of actual confusion, courts are more likely to find infringement under the doctrine. Rothman, *supra* note 19, at 141-45.

41. Though aspects of dilution other than its commercial requirement are not central to the thesis of this Note, a brief and general description follows: Under the FTDA, courts can enjoin any commercial use of a mark in commerce that dilutes the distinctiveness of another, famous trademark. 15 U.S.C. § 1125(c) (2000). In determining a mark's fame, courts may consider any number of factors, including but not limited to duration and ex-

courts have sometimes treated two distinct commercial references in the Lanham Act as interchangeable and have thus found unauthorized mark use by cybergrippers to be commercial—and therefore infringing—even when any commercial presence on the site in question is trivial.⁴² The first reference is “use in commerce”—a jurisdictional element under § 1114(1)(a) and § 1125(a) of the Lanham Act that simply creates a federal cause of action for trademark violations.⁴³ The second reference is the “noncommercial use” exception to the FTDA under § 1125(c)(4)(B), which is meant to further the function of the First Amendment commercial expression doctrine and protect “parody, satire, editorial, and other forms of expression that are not part of a commercial transaction.”⁴⁴ Though the Supreme Court has defined “commercial expression” as that “which does no more than propose a commercial transaction,”⁴⁵ there is no bright line between commercial and noncommercial expression.⁴⁶ First Amendment doctrine protects those commercial expressions that contain a communicative message even if the primary expression is meant to make a profit.⁴⁷ In applying the noncommercial use exception under § 1124(c)(4)(B), it is difficult to determine whether the First Amendment protects unauthorized mark use in expression that can neither be characterized as strictly commercial nor strictly communicative.⁴⁸

Courts have rolled what should be two distinct commercial analyses—whether a use is commercial with respect to federal trademark jurisdiction and whether said use is an immune noncommercial exception to the FTDA—into one and equated jurisdictional commerciality with commerciality under § 1125(c)(4)(b) without considering whether the use contains a communicative message. As a result of this conflation, courts have come

tent of use of the mark; degree of inherent or acquired distinctiveness of the mark; degree of recognition of mark; and the use of the mark by third parties. *Id.* § 1125(c)(4)(A)-(H). Claimants under the FTDA need not prove likelihood of confusion or competition or relation between the goods or services of the plaintiff and defendant, but must show either blurring or tarnishment. The Act explicitly lists three categories of use as nonactionable: fair use of a famous mark by someone other than the owner in comparative advertising or in identifying competing goods or services; noncommercial use; and all forms of news and reporting. *Id.* § 1125(c)(4)(A).

42. Blossom Lefcourt, *The Prosecution of Cybergrippers Under the Lanham Act*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 269, 274 (2004).

43. *Id.* at 293-94.

44. *Id.* at 294 (citing 141 CONG. REC. S19310 (daily ed. Dec. 29, 1995) (statement of Sen. Orrin Hatch)).

45. *Id.* (citing *Bolger v. Youngs Drug Prod. Co.*, 463 U.S. 60, 67 (1983)).

46. *Id.*

47. *Id.*

48. *Id.*

to hold unauthorized mark use by cybergrippers to be commercial, and therefore infringing, even when any commercial presence on the site in question is trivial.⁴⁹

1. *PETA, Inc. v. Doughney*

While a string of cases illustrates this judicial tendency,⁵⁰ *PETA, Inc. v. Doughney*⁵¹ is emblematic of the way courts have analyzed trademark-in-domain-name cases with respect to both the commercial requirements of federal trademark law and initial interest confusion and so warrants the focus of this Note, especially as it was decided by the same court that decided *Falwell*.

The issue at bar in *PETA* was defendant Doughney's registration of the domain name <peta.org>.⁵² Intended to parody the organization People for the Ethical Treatment of Animals, Doughney's site signaled that its content was not affiliated with or sponsored by PETA.⁵³ Seeking only enjoinder of use of the domain name, PETA sued Doughney for infringement, unfair competition, dilution, and cybersquatting.⁵⁴ Though Doughney responded by claiming his website was a constitutionally protected parody of PETA, the district court granted PETA's motion for summary judgment.⁵⁵

The Fourth Circuit affirmed the district court's finding, citing Doughney's concession that his use was "in commerce"⁵⁶ under § 1125(a) and,

49. A plaintiff must establish five elements in order to prove infringement under § 1114 and § 1125(a):

(1) that Plaintiff possess the mark; (2) that Defendant uses the Plaintiff's mark; (3) that such use occurs in commerce; (4) in connection with the sale or offering for sale, distribution, or advertising of goods or services; and (5) in a way that is likely to cause confusion among consumers.

