

NEW TENTH CIRCUIT STANDARDS: COMPETITIVE KEYWORD ADVERTISING AND INITIAL INTEREST CONFUSION IN *1-800 CONTACTS V. LENS.COM*

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Since the advent of search engines, companies have used their competitors' trademarks to manipulate search engine results and increase exposure to consumers online.¹ This practice, called "competitive keyword advertising," originally used keyword meta tags now obsolete,² but today occurs through systems like Google AdWords.³ The AdWords system allows businesses to create advertisements and bid on specific keywords, so that when users enter these specific keywords into Google's search engine, the search returns the created advertisement along with other ads on the results page.⁴ Almost any keyword is available for bidding—including a competitor's trademarks.⁵ Thus, through this system companies can bid on their competitors' trademark, even without the competitors' permission.

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1. See, e.g., *1-800 Contacts, Inc. v. Lens.com, Inc.* (*1-800 Contacts*), 722 F.3d 1229 (10th Cir. 2013) (involving a suit over Lens.com's purchase of nine keywords similar to 1-800's trademark); *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137 (9th Cir. 2011) (involving a suit for declaratory judgment of non-infringement after a business bid on a competitor's trademarked keyword); *Brookfield Commc'ns, Inc. v. W. Coast Entm't, Inc.*, 174 F.3d 1036 (9th Cir. 1999) (involving a suit over the use of a trademarked term in website meta tags).

2. See 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25A:3 (4th ed. 2012).

3. Eric Goldman, *More Evidence that Competitive Keyword Advertising Benefits Trademark Owners*, FORBES, (July 31, 2013, 9:49 AM), <http://www.forbes.com/sites/ericgoldman/2013/07/31/more-evidence-that-competitive-keyword-advertising-benefits-trademark-owners/>.

4. See *Advertising on Google AdWords: An Overview for Advertisers*, GOOGLE SUPPORT (last visited Feb. 2, 2015), <https://support.google.com/adwords/answer/1704410?hl=en>.

5. See Eric Goldman, *How Much Does 1-800 Contacts Hate Competitive Keyword Advertising? \$1.1M Worth!?*, TECHNOLOGY & MARKETING LAW BLOG (May 19, 2010) (describing a \$1.1 million cap 1-800 placed on its litigation expenses), http://blog.ericgoldman.org/archives/2010/05/how_much_does_1.htm; see also Greg

Because competitive keyword advertising makes unauthorized use of a competitor's trademark, the practice gives rise to claims of trademark infringement.⁶ These claims invoke the Lanham Act, a statute prohibiting the commercial use of a competitor's trademark when such use causes a likelihood of consumer confusion.⁷ Claimants must prove likelihood of consumer confusion ("LOC") through several factors; one of these factors is "evidence of actual confusion," which depends on anecdotal or survey evidence.⁸ Yet while survey evidence is easier to gather than specific, concrete examples of actual consumer confusion, courts have broad discretion to strike poorly constructed surveys. Furthermore, even if a survey survives a motion to strike, it must reveal a convincing rate of actual consumer confusion to prove LOC.⁹

When plaintiffs present evidence of actual confusion in an attempt to prove LOC in a competitive keyword advertising case, they generally allege that consumer confusion takes the form of initial interest confusion ("IIC").¹⁰ IIC occurs when the unauthorized use of a trademark attracts a consumer's interest by causing initial source confusion, whether or not the confusion results in an actual sale.¹¹ Historically, courts have ruled on IIC as a type of confusion that fits neatly within the LOC analysis.

Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1362 (indicating that Google has allowed companies to bid on competitors' trademarks since 2004). Google does restrict the use of keywords if they violate its AdWord's policies on prohibited content. *See Adwords Policies*, GOOGLE SUPPORT (last visited Feb. 25, 2015), <https://support.google.com/adwordspolicy/answer/6008942?rd=1>.

6. *See, e.g., 1-800 Contacts*, 722 F.3d at 1229 (involving AdWord litigation); *Network Automation*, 638 F.3d at 1137 (involving AdWord litigation); *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228 (10th Cir. 2006) (involving meta tag litigation); *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808 (7th Cir. 2002) (involving meta tag litigation); *Brookfield*, 174 F.3d at 1036 (involving meta tag litigation).

7. Lanham Act § 43(a), 15 U.S.C. § 1125 (2012).

8. *Vail Assocs., Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d 853, 864 n.8 (10th Cir. 2008) ("Evidence of actual confusion is often introduced through the use of surveys . . ."); *see also* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1641 (2006) (referencing thirty-four cases in which judges credited survey evidence).

9. *See Vail Assocs.*, 516 F.3d at 864–65 n.8 (describing multiple factors that make a survey inadmissible and describing the courts' discretion); *see also* FED. R. EVID. 702 (outlining the specific requirements for reliable expert testimony).

10. *See, e.g., 1-800 Contacts*, 722 F.3d at 1234; *Network Automation*, 638 F.3d at 1142; *Australian Gold*, 436 F.3d at 1238; *Brookfield*, 174 F.3d at 1062.

11. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:6 (4th ed. 2014).

However, near the turn of the twenty-first century, courts began ruling on competitive keyword advertising cases.¹² At this time, they seized on the IIC doctrine as a convenient concept to describe the user's experience with search engine ads; however, instead of following the LOC framework, the Seventh, Ninth, and Tenth Circuits ruled that the unauthorized use of a trademark in competitive keyword advertising caused IIC merely by diverting consumers.¹³

The Tenth Circuit's decision in *1-800 Contacts, Inc. v. Lens.com, Inc.* ("*1-800 Contacts*") illustrates a recent judicial rejection of these earlier competitive keyword advertising rulings; rather than focusing on consumer diversion, the court placed IIC firmly within the LOC analysis and focused on the evidence of the actual confusion factor in making its decision.¹⁴ It then made actual confusion nearly impossible to prove by capping the probable rate of confusion at the ratio of clicks on an ad against the number of times that ad appeared, as this ratio is usually well below a probative level.¹⁵ Importantly, the Tenth Circuit chose to make this ruling rather than affirming a sound district court holding, indicating that the judicial shift was deliberate.¹⁶

Part I of this Note will trace the development of internet-based trademark law and the relevant evidentiary standards for proving likelihood of confusion. Part II will discuss the *1-800 Contacts* case, first by examining the District of Utah's decision to strike survey evidence and rule in favor of Lens.com. Then Part II will describe the Tenth Circuit's ruling, also in favor of Lens.com but on different grounds. Finally, Part III

12. See *Brookfield*, 174 F.3d at 1062 (a ruling from 1999 on competitive keyword advertising through meta tags of a competitor's trademark).

13. See *id.* (ruling that meta tags of a competitor's trademark caused IIC through diversion, even though users were not confused); see also, e.g., *Australian Gold*, 436 F.3d at 1239 (citing *Brookfield*, 174 F.3d at 1062); *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 812 (7th Cir. 2002) (citing *Brookfield*, 174 F.3d at 1062, 1064).

14. See generally *1-800 Contacts*, 722 F.3d at 1229. For examples of the trend in general, see *Network Automation*, 638 F.3d at 1154 (rejecting the diversion standard and focusing on evidence of actual confusion); see also *Lamparello v. Falwell*, 420 F.3d 309, 316 (4th Cir. 2005) (explicitly rejecting *Brookfield*); *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1034–36 (9th Cir. 2004) (Berzon, J., concurring) (explaining that purchasing a trademarked AdWord without using it deceptively in an advertisement is permissible competitive behavior).

15. Eric Goldman, *Tenth Circuit Kills the Initial Interest Confusion Doctrine—1-800 Contacts v. Lens.com*, Technology & Marketing Law Blog (July 18, 2013) (explaining that click-through rates seldom rise above 3 percent), http://blog.ericgoldman.org/archives/2013/07/tenth_circuit_k.htm; *1-800 Contacts*, 722 F.3d at 1244 (implying that a rate less than 7.6 percent could weigh against LOC).

16. See *id.* at 1229.

evaluates *1-800 Contacts* in light of current trademark and evidentiary law and proposes that the Tenth Circuit's acceptance of search engine data and its focus on proof of actual confusion will make success difficult for plaintiffs in future competitive keyword advertising cases.

I. TRADEMARK IN THE AGE OF SEARCH ENGINES

Claims of trademark infringement in cases of competitive keyword advertising and the use of trademarks as meta tags have required courts to apply trademark law and precedent to a new medium: internet search engines.¹⁷ Early applications of the IIC doctrine in these cases refused to acknowledge the effect of the user's interactions with search engines and resulted in an internet-based IIC doctrine favoring trademark plaintiffs.¹⁸ However, judges in the last decade have acted to correct these earlier rulings and have created standards of interpretation and proof that now favor defendants in competitive keyword advertising cases.¹⁹

Section I.A will describe the Lanham Act and the multifactor LOC test. Next, Section I.B will examine how the LOC test applies in the Tenth Circuit, paying attention to the "evidence of actual confusion" factor and the standards of proof—including survey evidence—that can support actual confusion. Finally, Section I.C will review the IIC doctrine's development from part of the LOC analysis to a simple, almost separate claim in competitive keyword advertising cases, before courts once again placed it within the LOC framework.

