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USING TRADEMARKS AS KEYWORDS:
EMPIRICAL EVIDENCE OF CONFUSION

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I. INTRODUCTION

Since the earliest days of modern Internet search, consumer protection advocates have been concerned about the fact that search engines could manipulate the presentation of information so as to benefit the search engine company at the expense of the user. The major issue was and is that search engine providers are able to present users with search results that are not always optimized to provide the “best” information to consumers but are instead calibrated to maximize revenue for the search engine company. This can occur if a search engine company sells “keywords” to advertisers so that searches using those keywords trigger the appearance of the advertiser’s content in the search results. Traditionally, search engines such as Google had designated search results that were generated as a result of advertising practices as “sponsored” links. These were, at least in theory, distinct from “algorithmic” or “organic” search results generated by algorithms designed to review existing Internet websites and help a user find the content most relevant to the user’s search terms.

Because search engines count on advertising to generate revenue, however, the incentive to maximize profits may take precedence over serving consumers in the best manner. As Google’s founders Sergey Brin and Lawrence Page pointed out in

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their seminal paper proposing the creation of Google, “[t]he goals of the advertising business model do not always correspond to providing quality search to users... [W]e expect that advertising funded search engines will be inherently biased toward the advertiser and away from the needs of the consumers...”1 Brin and Page have not been the only ones to articulate this concern. For example, the European Commission recently served Google with a formal complaint accusing Google of abusing its position as a dominant search engine company by prioritizing its own “Google Shopping” search results over other comparison shopping sites—alleging that “when a consumer enters a shopping-related query in Google’s search engine, Google’s comparison shopping product is systematically displayed prominently at the top of the search results. This display is irrespective of whether it is the most relevant response to the query.”2 Google’s practice therefore may promote its own financial interests at the expense of consumers’ interests in “the most relevant response to a particular query.”3

This article explores the ramifications of such mixed motives in current search engine business models and reports on empirical tests assessing whether current practices are infringing trademarks by causing confusion among consumers. Google and other search engines offer their advertisers the opportunity to select as keywords not just generic terms but also words and phrases that function as trademarks so that advertisements will appear as search results when users search for those trademarks. Search engine companies often profit from selling these trademarks as keywords, even when the advertiser is a third party, and none of these profits are shared with the trademark owners. Some trademark owners may argue that they are effectively compelled to pay to make sure that links to their own websites are prominently displayed when search engine users search for their trademarks rather than potentially cede top search result positions to advertisements for their competitors or other unrelated companies. This article examines whether allowing third parties to use search engine keywords contributes to a likelihood that consumers will be confused into believing that there is a relationship between third parties listed in search engine results and the owner of the trademark that was used in the search engine query.


3. Id.
II. BACKGROUND

A. Trademarks and Brand Equity

The trademarks at issue in this discourse all function to convey a brand’s identity. A trademark is defined as “a word, phrase, logo, or other sensory symbol used by a manufacturer or seller to distinguish its products or services from those of others.”\(^4\) The concept of brand identity, which differentiates products or services of one company from those of another in the minds of consumers, is one of the most important concepts developed in marketing and the law. Marketers define “brand equity” as the difference between the value that brand identity brings to a product or service compared with the value of the same product or service without any brand identity.\(^5\) A brand is said to have achieved brand equity if it is endowed with four vital components that combine to determine the value of the brand. These components are brand awareness, a loyal franchise, positive perceived quality, and positive associations related to the brand. While each of these components is important on its own, it is the combination of all four that yields positive equity. In markets with easy substitutability of products or services, brand identities frequently serve as cues in customer decision-making. In particular, a brand’s equity often increases how often consumers select the brand over competitive products or services.\(^6\) Thus, the strength of brand equity is very important, and building such equity is an investment for trademark owners.