PETA, Inc. v. Doughney, 113 F. Supp. 2d 915, 919 (E.D. Va. 2002).

50. See, e.g., *Jews For Jesus v. Brodsky*, 993 F. Supp. 282 (D.N.J. 1998); *Planned Parenthood Fed'n of Am. v. Bucci*, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997).

51. 263 F.3d 359 (4th Cir. 2001).

52. *Id.* at 362.

53. Doughney's site included: the title "People Eating Tasty Animals"; a statement that the site was a "resource for those who enjoy eating meat, wearing fur and leather, hunting, and the fruits of scientific research"; links to meat, fur, leather, hunting, and animal research organizations holding views directly opposing PETA's; and a second statement reading, "Feeling lost? Offended? Perhaps you should, like, exit immediately" where the phrase "exit immediately" was hyperlinked to PETA's official website. *Id.* at 363.

54. *Id.* at 363.

55. *Id.* at 363-64.

56. *Id.* at 365.

relying on *Planned Parenthood*,⁵⁷ classified his use as “in connection” with the sale of goods as required for service or trademark infringement and unfair competition under § 1114.⁵⁸ According to the court, Doughney needed not actually sell or advertise any good or service directly on his site for his use to constitute a use “in connection with the sale of goods”—he needed only to have “prevented other users from obtaining or using PETA’s goods or services” or “connected [his] website to other’s [sic] goods or services.”⁵⁹ That is, Doughney’s site wreaked sufficient harm on PETA because prospective users of PETA’s site who mistakenly access Doughney’s may not continue to search for PETA’s page out of anger, frustration, misdirection to other commercial websites through Doughney’s links, or the belief that PETA’s page does not exist.⁶⁰

With the threshold requirement of commerciality satisfied, the court moved into an analysis of the likelihood of confusion Doughney’s use created. With respect to Doughney’s parody claim, the court defined parody as a work conveying two simultaneous-but-contradictory messages: that it

57. *Id.* at 365-66.

[In *Planned Parenthood*,] the court ruled that the defendant used the plaintiff’s mark “in connection with” the distribution of services “because it is likely to prevent some Internet users from reaching plaintiff’s own Internet web site. Prospective users of plaintiff’s services who mistakenly access defendant’s web site may fail to continue to search for plaintiff’s own home page, due to anger, frustration, or the belief that plaintiff’s home page does not exist.” The same reasoning applies [in *PETA*] because Doughney’s use of PETA’s mark is “likely to prevent Internet users from reaching [PETA’s] own Internet web site. The prospective users of [PETA’s] services who mistakenly access Defendant’s web site may fail to continue to search for [PETA’s] own home page, due to anger, frustration, or the belief that [PETA’s] home page does not exist.”

Id. (citing *Planned Parenthood Fed’n of Am. v. Bucci*, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997)).

58. To make out a case for service or trade mark infringement and/or unfair competition, a Plaintiff must prove the following elements: (1) that Plaintiff possesses a Mark; (2) that Defendant uses the Plaintiff’s Mark; (3) that such use occurs in commerce; (4) in connection with the sale or offering for sale, distribution, or advertising of goods or services; and (5) in a way that is likely to cause confusion among consumers. *Id.* at 364 (citing 15 U.S.C. §§ 1114, 1125(a)).

59. *Id.* at 365 (citing *Planned Parenthood*, 42 U.S.P.Q.2d at 1435 which found the plaintiff liable for creating <www.plannedparenthood.com> as a parody website containing information antithetical to plaintiff’s views because “prospective users of plaintiff’s services who mistakenly access defendant’s web site may fail to continue to search for plaintiff’s own home page, due to anger, frustration, or the belief that plaintiff’s home page does not exist”).