A. TRADEMARKS, THE LANHAM ACT, AND AN INTRODUCTION TO LOC

The basic purpose of a trademark is to help a consumer distinguish between similar goods in a competitive market environment through a "system of trade symbols that identify and distinguish each competitor's wares."²⁰ These symbols allow the consumer to make purchases based on the qualities they associate with a particular seller.²¹ Without exclusive

17. See *Brookfield*, 174 F.3d at 1036 (one of the first cases applying LOC and IIC to the internet).

18. See *id.*; see also Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 122–23 (2005) (indicating that *Brookfield* allowed plaintiffs to prove IIC without a showing of confusion).

19. See *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1147–48 (9th Cir. 2011).

20. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:5 (4th ed. 2014).

21. Lastowka, *supra* note 5, at 1362.

trademark rights, multiple companies could use similar marks and cause consumers who rely on trademarks to accidentally associate the positive qualities of one company's product with a different company's potentially inferior product. To avoid this type of confusion, the Lanham Act implements a system of exclusive rights to a trademark.²²

1. *The Lanham Act*

The Lanham Act regulates “deceptive and misleading uses [of trademarks] and . . . prevent[s] unfair competition, fraud, and deception. . . .” by providing trademark owners with a cause of action for trademark infringement.²³ Section 32(a) of the Lanham Act provides a claim for owners of registered trademarks against those who “use in commerce any reproduction, counterfeit, copy, or colorable imitation 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*.”²⁴ Section 43(a) extends this same protection to unregistered marks, and because the elements of infringement are identical to those in § 32(a), courts will reference the two sections interchangeably when discussing a use that could cause consumer confusion.²⁵ Regardless of registration, the Lanham Act only provides trademark owners with a cause of action for infringement; it does not define which uses are “likely to cause confusion.” That responsibility remains with the courts.²⁶

2. *LOC Framework: Inconsistencies and Overlaps*

The LOC framework is a judicial precedent that sets forth a multifactor test for proving the likelihood of consumer confusion in Lanham Act claims.²⁷ While each circuit recognizes and balances different LOC factors, four factors are consistent in all circuits: (1) the strength of their mark, (2) the similarity of the allegedly infringing mark, (3) the proximity of the marked goods, and (4) evidence of actual confusion in the

22. *See id.* at 1361–62. There are some exceptions to the grant of exclusive use such as comparative advertising, parody, criticism, and commentary. *See* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:124 (4th ed. 2014).

23. Rothman, *supra* note 18, at 123 (internal quotations omitted); *see generally* Lanham Act § 32, 15 U.S.C. § 1114 (2012).

24. Lanham Act § 32(a), 15 U.S.C. § 1114(a) (2012) (emphasis added).

25. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2012). *See 1-800 Contacts*, 722 F.3d at 1242 (“[T]he tests for likelihood of confusion under § 32 and § 43(a) do not differ materially”).

26. Beebe, *supra* note 8, at 1647.

27. *See id.* at 1582.

marketplace.²⁸ A fifth factor, the alleged infringer's intent, also appears in all circuits but the Federal Circuit.²⁹

If courts recognized LOC factors common to all circuits but gave them less weight than LOC factors unique to each circuit, there would be little similarity between the circuits' LOC frameworks; however, empirical data suggests that two of the five common factors have a disproportionate, if not dispositive, effect on outcomes in trademark litigation.³⁰ A cross-circuit study found that findings of "intent to infringe" resulted in rulings of LOC in 97 percent of cases, and a finding of actual confusion resulted in rulings of LOC in 92 percent of cases.³¹ The other three factors had smaller, but not insignificant, dispositive effects ranging from 72 to 84 percent across the circuits;³² thus, the weight given to these common factors indicates at least some similarity in the circuits' application of the LOC framework.³³

B. PROVING LOC IN THE TENTH CIRCUIT

In a Lanham Act claim, "[t]he party alleging infringement has the burden of proving LOC."³⁴ In the Tenth Circuit, plaintiffs meet this burden through six LOC factors set out in *King of the Mountain Sports, Inc. v. Chrysler Corp.*³⁵ Plaintiffs may attempt to show one of these factors—proof of actual confusion—through survey evidence, although courts have broad discretion in admitting surveys, and there is no guarantee that the survey will support the plaintiff's allegations.³⁶

1. King of the Mountain Factors

In *King of the Mountain*, the Tenth Circuit identified six factors for proving LOC in a trademark infringement case:

- (a) the degree of similarity between the marks;
- (b) the intent of the alleged infringer in adopting its mark;

28. *Id.*

29. *Id.* at 1589–90.

30. *Id.* at 1587, 1608.

31. *Id.* at 1608.

32. *Id.* at 1609.

33. *See id.* at 1610.

34. *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1484 (10th Cir. 1987).

35. 185 F.3d 1084, 1089–90 (10th Cir. 1999).

36. *See Vail Assocs., Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d 853, 864 n.8 (10th Cir. 2008).

- (c) evidence of actual confusion;
- (d) the relation in use and the manner of marketing between the goods or services marketed by the competing parties;
- (e) the degree of care likely to be exercised by purchasers; and
- (f) the strength or weakness of the marks.³⁷

According to the court, none of these factors should be determinative,³⁸ and the relative strength of each factor depends on the context of the situation.³⁹

When examining the similarity of marks, the first factor, the court looks at the parties' trademarks "in the context of the marks as a whole as they are encountered by consumers in the marketplace," and it examines the mark in isolation, not beside the allegedly infringed mark.⁴⁰ The focus when determining the second factor, intent, "is whether [the] defendant had the intent to derive benefit from the reputation or goodwill of [the] plaintiff."⁴¹ The relationship between the goods and manner of marketing, factor four, is significant because similar goods are more likely to cause consumer confusion.⁴² Since caring consumers focus on products rather than the associated trademarks, these consumers can and probably will distinguish between similar marks; thus, the fifth factor allows courts to determine the permissible level of similarity between two marks by analyzing the degree of consumer care in a particular market.⁴³ Finally, the sixth factor implies that a business is more likely to cause confusion by adopting a competitor's mark if the mark is unique and immediately

37. *King of the Mountain*, 185 F.3d at 1089–90. As indicated earlier, these factors are extremely similar to those in other circuits, probably because they all derive from the Restatement (First) of Torts (1938). For discussion of other circuits' factors, see *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012) (setting out nine factors and finding infringement where the trademark appeared in the ad copy); *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1220 (11th Cir. 2008) (listing seven factors); *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3rd Cir. 1983) (providing ten factors); *Sun-Fun Prods., Inc. v. Suntan Research & Dev., Inc.*, 656 F.2d 186, 189 (5th Cir. 1981) (compiling nine factors); *AMF v. Sleekcraft Boats*, 599 F.2d 341, 348–54 (9th Cir. 1979) (listing nine factors).

38. *King of the Mountain*, 185 F.3d at 1090.

39. *Id.*

40. *Id.* (quoting *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 925 (10th Cir. 1986)).

41. *Id.* at 1091 (quoting *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1485 (10th Cir. 1987) (quoting *Sicilia Di R. Beibow & Co. v. Cox*, 732 F.2d 417, 431 (5th Cir. 1984))).

42. *Id.* at 1092.

43. *Id.*

recognizable in a market—such a mark is a “strong” mark—than if the mark is only descriptive of the competitor’s good or service, and thus applicable to the market for those goods and services as a whole.⁴⁴

Evidence of actual confusion, the fourth factor, may be the most important factor. *King of the Mountain* held that evidence of actual confusion could help prove LOC, and courts across several circuits view this as the strongest evidence a plaintiff can present in a trademark infringement case.⁴⁵ But the evidence can cut both ways. If a plaintiff can only provide evidence of a few instances of actual confusion, then it may inadvertently prove that there is no likelihood of confusion.⁴⁶ This determination depends upon the number of transactions involved in the case, but when there are a large number of transactions but little evidence of confusion, the evidence tends to indicate that despite ample opportunity, consumers are not actually confused.⁴⁷

The *King of the Mountain* court ultimately found that there was no likelihood of consumer confusion based partially on the *de minimis* anecdotal evidence of actual confusion.⁴⁸ However, plaintiffs in a Lanham Act case have another option to prove actual confusion if anecdotal evidence is *de minimis*; in cases “where evidence of confusion is not available or is not persuasive, the gap can sometimes be filled by a properly

44. *See id.* at 1093.