60. *Id.* at 366.

is the original, and that it is not.⁶¹ Though the court subscribed to the rule that likelihood of confusion must be determined by considering the potentially infringing use in its entirety, the court disregarded the content of Doughney's site, explaining that the domain name conveyed one message—that the site was affiliated with or sponsored by PETA.⁶² The court then added that because the content of the site conveyed a second message—that the site was not affiliated with or sponsored by PETA—and because that second message was conveyed only when a viewer read the site's content, seeing or typing the domain name and accessing the web site constitute “two separate and nonsimultaneous activities.”⁶³ As such, there was no parody by confusion—only confusion as to the sponsorship of the site.⁶⁴

II. CASE SUMMARIES: *LAMPARELLO V. FALWELL* AND *BOSLEY V. KREMER*

Although courts to date have been willing to find the use of trademarks in domain names commercial under the Lanham Act and have applied initial interest analysis, albeit sometimes informally, to render that use infringement, *Falwell* and *Bosley* combine to undermine both the commercial and confusion prongs of that approach. The following Sections summarize the facts and disposition of both cases.

A. *Lamparello v. Falwell*

1. *Facts and Procedural History*

Lamparello registered the website <fallwell.com> after Reverend Jerry Falwell made comments about homosexuals during an interview which Lamparello found offensive.⁶⁵ The site, which contains in-depth criticisms of Falwell's views on homosexuality, explicitly warns viewers that the site is not affiliated with Jerry Falwell's ministry.⁶⁶ Though Falwell contended neither that Lamparello sold goods or services on his website⁶⁷ nor that

61. *Id.*

62. *Anheuser-Busch, Inc. v. L&L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992) (citing 2 J. MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* § 23:28 (2d ed. 1984)).

63. *PETA*, 263 F.3d at 367 (citing *Planned Parenthood*, 42 U.S.P.Q.2d at 1435).

64. *Id.* at 366-67.

65. *Lamparello v. Falwell*, 420 F.3d 309, 311 (4th Cir. 2005).

66. The disclaimer reads “If you would like to visit Rev. Falwell's website, you may click here”; where “here” is hyperlinked to Reverend Falwell's official website. *Id.*

67. The parties agree that Lamparello did not sell goods or services on his gripe site <www.fallwell.com>, though at one point the site included a link to the <Amazon.com> webpage for a book offering Bible interpretations Lamparello endorsed. *Id.*

Lamparello's site reduced the number of visits to his official site at <falwell.com>, Falwell sent Lamparello letters asking him to cease and desist using "fallwell" or any other variation on the Reverend's name as a domain name.⁶⁸ Lamparello sought declaratory judgment of noninfringement, while the Reverend filed counter claims of trademark infringement, false designation of origin, unfair competition, and cybersquatting.⁶⁹ The parties filed cross-motions for summary judgment.⁷⁰ The district court enjoined Lamparello from using Falwell's mark, required Lamparello to transfer the domain name to Falwell, and denied Falwell's request for statutory damages or attorney fees.⁷¹ Both Lamparello and Falwell appealed.⁷²

2. *The Fourth Circuit's Opinion*

The Fourth Circuit held that Lamparello's use of the mark caused no likelihood of confusion.⁷³ The court declined to resolve the question of what constitutes commercial speech and avoided determining whether the infringement and false designation of origin sections of the Lanham Act apply exclusively to commercial speech since Falwell's claims of trademark infringement failed regardless of these inquiries.⁷⁴

The Fourth Circuit applied a multifactor likelihood of confusion test comprised of the following seven factors, which need not all be considered or equally weighed: the strength or distinctiveness of the mark; the similarity of the marks; the similarity of the goods or services identified by the

68. *Id.*

69. As with *Bosley*, at issue in this case is Reverend Falwell's cybersquatting claim under the ACPA. While the court's disposition on this matter is not entirely necessary to the thrust of this Note, it is noteworthy. Cybersquatting requires proof that the defendant (1) had a bad-faith intent to profit from using the domain name, and (2) the domain name is identical or confusingly similar to or dilutive of the distinctive and famous mark. 15 U.S.C. § 1125(d)(1)(A) (2000). Although the ACPA was enacted to prevent cybersquatters from registering domain names in order to sell them to legitimate owners of the mark, to prevent auctioning of domain names, defrauding customers, or diverting customers from the mark-owner's site to the cybersquatter's own site, the ACPA counsels that comment and criticism constitute a "bona fide noncommercial or fair use." 15 U.S.C. § 1125(d)(1)(B)(i)(IV). Falwell could not demonstrate that Lamparello had a bad-faith intent to profit from use of the <www.fallwell.com> domain name, as Lamparello clearly used the site only to criticize the Reverend's views. As such, Lamparello was entitled to summary judgment, and the judgment of the district court was reversed. *Falwell*, 420 F.3d at 321-22.

70. *Id.* at 312.

71. *Id.*

72. *Id.*

73. *Id.* at 314.

74. *Id.* at 312-13; see also 15 U.S.C. §§ 1114(1), 1125(a)(1)(A).

marks; the similarity of the facilities the two parties used in their businesses; the similarity of the advertising used by the parties; the defendant's intent; and actual confusion.⁷⁵

Applying this test, the Fourth Circuit held that there was no likelihood of confusion because no one would believe that Falwell had sponsored a site criticizing himself. Though Lamparello used a domain name similar to Falwell's distinctive mark, the Fourth Circuit noted that the parties' sites looked nothing alike.⁷⁶ Lamparello did not sell goods or services on his site, and so, did not attempt to divert the Reverend's customers.⁷⁷ Lamparello's site simply offered views opposing Jerry Falwell's.

The court also explained that Falwell was necessarily unsuccessful under initial interest confusion, which forbids a competitor from luring potential customers away from a producer by "initially passing off its goods as those of the producer's, even if confusion as to the source of the goods is dispelled by the time any sales are consummated."⁷⁸ The Fourth Circuit specified that it has never adopted initial interest confusion and that it evaluates likelihood of confusion by studying the use of the mark in the context in which it is seen by the ordinary customer—not by comparing similar marks outside of their contexts, or, in this case, looking at domain names apart from their underlying content.⁷⁹ Even if the court were to adopt the initial interest confusion doctrine, Lamparello would be found free of liability because his use of Falwell's mark was not for business or financial gain; gripe sites do not equal an effort by an unauthorized mark-user to "capture the markholder's customers and profits."⁸⁰ Because the district court failed to consider the allegedly infringing domain name and the underlying content of Lamparello's website, the Fourth Circuit reversed the district court holding and granted summary judgment in favor of Lamparello.

B. *Bosley Medical Institute, Inc. v. Michael Kremer*

1. Facts and Procedural History

Dissatisfied with the hair replacement procedure performed by a Bosley Medical ("Bosley") physician, defendant Michael Kremer launched two gripe sites: <BosleyMedical.com> and <BosleyMedicalVio-

75. *Falwell*, 420 F.3d at 314-15.

76. *Id.* at 315.

77. *Id.*

78. *Id.* at 316.

79. *Id.*

80. *Id.* at 317.

lation.com>.⁸¹ Five days after registering the domain names, Kremer delivered to the founder and president of Bosley a letter outlining the content of the sites, which included negative testimonials from clients, and offered Bosley an opportunity to talk with Kremer before the sites went live.⁸²

Kremer began using <BosleyMedical.com> in 2001.⁸³ He earned no revenue from the website and sold no goods or services on the site.⁸⁴ The site contained no direct links to Bosley's competitors' sites. However, the site included a link to the website of Public Citizen, the organization that represented Kremer in this case, and <BosleyMedicalViolations.com>, a sister gripe site which linked to the newsgroup <alt.baldspot> displaying ads for Bosley's competitors.⁸⁵

Bosley, as owner of the registered trademark "Bosley Medical," brought suit alleging trademark infringement, dilution, and unfair competition, but did not argue initial interest confusion.⁸⁶ The district court ruled that Kremer's use of "Bosley Medical" in his site's domain name was noncommercial and unlikely to cause confusion.⁸⁷ Therefore, the court granted Kremer summary judgment on the issues of infringement and dilution.⁸⁸ Bosley appealed.

81. *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 672 (9th Cir. 2005). Defendant's use of the site <BosleyMedicalViolation.com> was not challenged in this action. *Id.* at 675.

82. *Id.* at 672.

83. *Id.* at 675.

84. *Id.*

85. *Id.*

86. *Id.* at 675. Bosley has used the mark "Bosley Medical" since 1992 and registered the mark with the United States Patent and Trademark Office in January of 2001. Bosley also owns the trademarks "Bosley," "Bosley Healthy Hair," "Bosley Healthy Hair Formula," and "Bosley." *Id.* at 674 n.1.