45. *Id.* at 1092; *see also* *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020 (9th Cir. 2004) (“actual confusion is at the heart of the likelihood of confusion analysis”); *Universal Money Ctrs., Inc. v. AT&T Co.*, 22 F.3d 1527, 1534 (10th Cir. 1994) (indicating that evidence of actual confusion as the best evidence for likelihood of confusion); *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons (Steinway I)*, 365 F. Supp. 707, 716 (S.D.N.Y. 1973) (“[T]here can be no more positive proof of likelihood of confusion than evidence of actual confusion”), *aff’d*, *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons (Steinway II)*, 523 F.2d 1331(2d Cir. 1975).

46. *King of the Mountain*, 185 F.3d at 1092 (seven instances of confusion in the case were *de minimis*); *Syndicate Sales, Inc. v. Hampshire Paper Corp.*, 192 F.3d 633, 638 (7th Cir. 1999) (two anecdotes detailing initial confusion were *de minimis*).

47. The court may go the other way, such as when the Eleventh Circuit held that four documented instances of confusion were probative of confusion when consumers were unlikely to inform the trademark owner of their confusion. *See* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 23:14 (4th ed. 2014) (referring to *AmBrit, Inc. v. Kraft, Inc.*, 805 F.2d 974 (11th Cir. 1986)); *see also* *Binder v. Disability Group, Inc.*, 772 F. Supp. 1172 (C.D. Cal. 2011) (crediting a survey finding evidence of sixteen of seventeen individuals who actually clicked on the defendant’s website after searching for the plaintiff were confused, and, in conjunction with persuasive witness testimony, finding sufficient likelihood of confusion).

48. *King of the Mountain*, 185 F.3d at 1092–93.

conducted survey of the relevant class of prospective customers of the goods or services at issue.”⁴⁹

2. *Proving Actual Confusion Through Survey Evidence*

Courts will accept a well-conducted survey as evidence of actual confusion that in turn acts as evidence of LOC.⁵⁰ The creator of a survey must also be an expert witness, however, as defined by Rule 702 of the Federal Rules of Evidence.⁵¹ Under this Rule, the survey is acceptable evidence if it “is the product of reliable principles and methods” and if the creator can reasonably be called an expert in her field.⁵² These are surprisingly difficult standards to satisfy; therefore, to aid in survey construction and expert selection, the Federal Judicial Center has published a guide on scientific evidence that includes criteria for survey construction and evaluation.⁵³ Commonly contested elements include the appropriateness of the universe of survey respondents,⁵⁴ the bias of the questions,⁵⁵ and the competence of the survey’s creator.⁵⁶

The first and, in some ways, the most determinative characteristic of a survey is its “universe.”⁵⁷ This is “the group of people from which participants in the survey are selected, and thus is the group of people whose perceptions the survey is intended to represent.”⁵⁸ Thus, an appropriate universe is one that includes “a fair sampling of those purchasers most likely to partake of the alleged infringer’s goods or services.”⁵⁹ If survey participants are not likely to consume the alleged infringer’s goods or use its services, their responses cannot be relevant to a

49. See MCCARTHY, *supra* note 47, at § 23:17. See also *Universal Money Centers, Inc. v. AT&T Co.*, 22 F.3d 1527 (10th Cir. 1994) (permitting surveys as actual evidence of confusion).

50. *Vail Assocs., Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d 853, 864 n.8 (10th Cir. 2008) (“[e]vidence of actual confusion is also introduced through surveys”). See Beebe, *supra* note 8, at 1641 (referencing thirty-four cases in which judges credited survey evidence).

51. FED. R. EVID. 702 (2012).

52. *Id.*

53. See Shari Seidman Diamond, *Reference Guide on Survey Research*, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 359 (3d ed. 2011).

54. See *id.* at 376.

55. See *id.* at 387.

56. See *id.* at 375.

57. William G. Barber, *The Universe*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS 27 (Shari Seidman Diamond & Jerre B. Swann eds., 2012).

58. *Id.*

59. *Id.* at 29 (quoting *Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980)).

survey intended to test consumer confusion and could impermissibly skew the results.⁶⁰

Even a survey with the correct universe may be problematic because it must still contain unbiased and well-crafted questions.⁶¹ While courts often perceive open-ended questions as the least biased, surveys generally use closed-ended questions where participants select from a set of predetermined responses.⁶² While courts are suspicious of closed-ended questions and will sometimes assume they are framed to lead a respondent, scholars believe “a question becomes leading only when it leads the respondent to *select* one answer rather than another.”⁶³

Finally, the court often looks to the qualifications of a survey expert when deciding on the survey’s validity.⁶⁴ Given that objectivity is a good expert’s first qualification, disputants should not conduct in-house surveys, especially when they do not have the necessary experience.⁶⁵ This experience includes “academic credentials and relevant publications and work experience,”⁶⁶ although any degree must be in the correct field: a doctorate in “statistics, for example, is too mathematically focused to imbue significant credibility to a trademark study.”⁶⁷

These three factors—universe, questions, and creator qualifications—can contribute to an excellent survey, but when unsatisfied, these factors

60. G. Kip Edwards, *The Daubert Revolution and Lanham Act Surveys*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS 340 (Shari Seidman Diamond & Jerre B. Swann eds., 2012).

61. Jacob Jacoby, *Are Closed-Ended Questions Leading Questions?*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS 261–62 (Shari Seidman Diamond & Jerre B. Swann eds., 2012) (indicating that courts are wary of certain types of questions).

62. *Id.* at 263–64.

63. *Id.* at 267 (emphasis in original). Empirical evidence tends to support these scholars’ belief. *See id.* at 268–70 (indicating that closed-ended questions are proven to work within the relevant field of social science); *see also* FED. R. EVID. 703 (allowing experts to use empirical methods from their respective fields). Nevertheless, closed-ended questions may still create bias if they fail to provide a neutral response, only require a “yes” or “no” as an answer, fail to be fair and balanced by excluding the opposition’s opinions, emphasize one position over the other, use an unbalanced scale, or employ directional or loaded language. *See* Jacoby, *supra* note 61, at 274–80.

64. Jacob Jacoby, Robert L. Raskopf, & Claudia Bogdanos, *Selecting a Survey Expert*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS 57 (Shari Seidman Diamond & Jerre B. Swann eds., 2012).

65. *Id.* at 60.

66. *Id.* at 65.

67. *Id.* Some factors that work in a survey expert’s favor include a background in consumer psychology or behavior, excellent referrals, and a history of studies that display both depth and quality, which all significantly bolster an expert’s credibility. *See id.*

can also cast doubt on the evidentiary quality of the survey. If a court considers a survey unsatisfactory in some way, it has several options.

3. *Solutions for Survey Problems: Weight Versus Admissibility and the Court's Discretion to Strike*

Inevitably, a survey will have some flaws. The general rule in this circumstance, then, is that the flaws influence the survey's weight, not its admissibility—the jury may decide how readily it will accept the evidence.⁶⁸ However, under some circumstances the judge may rule that the survey is too flawed and strike it from the evidence.⁶⁹

A judge can choose not to admit expert testimony under Rule 702, and in the Tenth Circuit, this discretion explicitly extends to survey evidence.⁷⁰ The correct use of this discretion is evident in *Vail Associates, Inc. v. Vend-Tel-Co., Ltd.*, a case where the defendant was able to introduce an expert who testified that the plaintiff's survey suffered from severe methodological flaws that unduly favored the plaintiff.⁷¹ The district court agreed and struck the evidence on reasonable grounds, and because the appellate court had to honor the lower court's Rule 702 discretion absent a "conviction that it [was] arbitrary, capricious, whimsical, manifestly unreasonable, or clearly erroneous," the appellate court affirmed the decision.⁷²

Thus, a court may refuse to admit a poor survey; it must, however, allow parties to present a well-crafted survey, even if the evidence is weak or unhelpful.⁷³ The case then depends on the judge or jury's interpretation of the admitted evidence, which can ultimately harm the submitting party's case.⁷⁴

4. *Interpreting Survey Evidence*

Even if a survey is admissible and free of defect, it may reveal a *de minimis* rate of confusion that indicates a lack of actual consumer

68. *1-800 Contacts*, 722 F.3d at 1246 (citing *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 523 (10th Cir. 1987)).

69. *See Vail Assocs., Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d 853, 864–65 n.8 (10th Cir. 2008) (noting a district court may refuse to admit unreliable survey evidence).

70. *Id.*

71. *Id.*

72. *Id.* (quoting *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1232 (10th Cir. 2004)) (internal quotations omitted).

73. With some frequency, parties will submit survey evidence that ultimately harms their case. *See Beebe, supra* note 8, at 1641 (describing instances where courts used survey evidence against the submitting party).