87. *Id.*

88. Also at issue in this case were Bosley's claims under the ACPA and California's anti-SLAPP rule. While the issues under these statutes are not entirely relevant to the discussion of this Note, the fate of Bosley's claims under them is noteworthy. The district court dismissed Bosley's ACPA claim because Kremer did not use Bosley's mark in a commercial way. *Id.* at 680. The Ninth Circuit held that because the ACPA does not require commercial use, the district court should have confined its inquiry to the nine elements of the ACPA, particularly the issue of whether Kremer has a bad-faith intent to profit from his use of Bosley's mark in the domain name by making an extortionate offer for its sale. *Id.* 681. Because Bosley was prevented from conducting discovery on Kremer's possible bad faith, the Ninth Circuit reversed the lower court's granting of summary judgment for Kremer and remanded for further review. The hallmark of a SLAPP suit is that it "lacks merit, and is brought with the goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party's case will be weakened or abandoned, and of deterring future litigation." *Id.* at

2. *The Ninth Circuit's Opinion*

The Ninth Circuit framed the issue at bar as whether Kremer's use of Bosley Medical as his domain name was "in connection with a sale of goods or services"⁸⁹ as required by § 1114 of the Lanham Act for a finding of infringement.⁹⁰ According to the Ninth Circuit, none of Bosley's assertions show Kremer's use of the mark to be in connection with the sale of goods or services.⁹¹ It found Kremer's site does not contain commercial links; the site contains only a link to another site, which links to a discussion group, which in turn contains advertising.⁹² The Ninth Circuit found this "roundabout path" to advertisement too weak to qualify Kremer's site—and hence his use of Bosley's mark—as commercial.⁹³ The court also found no evidence that Kremer intended to sell the domain name itself.⁹⁴ Finally, while Kremer's use of Bosley's mark may have dissuaded consumers from purchasing Bosley's products, it could not have misled consumers into buying a competing product as "no customer will mistakenly purchase a hair replacement service from Kremer under the belief that the service is being offered by Bosley."⁹⁵ As such, the Ninth Circuit affirmed summary judgment for Kremer on the issues of infringement and dilution.⁹⁶

III. ANALYSIS

The recent decisions in both the Fourth Circuit in *Falwell* and the Ninth Circuit in *Bosley* signal that courts deem protection against potential initial interest confusion from trademarks in domain names alone inappropriate. Courts are recasting initial interest confusion as only one spoke in the likelihood of confusion wheel, if not rejecting the doctrine totally. At the very least, courts are being more selective, by way of evaluating commercial use, in which trademark-in-domain-name cases even warrant in-

682. Because domain names are not automatically entitled to nor denied First Amendment protection, and it was not apparent from the evidence that Bosley sought to squelch Kremer's free speech, the Ninth Circuit reversed the lower court's anti-SLAPP finding. *Id.*

89. *Id.* at 677.

90. 15 U.S.C. § 1114(1)(a) (2000).

91. *Bosley*, 403 F.3d at 677-79.

92. *Id.* at 675.

93. *Id.* at 678.

94. It also could not be charged, then, that his website was used "in connection with the sale of good or services" for enabling extortion. *Id.*

95. *Id.* at 680.

96. *Id.* at 682.

fringement analysis. This Part discusses the shift in infringement analysis within *Falwell* and *Bosley*, then demonstrates why this move away from initial interest confusion is appropriate.

A. *Falwell* and *PETA*: The Fourth Circuit Corrects Its Unofficial Stance On Initial Interest Confusion

The thrust of the holding in *Falwell* can hardly be termed remarkable. In refusing to hold Lamparello liable for infringement for using a trademark in the domain name of his noncommercial gripe site absent any bad faith intent to profit from its registration, the Fourth Circuit simply continues a line of cases in which courts have provided a “judicial safe harbor for pure criticism of a mark owner regardless of the domain name used.”⁹⁷ What is striking about the court’s 2005 decision in *Falwell*, however, is that it seriously undermines its own 2001 opinion in *PETA v. Doughney*, and in so doing, reverses the court’s unofficial stance on initial interest confusion.

Though the *PETA* court did not explicitly rely on initial interest confusion, its infringement holding was steeped in the doctrine. The court acknowledged “that parody engenders some initial confusion”⁹⁸ but then held Doughney’s use of the PETA trademark did not constitute a parody.⁹⁹ Because the domain name <www.peta.org> did not alone convey a parodic message, the court effectively reasoned, Doughney’s mis-executed parody would likely cause internet users to become initially interested in visiting his site under the mistaken apprehension that it was affiliated with PETA.¹⁰⁰ Thus, the court actually held Doughney liable for the credibility-transferring initial interest confusion that had been deemed infringement by the *Grotrian* and *Mobile* courts because an internet user might decide to investigate <www.peta.org> in his initial search stages because of the possibility that the site was related to the official group, People for the Ethical Treatment of Animals. The court never discussed whether Doughney’s use of the “PETA” mark might have momentarily given the site’s viewers the idea that the products or services sold on the thirty-something sites <www.peta.org> linked to met PETA’s standards. Hence, the court there did not contemplate the diversion category of initial interest present in *Brookfield*—the chance that a viewer might be diverted or distracted by PETA’s competitors’ links even though, once he read the site, no viewer

97. Gilfoil, *supra* note 2, at 186.

98. *PETA*, 263 F.3d at 366.