74. *See id.*

confusion.⁷⁵ Unfortunately, the circuits have never provided a bright line rule for the *de minimis* threshold. Within the Tenth Circuit, at least, it was certain in the 1990s that a 2.6 percent rate of confusion was *de minimis*, but the court never set a rate at which it would automatically find confusion.⁷⁶ The Seventh Circuit has indicated that a 7.6 percent rate of confusion is insufficient to prove actual confusion.⁷⁷ The Second-Circuit *Grotian, Helferich, Shulz, Th. Steinweg Nachf. v. Steinway & Sons* (“*Steinway II*”) case found an 8.5 percent rate of confusion indicative of actual confusion, but only when there was additional compelling evidence.⁷⁸ Another Second Circuit case set the threshold around 7 percent, but also required further evidence of confusion.⁷⁹ J. Thomas McCarthy, a prominent trademark scholar, indicates that a rate of confusion less than 10 percent is poor evidence for actual confusion, and lower rates can be evidence against confusion.⁸⁰

A survey must thus be both well crafted and probative of a greater than *de minimis* rate of confusion in order for courts to accept it as proof of actual confusion alongside traditional anecdotal evidence.⁸¹ Once evidence of actual confusion has been accepted, it serves as part of the LOC framework.

C. DEVELOPMENT OF THE IIC DOCTRINE: FROM *STEINWAY* TO SEARCH ENGINES

Other considerations fit within the LOC analysis, including the nature of consumer confusion.⁸² Courts have indicated that confusion can occur pre-sale, post-sale, or at the point of sale, and the IIC doctrine reflects judicial attempts to define the scope of pre-sale confusion to include confusion that grabs customers’ attention rather than deceiving them.⁸³

75. 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:189 (4th ed. 2014).

76. *Universal Money Ctrs., Inc. v. AT&T Co.*, 22 F.3d 1527, 1537 (10th Cir. 1994).

77. *Henri’s Food Prods. Co. v. Kraft, Inc.*, 717 F.2d 352, 358 (7th Cir. 1983).

78. *Steinway I*, 365 F. Supp. at 716.

79. *Goya Foods, Inc. v. Condal Distribs., Inc.*, 732 F. Supp. 453, 457 n.7 (S.D.N.Y. 1990).

80. See MCCARTHY, *supra* note 75, at § 32:189.

81. See *Vail Assocs., Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d 864 n.8 (10th Cir. 2008) (holding that courts may refuse to admit unreliable survey evidence); *Universal Money Ctrs.*, 22 F.3d at 1537 (indicating that *de minimis* survey evidence is not probative of actual confusion).

82. MCCARTHY, *supra* note 47, at § 23:5.

83. See *id.* at §§ 23:5, 23:10 (describing common types of confusion). See also *Steinway I*, 365 F. Supp. at 717 (indicating when IIC occurs).

This Section will track the development of the IIC doctrine from the 1970s to today and its application to competitive keyword advertising.

1. *IIC Before the Internet*

The IIC doctrine arose in 1973 with *Steinway II*, in which a German piano manufacturer sought declaratory judgment that its “Grotian-Steinweg” mark did not infringe upon the well-known U.S. “Steinway” mark.⁸⁴ While the court acknowledged that the similarity of the marks would not confuse purchasers of pianos at the point of sale, there was a risk that the similarity between the Steinweg and Steinway marks might confuse consumers in the earliest stage of the purchasing process when buyers were searching the market for a musical instrument.⁸⁵ The “Grotian-Steinweg” mark could “attract potential customers based on the reputation built up by Steinway. . . . [and s]uch initial confusion work[ed] an injury to Steinway.”⁸⁶ After acknowledging evidence of actual confusion and examining other LOC factors, the court found in favor of Steinway, enjoined Steinweg from using its mark in the United States, and created the IIC precedent that would prove useful to courts ruling on search engine-based trademark infringement more than twenty years later.⁸⁷

2. *Search Engine IIC*

The 1990s saw the first cases involving confusion from competitive keyword advertising, and because the alleged confusion occurred while internet users were searching for a product or service, the IIC doctrine, which applied to the pre-sale consumer experience, was an attractive standard.⁸⁸ Unfortunately, *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, a 1999 Ninth Circuit decision addressing competitive keyword advertising, misunderstood the concept of IIC.⁸⁹ The ruling created a precedent that warped search engine-based IIC doctrine for several years, after other federal courts cited *Brookfield* when deciding on competitive keyword advertising claims in their own circuits.⁹⁰

84. See *Steinway II*, 523 F.2d at 1334–35.

85. *Id.* at 1342.

86. *Id.*

87. *Id.* at 1344. See *Brookfield Commc’ns, Inc. v. West Coast Entm’t, Inc.*, 174 F.3d 1036, 1063 (9th Cir. 1999) (citing *Steinway II*, 523 F.2d at 1341–42, in a meta tag case).

88. See *Brookfield*, 174 F.3d at 1064.

89. *Id.*

90. See *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1239 (10th Cir. 2006) (citing *Brookfield*, 174 F.3d at 1061–65, seven years after the ruling).

In the *Brookfield* case, Brookfield Communications, the creator of an entertainment database, owned the “MovieBuff” trademark and brought suit after discovering that West Coast Entertainment, a movie rental chain, intended to use the term MovieBuff in its website meta tags.⁹¹ West Coast’s website would thus appear in the search results when an internet user searched for MovieBuff.⁹² However, users conducting a search for these terms would never see the meta tag, just the search engine link to the clearly labeled West Coast website.⁹³

Despite users’ inability to observe meta tags, the court in *Brookfield* analogized using a competitor’s trademark in an invisible code to visibly displaying a competitor’s trademark in front of a store.⁹⁴ It then compared using a search engine to driving down a highway, where the various website links were like exit signs.⁹⁵ West Coast’s use of the “MovieBuff” meta tag was supposedly similar to a business tricking drivers by advertising for a competitor at the highway exit for the business’s own premises.⁹⁶ According to the court, the drivers would leave the highway too early, find the deceptive business, and would perhaps make a purchase for the sake of convenience.⁹⁷ In this scenario, the drivers were not confused at the time of purchase—they knew exactly from whom they were buying a product—but the IIC diverted drivers, causing a competitor to lose a sale.⁹⁸

The difference between drivers and web surfers is that while an intentionally misleading highway exit sign might confuse the former, the latter know where a search engine link will lead; there is no actual confusion.⁹⁹ The court explicitly recognized this difference in *Brookfield*, acknowledging that “there [was] no source of confusion in the sense that consumers [knew] they [were] patronizing West Coast rather than Brookfield.”¹⁰⁰ Even though the website link, unlike a deceptive exit sign, indicated that it led to West Coast’s website and thus created no LOC, the court concluded “that the Lanham Act bar[red] West Coast from

91. *Brookfield*, 174 F.3d at 1041–42.

92. *Id.* at 1045.

93. *Id.* at 1041–42.

94. *Id.* at 1036.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* at 1062.

100. *Id.*

including in its meta[]tags any term confusingly similar with Brookfield's mark."¹⁰¹

Like other circuits,¹⁰² the Tenth Circuit followed the Ninth Circuit's approach to competitive keyword-advertising IIC in another case involving meta tags, *Australian Gold, Inc. v. Hatfield*.¹⁰³ Plaintiffs, collectively "Australian Gold," were producers and distributors of tanning lotion who discovered that the Hatfields, a family with several online businesses, were reselling Australian Gold's lotion on multiple websites, placing its trademark in those websites' meta tags, and paying for those websites to appear in premium positions in search results for Australian Gold's mark.¹⁰⁴ Citing *Brookfield*, the court held that the Hatfields' use of the Australian Gold trademarks in the meta tags and the payment for a better search result position created IIC by attempting to divert traffic away from Australian Gold's products.¹⁰⁵

3. *Changes in the Ninth Circuit Doctrine*

Since the rulings in *Brookfield* and similar cases, trademark scholars have noted the misapplication of IIC to claims of competitive keyword advertising,¹⁰⁶ and several circuits have shifted or rejected the *Brookfield* analysis.¹⁰⁷ Without expressly repudiating *Brookfield*, the Ninth Circuit stepped away from competitive keyword-advertising IIC in *Network Automation v. Advanced System Concepts*.¹⁰⁸ The court held that using a trademark as a search engine keyword was not likely to cause IIC, replacing the *Brookfield* highway metaphor with the department store metaphor first articulated in a concurrence in *Playboy Enterprises v. Netscape Communications Corp.*¹⁰⁹ Under this analogy, users were like

101. *Id.* at 1065.

102. *See* *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 814 (7th Cir. 2002).

103. *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1231–32 (10th Cir. 2006).

104. *Id.* at 1231–32, 1239.

105. *Id.* at 1239–40.

106. Rothman, *supra* note 18, at 107–09 (indicating that the IIC doctrine fails to apply key elements of trademark law). *See Brookfield*, 174 F.3d at 1062, 1064–66.)

107. The Ninth Circuit was among the circuits to shift from *Brookfield's* ruling. *See* *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1148 (9th Cir. 2011); *see also Brookfield*, 174 F.3d at 1062. Meanwhile the Fourth Circuit adamantly insists it never recognized IIC. *See Lamparello v. Falwell*, 420 F.3d 309, 316 (4th Cir. 2005).

108. 638 F.3d at 1148.

109. *Id.* (citing with approval *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020 (9th Cir. 2004)) (Berzon, J., concurring) (explaining that purchasing a trademarked AdWord without using it deceptively in an advertisement is permissible competitive behavior).

shoppers, the search engine was like a department store, and entering a search term was like asking a salesperson for directions to a specific brand.¹¹⁰ The salesperson would direct the user to the brand, but the user might encounter another, preferable brand in the meantime, probably because the brand owner paid for favorable placement within the store.¹¹¹ The brand owner did not violate the Lanham Act in this scenario by diverting the user “with a clearly labeled, but more prominent display.”¹¹² There was no effort to deceive, and the court held that “it would be wrong to expand the [IIC] theory of infringement beyond the realm of the misleading and deceptive.”¹¹³

The Ninth Circuit’s stance in *Network Automation* conforms more closely to user experiences on the internet than its previous position in *Brookfield*; however, some circuits, including the Tenth Circuit, continued to follow the *Brookfield* court’s example in the application of IIC to competitive keyword advertising.¹¹⁴

II. 1-800 CONTACTS V. LENS.COM

In *1-800 Contacts*, the Tenth Circuit held that Lens.com did not create a LOC by purchasing a search keyword that resembled 1-800’s “1800CONTACTS” trademark.¹¹⁵ While this ruling affirmed the district court’s decision in *1-800 Contacts v. Lens.com* (“*Contacts I*”), it did so on slightly different grounds and also considered Google data as evidence of actual confusion.¹¹⁶ This Section will describe the facts of the case and discuss 1-800 Contacts, Inc.’s (“1-800”) attempt to prove LOC through survey evidence, before detailing the district court’s refusal to admit the survey and its subsequent summary judgment in favor of Lens.com. The Section will then expand on the Tenth Circuit’s decision to examine the struck survey as if it were admissible, and then touch on the court’s choice

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. The Tenth Circuit followed *Brookfield* until *1-800 Contacts*. See *Australian Gold*, 436 F.3d 1228, 1239 (10th Cir. 2006) (citing *Brookfield*, 174 F.3d at 61–65); see also *1-800 Contacts*, 722 F.3d at 1245 (distinguishing *Australian Gold*); but see *Promatek Inds., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 812–13 (7th Cir. 2002) (citing with approval *Brookfield*, 174 F.3d at 1062, 1064).

115. *1-800 Contacts*, 722 F.3d at 1229.

116. See generally *id.* at 1234–35, 1244; see also *1-800 Contacts, Inc. v. Lens.com, Inc. (Contacts I)*, 755 F. Supp. 2d 1151 (D. Utah 2010).

to examine evidence from Google as proof against actual confusion in a competitive keyword-advertising suit.

A. FACTS OF THE CASE AND THE EVIDENCE

1-800 is a leading contact retailer that owns the registered trademark “1800CONTACTS.”¹¹⁷ In 2005, the company began a legal dispute with its competitor Lens.com after discovering that a search for “1-800 Contacts” on Google produced AdWord impressions for Lens.com, suggesting that Lens.com had paid for its links to appear when users searched for 1-800.¹¹⁸

Lens.com, unlike 1-800, conducts its business almost exclusively online.¹¹⁹ Discovery in the case revealed that Lens.com had bid on nine AdWords that were similar to 1-800’s trademark, including slight variations such as “1-800 contact lenses” and misspellings of the company’s name like “800 comtacts.com.”¹²⁰ Lens.com did not bid on the actual trademark 1800CONTACTS, nor did it feature the mark in the impression’s ad copy; thus, Google users never saw 1-800’s trademark associated with Lens.com’s own ads.¹²¹

At trial, 1-800 attempted to prove actual consumer confusion through two key pieces of evidence.¹²² The first was the recording of a single phone call made by a customer of Lens.com.¹²³ The customer was canceling her order after realizing that Lens.com was not, in fact, 1-800.¹²⁴ Importantly, at no point in the recording did she indicate how she became aware of Lens.com or claim to make the incorrect order.¹²⁵

The second piece of evidence considered by the court was a survey conducted by Carl Degen that revealed an average consumer confusion rate of 7.4 percent in this case.¹²⁶ Degen is an economist with a bachelor’s and master’s degree in economics, and Ph.D. coursework in the same

117. *1-800 Contacts*, 722 F.3d at 1234.

118. *Id.*

119. *Id.* at 1235.

120. *Id.* at 1237. Note that these bids were only nine of the thousands of bids Lens.com made during this period. *See Contacts I*, 755 F. Supp. 2d at 1176.

121. *1-800 Contacts*, 722 F.3d at 1237.

122. *See id.* at 1240, 1245.

123. *Id.* at 1245.

124. *Id.*

125. *Id.*

126. *Id.* at 1240; *1-800 Contacts*, 722 F.3d at 1247.

subject.¹²⁷ He also has academic training in statistics and a long history of employment at an economic research and consulting firm.¹²⁸ While Degen did have experience conducting surveys, they were primarily related to postal cases and involved a higher degree of statistical and numerical analysis than was useful in a test for consumer confusion.¹²⁹ In fact, before the *1-800 Contacts* case, Degen had never created a survey to test for the likelihood of consumer confusion.¹³⁰

B. THE DISTRICT COURT'S DECISION

The United States District Court for the District of Utah handed down two important decisions in *Contacts I*, the precursor to *1-800 Contacts*.¹³¹ The first significant holding in the case came from a memorandum decision that struck 1-800's survey from evidence because of impermissible flaws in the creator's qualifications and in his execution of the study. The final reported decision granted a motion for summary judgment, since the remaining evidence in the case could not prove LOC.¹³²

1. *The Memorandum Decision Struck Carl Degen's Survey Evidence*

In the memorandum decision, the court exercised its Rule 702 discretion to strike the Degen survey after Lens.com moved to strike the evidence for failing to meet the rule's reliability requirements.¹³³ Citing deficiencies in Degen's background and various flaws in his methodology, the court granted Lens.com's motion.¹³⁴ First, the court ruled that Degen was not a qualified expert in consumer confusion surveys, and that his lack of experience negatively impacted his credibility.¹³⁵ Second, the court held that Degen's survey was overinclusive because it did not limit the pool of respondents to individuals who purchased contact lenses over the internet.¹³⁶

127. Memorandum Decision and Order on Carl Degen Evidence at 2, *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010) (No. 2:07-cv-591 CW) [hereinafter Memorandum Decision].

128. *Id.* at 2.

129. *Id.* at 2–3.

130. *Id.*

131. *See* Memorandum Decision, *supra* note 127, at 1; *Contacts I*, 755 F. Supp. 2d at 1181–82.

132. *Id.*

133. Memorandum Decision, *supra* note 127, at 1.

134. *Id.* at 1.

135. *Id.* at 13.

136. *Id.* at 16.

Third, the court took issue with the survey questions' suggestiveness. Degen's survey asked the respondents if an indicated link originated from 1-800-CONTACTS and gave them the options "yes," "no," or "don't know."¹³⁷ This was a closed-ended question, and although closed-ended questions do not always render the survey inadequate, this particular structure failed to offer "exhaustive alternative responses" because no company was named other than 1-800.¹³⁸ Furthermore, the court held that the question itself was ambiguous because 1-800-CONTACTS could have referred to the company or the search term, and some participants might have selected "yes" to indicate a belief that the Lens.com ad originated from the scenario described in the survey.¹³⁹ The court also concluded that even the word "originates" as used in the survey was ambiguous because laypersons and lawyers might interpret it differently.¹⁴⁰

In support of these criticisms, the court heard testimony from Hal Poret, the vice president of a survey research firm, who has a significant background in the field of trademark survey design and a record of presenting acceptable evidence before a court.¹⁴¹ In light of Poret's testimony and the court's independent conclusions, the court found the flaws in Degen's survey to be substantial enough to overcome the general rule that a survey's technical flaws affect its weight instead of its admissibility.¹⁴² Therefore, the court concluded that 1-800 "failed in its burden of establishing that Degen's survey [was] admissible under Rule 702."¹⁴³ With the survey dismissed, the court examined the remainder of 1-800's case.

2. *The District Court Ruling*

After striking the Degen survey, the district court ruled that 1-800 had not adequately shown LOC.¹⁴⁴ While Lens.com used the mark in commerce by purchasing nearly identical AdWords, it could only be liable if that use caused some kind of consumer confusion.¹⁴⁵ The court tested

137. *Id.* at 18.

138. *Id.*

139. *Id.* at 19.

140. *Id.* at 20.

141. *Id.* at 3, 5.

142. *Id.* at 21.