99. *Id.* at 367.

100. *Id.* at 366-67.

could reasonably be confused as to PETA's lack of affiliation with the site.

Factually, there is no material difference between *PETA* and *Falwell*.¹⁰¹ Although Doughney's site is branded a failed attempt at parody while Lamparello's is justified as a gripe site, both sites use another party's mark as the domain name for sites which post views antithetical to those of the entities on which they base their domain names. Yet, the same court returned different infringement verdicts, declaring Doughney's site likely to cause confusion and Lamparello's not. The inconsistent outcome of *Falwell* is derived from the court's decision to consider the domain name in the context in which it is ordinarily seen by a consumer—that is, in conjunction with the site's content.¹⁰² The court illustrates such analysis in its explanation of how Lamparello's use fails the court's seven-factor likelihood of confusion test: "After even a quick glance at the content of the website at www.falwell.com, no one would believe that Reverend Falwell sponsored a site criticizing himself."¹⁰³ In *Falwell*, then, the court moves beyond simply stating that it does not endorse initial interest confusion.¹⁰⁴ In treating an allegedly infringing domain name of a gripe site as inextricably bound with the underlying content and requiring that a court consider both during its likelihood of confusion analysis,¹⁰⁵ the Fourth Circuit renders the initial interest confusion doctrine a useless wrench in the likelihood of confusion toolbox vis-à-vis gripe sites. Any confusion the domain name inspires in the viewer will be immediately dissipated by his simultaneous view of the clearly critical and non-confusing content. In other words, there is no initial phase of viewing a website that consists only of reading the domain name in likelihood of confusion analysis; the court, apparently modeling its approach on what it perceives is the way internet users encounter sites, sees the entire website at once.¹⁰⁶ Confusion radiates from its entirety or not at all.

101. The fact that Lamparello had no material links to goods or services while Doughney did only significantly enters the court's analysis in determining whether either use is commercial, i.e., whether either case meets the threshold commercial use requirement that proceeds confusion analysis. This difference, then, does not enter the court's evaluation of likelihood of confusion.

102. *Falwell*, 420 F.3d at 316.

103. *Id.* at 315. The court goes on to say as part of its initial interest confusion analysis that "to determine whether a likelihood of confusion exists as to the source of a gripe site like that at issue in this case, a court must look not only to the allegedly infringing domain name, but also to the underlying content of the website." *Id.* at 318.

104. *Id.* at 316.

105. *Id.* at 318.

106. *See id.*

The Fourth Circuit's seemingly new rule corrects its weakest point of analysis in *PETA*. The Lanham Act contains no bright line rule exempting parody from trademark infringement, yet the court's reasoning proceeded along the following lines: since <PETA.org> is not a successful parody, its initial message does not communicate its own negation, therefore the use of the mark is confusing, and so, an infringing use. With this logic, the *PETA* court basically substituted initial interest confusion for its multifactor likelihood of confusion test, giving great weight and dispositive power to only one of seven factors—actual confusion—and accepting initial *interest* as a valid form of this actual *confusion*.¹⁰⁷ In *Falwell* the court correctly disallows initial interest confusion the power to support a finding of infringement by itself.

B. *Bosley*: A Tacit Undermining of *PETA* Reasoning

The Ninth Circuit *Bosley* decision also calls into question the likelihood of confusion and commerce aspects of the *PETA* decision. First, in finding that no customer will mistakenly purchase hair replacement services from Kremer under the confused belief that the service is offered by *Bosley*, the *Bosley* court implies that any likelihood of confusion analysis of a gripe site must consider the domain name and underlying site content together: in order to consider services offered on any website, a court must look at the content of the site and not just the domain name. If the court considers domain names in conjunction with site content, there is no room for initial confusion caused by the domain name alone. Thus, with respect to trademark-in-domain-names, *Bosley* narrows the doctrine of initial interest confusion as much as *Falwell*.