143. *Id.*

144. *Contacts I*, 755 F. Supp. 2d at 1181.

145. *Id.* at 1169–70.

for the likelihood of IIC by applying the six Tenth Circuit factors articulated in *King of the Mountain*.¹⁴⁶

When determining the degree of similarity between the two marks, the district court examined the similarities between the mark and the ad copy, not the AdWord that was invisible to the customer.¹⁴⁷ The court found that other than containing the word “contacts,” which was at most descriptive of the company’s business, the ads were not similar.¹⁴⁸ Thus, the similarity factor was in Lens.com’s favor.¹⁴⁹

The court could not readily assess Lens.com’s intent in purchasing its competitor’s trademark as an AdWord, and the intent factor favored neither party as result. The court noted that bidding on a common misspelling of 1-800’s mark could be an attempt to benefit from the company’s goodwill; however, the 1-800 AdWords represented only a small portion of Lens.com’s advertising efforts—nine of approximately eight thousand AdWords purchased during this time.¹⁵⁰ The court thus considered this factor to be, at most, neutral.¹⁵¹

The remaining four factors were less ambiguous. The court struck the survey, the only evidence of actual confusion available at the time; thus, the evidence of actual confusion factor could not help 1-800.¹⁵² Lens.com did have products and marketing channels that were similar to 1-800’s own, and consumers probably did not exercise great care when choosing a contact supplier—both of these factors weighed in 1-800’s favor.¹⁵³ The court found the trademark strength factor to be irrelevant: while 1-800’s mark was “moderately strong,” Lens.com never placed it in the ad copy and thus did not feature it in a way that might confuse consumers.¹⁵⁴

Given that few of the factors weighed strongly in 1-800’s favor, and most were neutral or weighed strongly for Lens.com, the court granted summary judgment for Lens.com, holding that the nine AdWords

146. *Id.* at 1174. See *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1089–90 (10th Cir. 1999).

147. *Contacts I*, 755 F. Supp. 2d at 1175.

148. *Id.*

149. *Id.*

150. *Id.* at 1176.

151. *Id.*

152. *Id.* at 1176–77.

153. *Id.* at 1177.

154. *Id.* at 1181.

Lens.com purchased did not infringe on 1-800s mark.¹⁵⁵ Dissatisfied with this decision, 1-800 appealed.¹⁵⁶

C. 1-800 CONTACTS AT THE TENTH CIRCUIT

On appeal the Tenth Circuit reexamined 1-800's proof of actual confusion.¹⁵⁷ 1-800 argued that the district court improperly excluded Degen's survey.¹⁵⁸ The Tenth Circuit, like the district court before it, expressed concern regarding the ambiguity of Degen's questions and noted the survey's flaws.¹⁵⁹ However, instead of affirming the lower court's decision to strike the survey, the appellate court ruled on the strength of the survey's results.¹⁶⁰ These results showed a 7.4 percent rate of consumer confusion that was, in the court's view, "fairly low."¹⁶¹ While there were other cases in which surveys with rates as low as 7 percent indicated a chance of confusion, additional evidence contributed significantly to the surveys' probative value.¹⁶² Thus, the court agreed with the Restatement (Third) of Unfair Competition's statement that "surveys *without obvious defects* indicating confusion of seven percent to [fifteen] percent of the sample have been held adequate, *when supported by other evidence*, to prove LOC."¹⁶³ It also adopted McCarthy's view that "when the percentage results of a confusion survey dip below 10 percent, they can become evidence which will indicate that confusion is *not likely*."¹⁶⁴ Because the 7.4 percent rate of confusion was too low and had no additional evidence to support it, the Degen survey received "minimal weight" in the court's analysis.¹⁶⁵

But rather than ending with the Degen survey, the court examined a new type of evidence: Google AdWords data. This data indicated that Lens.com's use of 1-800's mark only generated 1,626 ads for Lens.com

155. *Id.* at 1181-82.

156. *See 1-800 Contacts*, 722 F.3d at 1234 (10th Cir. 2013).

157. *Id.* at 1245-46.

158. Opening Brief of Appellant at 31-34, *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013) (No. 11-4204) [hereinafter Opening Brief].

159. *See 1-800 Contacts*, 722 F.3d at 1246-47.

160. *Id.*

161. *Id.* at 1247.

162. *Id.* at 1248-49.

163. *Id.* at 1249 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 20 (1995)) (quotations omitted) (emphasis added by the court). The court stated that this was the strongest statement it could make in light of earlier cases that found a 7 percent rate of confusion as evidence of actual confusion only because other, stronger factors—including additional survey evidence—indicated LOC. *See id.* at 1148-49.

164. *Id.* (quoting MCCARTHY, *supra* note 75, at § 32:189).

165. *Id.*

over an eight-month period.¹⁶⁶ These 1,626 instances resulted in only twenty-five clicks on the Lens.com ad.¹⁶⁷ This evidence led the court to conclude, even disregarding all other possible motivations a user could have for clicking on the Lens.com ad,¹⁶⁸ that IIC occurred at most 1.5 percent of the time.¹⁶⁹

The Tenth Circuit affirmed the lower court and found “summary judgment for Lens.com was required.”¹⁷⁰ The court also found that 1-800s’ survey evidence could not “sustain a finding of [LOC] in the circumstances presented,”¹⁷¹ nor was 1-800’s anecdotal evidence in any way dispositive.¹⁷² Most damning to 1-800’s case, however, was the data directly from Google’s AdWords program that “overwhelmingly indicate[d] the unlikelihood of confusion.”¹⁷³

III. ANALYSIS OF THE TENTH CIRCUIT AND DISTRICT COURT OPINIONS: AN OPPORTUNITY FOR CHANGE

In *1-800 Contacts*, the Tenth Circuit examined the results of a properly struck survey and then considered search engine data as evidence of actual confusion to create a shift in doctrine that, much like the Ninth Circuit’s *Network Automation* precedent,¹⁷⁴ favors defendants in competitive keyword advertising cases. Because it could have easily affirmed the lower court, it is likely that the Tenth Circuit used *1-800 Contacts* to shift its standard for IIC in competitive keyword advertising towards a more modern understanding of search engines and consumers. Section III.A examines why the district court’s decision to strike the Degan survey and its subsequent summary judgment in favor of Lens.com was proper. Next, Section III.B proposes a justification for the Tenth Circuit’s decision to evaluate Degan’s survey results rather than affirming the lower court’s decision. Finally, Section III.C examines the Tenth

166. *Id.* at 1244.

167. *Id.*

168. For a comprehensive list of suggestions, see Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 524–25 (2005).

169. *1-800 Contacts*, 722 F.3d at 1244.

170. *Id.* at 1249.

171. *Id.*

172. *Id.* at 1245.

173. *Id.* at 1249.

174. The *Network Automation* standard was significantly more permissive towards defendants than the earlier *Brookfield* “diversion” standard. See *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1148 (9th Cir. 2011); see *Brookfield Commc’ns, Inc. v. W. Coast Entm’t, Inc.*, 174 F.3d 1036, 1062 (9th Cir. 1999).

Circuit's new Google statistics test and considers the future of trademark claims in competitive keyword advertising in the Tenth Circuit.

A. FLAWS IN THE DEGEN SURVEY AND A LACK OF ADDITIONAL EVIDENCE MADE THE LOWER COURT'S DECISION EASILY AFFIRMABLE

The lower court's rulings, both in the memorandum decision and in *Contacts I*, were within its judicial discretion. This Section will examine the memorandum decision regarding the Carl Degen survey and the grant of summary judgment.

1. *Rejecting the 1-800 Survey Was Proper*

Precedent in the Tenth Circuit allows district courts to strike survey evidence under Rule 702.¹⁷⁵ Although the courts are to exercise this power with restraint, an appellate court must apply the deferential "abuse of discretion" test when reviewing the lower court's refusal to admit a survey.¹⁷⁶ This deferential standard of review is the likely explanation for the Tenth Circuit's reluctance to explicitly reverse the lower court's decision to strike the Degen survey.¹⁷⁷ Yet comparing this case with *Vail*, especially in the context of accepted evidentiary guidelines for survey creation, indicates that the district court was correct in its decision to strike the survey.¹⁷⁸

Much of a survey's credibility stems from the qualifications of its creator, and Carl Degen was not qualified to create or evaluate a marketing survey.¹⁷⁹ His studies in economics and statistics, while useful in data analysis, were insufficient for the creation of marketing surveys without additional education in consumer psychology or marketing.¹⁸⁰ Furthermore, his portfolio of highly numerical postal service surveys did not substitute sufficiently for experience creating surveys that measure consumer confusion.¹⁸¹

175. *Vail Assocs., Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d 853, 864–65 n.8 (10th Cir. 2008).

176. *Id.*

177. *1-800 Contacts*, 722 F.3d at 1246.

178. *Vail Assocs.*, 516 F.3d at 864–65 n.8.

179. *See* Diamond, *supra* note 53, at 375; *see also* Jacoby, *supra* note 64, at 65.

180. Memorandum Decision, *supra* note 127, at 2; *see also* Jacoby, *supra* note 64, at 65.

181. *See* Jacoby, *supra* note 64, at 65.

Hal Poret's testimony was also particularly problematic for the Degen survey.¹⁸² Poret is an expert on trademark surveys, and according to his professional opinion, the Degen survey was flawed in several critical ways.¹⁸³ First, the survey universe included individuals who did not purchase contacts online, a fault that essentially rendered it "irrelevant" by providing the court with data unrelated to the survey's intended targets.¹⁸⁴ Second, the survey contained leading questions that were closed-ended and nearly forced the survey takers to give answers that indicated actual consumer confusion.¹⁸⁵ On these factors alone, the court could and did strike the survey.¹⁸⁶

2. *In Light of this Rejection, the Court's Analysis of the King of the Mountain Factors Was Also Proper*

The rejection of the Degen survey naturally and appropriately led to summary judgment in Lens.com's favor.¹⁸⁷ While little evidence of infringement remained after striking the Degen survey, the district court still performed an adequate analysis of each relevant *King of the Mountain* factor.¹⁸⁸ Of the five common factors that all circuits—excluding the Federal Circuit—consider when determining LOC, the similarity of product and marketing channels is the only one that weighed in 1-800's favor.¹⁸⁹ The other four—similarity of marks, intent of the alleged

182. See Memorandum Decision, *supra* note 127, at 22–23. A major indicator of the memorandum decision's appropriateness beyond the survey's obvious flaws is the similarity between Poret and the expert whose opinion led to the *Vail* ruling. See Memorandum Decision, *supra* note 127, at 13; see also *Vail Assocs., Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d 853, 864–65 n.8. (10th Cir. 2008). In both *Vail* and *Contacts I*, a recognized professional with greater experience creating marketing surveys harshly criticized contested survey evidence that suffered from multiple forms of bias. See *Vail Assocs.*, 516 F.3d at 864–65 n.8; see also Memorandum Decision, *supra* note 127, at 13. The Tenth Circuit in *Vail* placed great faith in this expert testimony, and ruled that the district court "most assuredly did not abuse its discretion in excluding from trial *Vail's* survey evidence." *Vail Assocs.*, 516 F.3d at 864–65 n.8. In the face of the Tenth Circuit's willingness to rely on expert testimony to reject unqualified testimony, and considering Carl Degen's inexperience and flaws in his survey, the district court's decision to strike the survey seems completely appropriate and within its Rule 702 discretion.

183. See Memorandum Decision, *supra* note 127, at 4.

184. *Id.* at 15; see also Edwards, *supra* note 60, at 340.

185. Memorandum Decision, *supra* note 127, at 18; see Jacoby, *supra* note 61, at 262–63.

186. Memorandum Decision, *supra* note 127, at 21.

187. See *Contacts I*, 755 F. Supp. 2d at 1181–82.

188. See *id.* at 1181.

189. See *Contacts I*, 755 F. Supp. 2d at 1181 (finding that the similar goods at issue share similar channels); see also Beebe, *supra* note 8 (indicating the similarity of goods and market channels factor carries great weight in LOC claims).

infringer, strength of the mark, and evidence of actual confusion—favored Lens.com.¹⁹⁰ In these circumstances, summary judgment favoring Lens.com was appropriate;¹⁹¹ the district court provided an adequate ruling.

B. THE TENTH CIRCUIT SEES AN OPPORTUNITY

The Tenth Circuit was apparently dissatisfied with the lower court's ruling in *Contacts I* and chose to do more than simply affirm both the lower court's grant of summary judgment and its exclusion of the Degen survey.¹⁹² Instead, the appellate court evaluated the survey as admissible evidence, and concluded that under the circumstances, 1-800's claim failed because the company lacked evidence of IIC.¹⁹³ This reasoning is a major shift from the earlier *Australian Gold* case that followed the Ninth Circuit's reasoning in *Brookfield*. This line of cases focused on consumer diversion rather than the element of consumer confusion in trademark infringement claims.¹⁹⁴ Considering that the Ninth Circuit changed its stance on IIC in *Network Automation*, however, the Tenth Circuit may have also been looking for an opportunity to distinguish *Australian Gold*.¹⁹⁵ And in *1-800 Contacts*, the court took that opportunity, moving away from the old *Brookfield* "highway" diversion interpretation of IIC in competitive keyword advertising towards the *Network Automation* permissive "shopping mall" view.¹⁹⁶ The Tenth Circuit did this by focusing on evidence of actual confusion in the case, including survey evidence and search engine evidence, rather than the possibility of diversion.¹⁹⁷

190. See *Contacts I*, 755 F. Supp. 2d at 1181; see also Beebe, *supra* note 8, at 1589 (setting out the four factors).

191. These factors are often dispositive in LOC cases. See Beebe, *supra* note 8, at 1608–10.

192. See generally *1-800 Contacts*, 722 F.3d at 1229.

193. *Id.* at 1243.

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

195. See *1-800 Contacts*, 722 F.3d at 1245 ("This case is readily distinguishable from *Australian Gold* . . .").

196. See *Brookfield Commc'ns, Inc. v. W. Coast Entm't, Inc.*, 174 F.3d 1036, 1062 (9th Cir. 1999) (choosing to apply IIC in order to find likelihood of confusion, even while acknowledging the absence of confusion); see also *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1154 (9th Cir. 2011) (choosing to focus on actual confusion).

197. See generally *1-800 Contacts*, 722 F.3d at 1244–46 (refusing to follow 1-800's diversion theory, and focusing instead on evidentiary standards).

1. *Moving from Brookfield to Network Automation*

The Tenth Circuit's shift away from the "diversion" understanding of IIC in the competitive keyword advertising context is evident in the court's eagerness to distinguish *Australian Gold*, which cited *Brookfield* in its ruling that diversion on the internet violated the Lanham Act.¹⁹⁸ The Tenth Circuit instead looked to *Network Automation* and focused on users' interactions with search engines, rather than the programs operating behind the screen, to determine a likelihood of confusion.¹⁹⁹ This shift is consistent with scholarly opinion, which levels severe criticism against the *Brookfield* court for misunderstanding how users interact with search engines and how an advertising structure might affect a user who will never see the trademarked term in a competitor's ad.²⁰⁰

This shift may be the result of a development in the judges' understanding of how the internet functions and how individuals use a search engine. *Brookfield* was decided in 1999 when the internet was still relatively young and a "venture into cyberspace" to rule on internet trademark law was worth a comment.²⁰¹ Since that time, users have become more sophisticated, shopping online has become more prevalent, and trademark doctrine—an area of law dependent upon user perceptions—has changed as well.²⁰² Today, "the reasonable consumer does not accord initial credibility to a web site simply because it is listed among the search engine results in a query for the trademark owner's mark."²⁰³ Furthermore, the sophisticated consumer might actually search for a particular product by entering the trademark of a known competitor.²⁰⁴ In this environment, the six factors mentioned in *King of the Mountain* must have different weights. If factors like the similarity of marketing channels no longer affect consumers and the similarity of marks

198. See *1-800 Contacts*, 722 F.3d at 1245; see also *Australian Gold*, 436 F.3d at 1239.

199. *1-800 Contacts*, 722 F.3d at 1245.

200. Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777 (2004). See Goldman, *supra* note 168, at 524 (noting that users might have multiple reasons for using a trademarked term to search for goods not sold under that trademark); see also David M. Klein & Daniel C. Glazer, *Reconsidering Initial Interest Confusion on the Internet*, 93 TRADEMARK REP. 1035 (2003).

201. See *Brookfield*, 174 F.3d at 1041.

202. See *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1152 (9th Cir. 2011) (indicating that online shoppers are actually quite sophisticated).

203. Klein & Glazer, *supra* note 200, at 93.

204. See Eric Goldman, *supra* note 168, at 524 (indicating that users occasionally enter trademarks into search engines as proxies for other goods).

is a non-issue regarding invisible AdWords, then the “actual confusion” factor becomes dispositive.