The Ninth Circuit also showed a reluctance to find the website in *Bosley* a use in commerce. The court called the two-link removal of Kremer's gripe site from the products advertised at <alt.baldspot> a "roundabout path . . . too attenuated to render Kremer's [gripe] site commercial."¹⁰⁸ This interpretation signals a shift away from cases that quickly and without much analysis assumed websites were necessarily commercial,¹⁰⁹ and provides a more nuanced and sophisticated analysis of

107. Courts have sometimes applied initial interest confusion as a test "separate and apart from the traditional likelihood of confusion analysis." Rothman, *supra* note 19, at 141. Rothman argues that courts often disregard several factors of the multifactor likelihood of confusion test, while some courts have allowed evidence of initial interest—and not confusion—to meet the actual confusion requirement of many of these multifactor tests. Rothman, *supra* note 19, at 145.

108. *Bosley*, 403 F.3d at 678.

109. See *Jews For Jesus v. Brodsky*, 993 F. Supp. 282 (D.N.J. 1998) (finding a same-name gripe site espousing a religious doctrine commercial under trademark law because

commerce on the internet. The Ninth Circuit's analysis in *Bosley* illustrates an understanding that not all websites using a trademark in their domain names are necessarily used in commerce or in connection with the sale of goods or services.

C. The Shift Away From Initial Interest Confusion is Appropriate

The Fourth and Ninth Circuits' disavowal of initial interest confusion with regards to trademark gripe sites such as those in *Falwell* and *Bosley* is appropriate on two counts. First, internet users today are savvier than searchers have been in the past or courts once thought them to be. Second, internet navigation mistakes can be corrected at a cost negligible to the searcher.

1. Increased Searching Savvy

The *PETA* court adopts a paternalistic stance in eliminating junior mark users like Doughney in an effort to protect internet users ("searchers") from content they did not purposefully seek. This protective effort, however, assumes searchers follow links haphazardly, are helplessly and gullibly stranded once they do, and that courts can divine what these searchers were actually looking for in the first place. But these assumptions are baseless.

Searchers have two primary ways of accessing a site: (1) conduct a search by entering keywords into a search engine, or (2) enter a URL directly into the navigation bar of any browser.¹¹⁰ If a searcher elects to use a search engine, he will most likely be presented site listings, each accompanied by filter content¹¹¹ meant to help him decide whether to invest time in a given result by accessing the site and reviewing its content.¹¹² In fact, searching may educate the searcher about how better to select better keywords. For example, a search engine might return a query of its own—"did you mean Jerry Falwell"—in response to a searcher's entry of the

it asserted views antithetical to those of the mark holder and because it might diverted internet users from accessing the mark holder's official site); *PETA v. Doughney*, 113 F. Supp. 2d 915, 919 (E.D. Va. 2002) (finding a same-name gripe-site commercial for diverting internet searchers from reaching the official site of the mark holder); *Planned Parenthood Fed'n of Am. v. Bucci*, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997) (finding a same-name gripe site commercial because it diverted internet searchers from the mark holder's official site).

110. Goldman, *supra* note 16, at 517.

111. Filtering content could include the page title, an excerpt from the page, summary or description of the website, or category into which the website has been placed by the search engine. Goldman, *supra* note 16, at 516-17.

112. Goldman, *supra* note 16, at 516-17.

keywords “Jerry” and “Fallwell,” thereby tipping off the searcher that she may have misspelled the Reverend’s last name. The truth, then, that emerges about searcher behavior is that searchers expect to recast their search terms and objectives. A searcher implements a nuanced assessment of a site’s relevancy in deciding if a site matches his search objective.¹¹³ Because searchers are not expert in grading the relevancy of search results,¹¹⁴ and because results never consist solely of perfectly relevant results, searchers expect to sort through sites, and search engines provide them with sufficient information to do so.¹¹⁵ Exposure to a domain name no longer can reasonably be said to lead a searcher to expect the information on the underlying site to be relevant. Because searchers are skeptical of relevancy, their expectations of site credibility are necessarily lowered and credibility-transference becomes less harmful.

The truth about most searchers, then, is that they are not haphazardly following links to domains completely stripped of content. Even where a searcher decides to invest time in accessing a site simply because its domain name suggests relevancy, he will be forced to reassess the relevancy of the site the moment he reviews the content. If a searcher determines a website does not meet his search objectives—whether he got there by way of search engine, direct URL entry, or a trick or unscrupulous practice meant to lure him there—he can change his search or remedy his mistaken apprehension at a trivial cost.

2. *The Negligible Cost of Searching and Search Revision on the Internet*

While the cognitive process behind a searcher’s moves on the internet might be complex, internet navigation in and of itself is not. A searcher can move from site to site via hyperlinks in a fraction of a second: he can back out of the site with a single click of his browser’s back button, enter a new web address into the address bar of his browser, try another site on the results list produced by the search engine, or redirect his search with improved search terms.¹¹⁶ Any of these options consumes just a moment of the searcher’s time—a cost not on par with what initial interest aimed to guard.¹¹⁷ Since searchers are conditioned to weed through pages until their

113. Goldman, *supra* note 16, at 516-17.

114. Goldman, *supra* note 16, at 516-17.

115. Goldman, *supra* note 16, at 518-19.

116. Goldman, *supra* note 16, at 520-21.

117. One major justification for initial interest confusion is to prevent the practice of baiting and switching. Rothman, *supra* note 19, at 161. “Baiting and switching involves initially passing off one’s goods as those of another One aspect of baiting and switching involves ‘luring’ an unwary consumer by creating initial confusion.”

search objectives are met, users are inclined to move quickly and skim content.¹¹⁸ The Ninth Circuit's decision in *Bosley* suggests courts are becoming aware of the casual and speedy way in which internet users navigate. In calling Kremer's site's two-link removal from an advertisement too weak to satisfy the FTDA's "commercial use in commerce" requirement, the court ultimately chipped away at diversion-style initial interest.¹¹⁹ If movement on the internet is fast and low-cost, then searchers who enter Kremer's site expecting it to be a bona fide Bosley Medical site may not be likely to end their search there out of anger, frustration, or the belief that Bosley has no official site.¹²⁰ Searchers will probably simply click the "back" button on their browsers and continue trying to meet their search objectives. The cost of this correction in the event an internet-user is initially confused is trivial and expected by users. To the extent searchers might find even the minimal cost of search correction annoying, levying the consequences of infringement to prevent their perturbation is too strong a remedy. When initial interest confusion and findings of commerciality quickly shut down trademark-in-domain-name gripe sites, both freedom of expression and consumer protection and education are heavily restrained.

IV. CONCLUSION

While the *Bosley* and *Falwell* courts lay initial interest confusion to rest with respect to gripe sites alone, the ultimate impact of their reasoning suggests the doctrine is obviated in its entirety with respect to all cases of

Rothman, *supra* note 19, at 161. A classic example of the substantial cost initial interest confusion can impose on consumers is articulated by the court in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999). Drawing from the issue at bar in *Brookfield*: "suppose West Coast's competitor (let's call it "Blockbuster") puts up a billboard on a highway reading – "West Coast Video: 2 miles ahead at Exit 7" – where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast's store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth *the trouble to continue searching for West Coast* since there is a Blockbuster right there. Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by, West Coast." *Id.* (emphasis added). Clearly, the trouble of getting back to a highway entrance and then driving until West Coast Video—the desired producer in this case—is found is much greater than clicking a back button on a browser.

118. Goldman, *supra* note 16, at 519.

119. See *Bosley*, 403 F.3d at 678.

120. See *id.*

potential infringement. Initial interest or initial confusion comprises only one factor in evaluating confusion. The idea that initial confusion dissipates and only threatens credibility transference, or never exists but in the form of distraction, does not warrant a doctrine separate from and superior to traditional infringement analysis. Such an idea simply determines how strongly the actual confusion factor in a multifactor test militates toward or against a finding of infringement. To this extent, the function of the initial interest confusion doctrine is provided for by the Lanham Act's infringement and dilution sections. Scholars and critics have weighed in on initial interest confusion as not only unnecessary, but ultimately harmful in its contravention of justifications for trademark protection, consumer interests, fair competition, and even trademark law itself.¹²¹ It appears courts are beginning, if only slightly, to mold their thinking accordingly and take a step in the right direction.

121. See generally Rothman, *supra* note 19 (discussing the problems caused by the use of initial confusion and the doctrine's conflict with basic trademark law, unfair competition principles, intellectual property laws, and the First Amendment); Goldman, *supra* note 16; Stacey L. Dogan & Mark A. Lemley, *Symposium: Trademarks And Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777 (2004) (arguing that increased internet trademark cases threatens the purpose of the Lanham Act).