Furthermore, the Tenth and Ninth Circuits have created a greater distinction between consumer confusion and diversion. While the early IIC cases like *Australian Gold* and *Brookfield* held that the intentional diversion of consumers was a violation of trademark law, *Network Automation* explicitly stated that “because the *sine qua non* of trademark infringement is consumer confusion, when we examine IIC, the owner of the mark must demonstrate likely confusion, not mere diversion.”²⁰⁵ This is in keeping with the Lanham Act’s purpose, which states that an action must cause consumer confusion to be actionable.²⁰⁶ And while scholars and courts both agree that the Lanham Act was in part designed to protect a business’s goodwill,²⁰⁷ scholars have also noted that the protection only extends insofar as companies appropriate competitors’ goodwill in order to deceive consumers.²⁰⁸ True to the spirit of the act, *Network Automation* recognizes that consumers are not confused by the purchase of trademarked AdWords when the ad copy contains no deceptive information. The Tenth Circuit was correct in focusing on *Network Automation* when shifting its doctrine.²⁰⁹

2. Evidence of Actual Confusion

Evidence of actual confusion plays a major role in the *1-800 Contacts* cases,²¹⁰ and this too seems reasonable when courts consider current levels of user sophistication. When a user never actually sees the allegedly infringing AdWord and understands that a sponsored link could lead *anywhere*, factors like the similarity of a trademark and an allegedly infringing AdWord become less relevant than evidence of actual confusion.²¹¹ Some courts already consider evidence of actual confusion as the best source of evidence for LOC in trademark litigation.²¹²

205. See *Network Automation*, 638 F.3d 1149 (9th Cir. 2011); *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1239 (10th Cir. 2006); *Brookfield Commc’ns, Inc. v. W. Coast Entm’t, Inc.*, 174 F.3d 1036, 1063 (9th Cir. 1999).

206. Lanham Act § 43(a), 15 U.S.C. § 1125 (2012).

207. See *Steinway II*, 523 F.2d at 1342; Rothman, *supra* note 18, at 163.

208. See Rothman, *supra* note 18, at 163, 165.

209. See *Australian Gold*, 436 F.3d at 1239 (citing *Brookfield*, 174 F.3d at 1061–65); see also *Network Automation*, 638 F.3d at 1149.

210. See *Contacts I*, 755 F. Supp. 2d at 1151; *1-800 Contacts*, 722 F.3d at 1229.

211. E.g., *Network Automation*, 638 F.3d at 1149.

212. See *Universal Money Ctrs., Inc. v. AT&T Co.*, 22 F.3d 1527, 1534 (10th Cir. 1994) (indicating that evidence of actual confusion as the best evidence); see also *Steinway*

But is a survey still a viable source of this evidence? Perhaps yes, provided it is extremely well crafted and, according to the court in *1-800 Contacts*, reveals a rate of confusion at least above 7 percent.²¹³ However, because the major authorities indicate less than a 10 percent rate of confusion will not suffice without additional evidence of actual confusion, however, courts may ultimately require a higher rate of confusion or alternate forms of evidence.²¹⁴

Anecdotes can provide this additional evidence of actual confusion, but only in sufficient numbers.²¹⁵ At the Tenth Circuit, *1-800* presented a single *de minimis* anecdote.²¹⁶ Notably, the Tenth Circuit explicitly required more than seven anecdotes in *King of the Mountain*.²¹⁷ Other authorities have indicated that the floor may be four anecdotes when users are unlikely to inform the trademark owner of their confusion.²¹⁸ While users may not have reported their confusion between contact lens distributors, it is difficult to imagine a single anecdote and an insignificant survey as adequate proof of actual confusion.

The unsurprising result of this sound reasoning is that the Tenth Circuit avoided making a bright-line rule for an acceptable rate of confusion.²¹⁹ Yet the range between 7 percent and 10 percent—where a well-crafted, well-supported survey may be evidence of actual confusion—is probably irrelevant, because the Google AdWord evidence that parties may now present to the court will make proving actual confusion in competitive keyword-advertising cases nearly impossible in the future, at least in the Tenth Circuit.²²⁰

C. THE NEW GOOGLE TEST: AN AFFIRMATIVE DEFENSE?

The court in *1-800 Contacts* accepted statistics from Google's AdWords program as evidence of actual confusion. The statistics indicated at most a 1.5 percent rate of confusion, assuming that each time

I, 365 F. Supp. at 715-16, *aff'd Steinway II*, 532 F.2d at 1331 (indicating that "there can be no more positive proof of [LOC] than evidence of actual confusion).

213. *1-800 Contacts*, 722 F.3d at 1249.

214. MCCARTHY, *supra* note 82, at § 23:14; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 20 (1995).

215. *See* MCCARTHY, *supra* note 82, at § 23:14.

216. *1-800 Contacts*, 722 F.3d at 1245.

217. *See* *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1092 (10th Cir. 1999).

218. *See* MCCARTHY, *supra* note 82, at § 23:14 (referring to *AmBrit, Inc. v. Kraft, Inc.*, 805 F.2d 974 (11th Cir. 1986)).

219. *See generally 1-800 Contacts*, 722 F.3d at 1229.

220. *Id.* at 1241.

a user clicked on Lens.com's ad when it appeared during a search for 1-800 the user was in fact confused.²²¹ But even if the court assumed this, 1-800 would have never proven actual confusion; the rate is too far beneath the Restatement (Third) of Unfair Competition's 7 percent minimum recognized by the court in *1-800 Contacts*.²²² Any defendant who can submit this type of search engine data will be able to provide evidence against actual confusion—the rates at which users click on a particular ad seldom rise above 3 percent and a low rate of confusion is evidence against actual confusion.²²³ Given the Tenth Circuit's focus on evidence of actual confusion, and given the evidence's dispositive effect on LOC analyses in general, search engine data could make competitive keyword-advertising cases nearly impossible for plaintiffs to win.²²⁴

Perhaps one solution for a desperate plaintiff faced with search engine data would be to disprove it; however, websites like Google are sophisticated tools, and according to a recent paper, using Google as evidence makes sense in certain situations that require precise statistics.²²⁵ In the present case, for example, the 1,624-click sample is robust and contains the correct population by definition—internet users who are looking for contact lenses. Thus, this evidence is more like survey data than anecdotes, except it measures, in an admittedly overly broad manner, confusion as it actually occurs. But this data still provides a major advantage to defendants by placing a cap on the possible rate of confusion that will almost never approach the blurry 7 to 10 percent confusion rate threshold the court skirted in *1-800 Contacts*.²²⁶ Thus, the Tenth Circuit has provided what is almost an affirmative defense in competitive keyword

221. *Id.* at 1244.

222. *Id.* at 1249 (quoting Restatement (Third) of Unfair Competition § 20 (quotations omitted) (emphasis added by the court)).

223. Eric Goldman, *Tenth Circuit Kills the Initial Interest Confusion Doctrine—1-800 Contacts v. Lens.com*, Technology & Marketing Law Blog (July 18, 2013) (explaining that click-through rates seldom rise above 3 percent), http://blog.ericgoldman.org/archives/2013/07/tenth_circuit_k.htm; *1-800 Contacts*, 722 F.3d at 1244 (implying that a rate less than 7.6 percent could weigh against LOC).

224. *See 1-800 Contacts*, 722 F.3d at 1239–40 (indicating that actual confusion is a major factor in the LOC analysis); *see also* Beebe, *supra* note 8, at 1608.

225. Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 CALIF. L. REV. 351 (2014).

226. *See 1-800 Contacts*, 722 F.3d at 1248–49. *See also* Goldman, *supra* note 223 (indicating that the rates of confusion search engine data reveals will probably be extremely low).

advertising cases, and it has probably destroyed the ability of plaintiffs to bring these claims successfully in the process.²²⁷

IV. CONCLUSION: THE CONTINUED VIABILITY OF IIC

Competitive keyword advertising claims evolved alongside the internet and search engines, but the ruling in *1-800 Contacts* may signal their extinction, at least in the Tenth Circuit. After following the Ninth Circuit's plaintiff-friendly *Brookfield* "diversion" standard for years, the court has ruled on a case it could have easily affirmed in order to create a new, stricter competitive keyword IIC doctrine. Plaintiffs will have to prove a likelihood of IIC with the six *King of the Mountain* factors, paying particular attention to the proof of actual confusion factor.²²⁸ If statistical, that proof must reveal a rate of confusion no less than 7 percent, and the rate must be even higher in the absence of other evidence.

Yet a quality survey indicating more than a 10 percent rate of confusion may not even be enough to win a case since the *1-800 Contacts* ruling allows the Tenth Circuit to accept data from search engines into evidence. Therefore, the number of times search engine users click on an advertisement, when expressed as a percentage of the advertisement's total appearances on the search engine, is admissible in court.²²⁹ Because this percentage is usually extremely low and serves as a cap to the normal rate of confusion, the evidence will probably never prove actual confusion; in fact, it will tend to disprove it.²³⁰ Furthermore, because this type of data exists in most competitive keyword advertising cases, the result is that defendants in Tenth Circuit competitive keyword advertising suits have something like an affirmative defense against a claim of infringement.²³¹ Plaintiffs in Tenth Circuit competitive keyword advertising cases, after a brief period of ease, thus may have a much harder time bringing a successful claim.

227. See Goldman, *supra* note 223.

228. *1-800 Contacts*, 722 F.3d at 1239–40.

229. *Id.* at 1244.

230. MCCARTHY, *supra* note 75, at § 32:189.

231. Goldman, *supra* note 223.