Developing the brand equity that can influence consumer behavior as described above requires time and significant expense. In order to develop positive reputations, strong brands often spend millions of dollars to develop associations that are positive, unique, and strongly held.\(^7\) To be successful, a trademark owner must ensure that its brand is well-recognized in its product category and has a positive reputation. If a brand is not recognized, then it is unlikely to be considered in the potential buyer’s “evoked set of

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choices,” which is the list of brands that come to consumers’ minds when they begin to think about their options for a particular purchasing decision.\(^8\) This investment in brand recognition is undermined when some type of system is used to make an otherwise unconsidered brand come into the evoked set, as in the case of paid search advertising, which is discussed in greater detail below.

Again, a company with strong brand identity will use its trademark to differentiate its products or services from competitors. At the same time, however, competitors might use tactics intended to blur the differences. This strategy is commonly referred to as “associating.” Associative marketing strategies are often used as attempts to confuse consumers’ identification of recognized and successful products or services that have high levels of brand equity with the products and services of other companies.\(^9\) Sponsored search is one example of such an associative marketing strategy in that the greater the brand equity of a trademark, the less likely it is that inferior competitors would come to mind when searching for a brand in the product category. This situation may be exacerbated further when a user searches a specific trademark through a search engine query. To display other brands in search engine results after selling the trademarked term as a keyword to competitors, and to arguably suggest that these other brands are somehow affiliated with or sponsored by the trademark owner, hurts both the sales and equity of the trademark owner.\(^10\)

**B. Search Engines and Sponsored Results**

The Internet is an enormous repository of information of all types. As originally conceived, the idea of an interconnected network of computers (servers) was meant to provide a mechanism whereby documents could readily be stored and retrieved by users

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of the network. As it turned out, the storage of documents and the interconnection of computers were easily accomplished, but finding the desired document proved to be a much more complex problem. The effective retrieval of the desired information presented a unique challenge.

The problem of how to consult such records predates the modern Internet, but for most the use of computer-based search prior to the 1990s was not a fact of daily life. Prior to the 1990s, computer-based search was limited to highly technical and focused systems like those available at large research universities such as, for example, Lexis/Nexis, Dialog, and others. These systems typically searched within discrete databases and were used in technical applications; universities and other research-intensive professional organizations purchased these software systems, their associated databases, and their rights of access.

Beginning in the 1990s, as the Internet became a more widely accessible and publicly useful medium for storing all manner of information, the need for search tools became evident. In the early days of the Internet, users typically knew the name of the document they were looking for and search engines functioned more as locators. These early tools, like their predecessors, did not so much search the Internet as search databases or directories of locations and/or documents. With the tremendous growth in Internet use from the early 1990s onward, and with the attendant huge growth in numbers of websites and documents, there was a clear need for more sophisticated search tools.

Modern search engines are highly sophisticated and flexible tools designed to sift through enormous amounts of information very quickly. Most of these search engines share certain common elements. For instance, they accept the user inputted query, attempt to match any advanced syntax, and check to see if the query is misspelled to recommend more popular or correct spelling variations. They check to see if the query is relevant to other vertical search databases (such as news search or product search) and place relevant links to a few items from that type of search query near the search results. Search engines also gather a list of relevant pages based on the workings of the particular search algorithm that is used by the search engine to locate relevant items. These results are ranked based on page content, usage data, and link citation data. Search engines display the foregoing types

11. See, for example, Tim Berners-Lee & Mark Fischetti, Weaving the Web: The Original Design and Ultimate Destiny of the World Wide Web by its Inventor (Harper-Collins 1999) for a history of Internet development.


13. Vertical search pertains to searching within more specialized (and narrow) databases that might be relevant to the search query.
of results in response to the searcher’s query and are generally referred to as “algorithmic” or “organic” results. Finally, search engines have evolved to generate lists of relevant advertisements to place near the organic search results, where the priority given to a particular advertisement can be as much or more the result of the fee paid by the company that bid on the keyword as it is the result of the keyword’s relevance to the user’s query (depending on the size of the advertiser’s bid).^{14}

The search behaviors of users are not uniform and are often directed toward distinctly different goals. The desire to access a specific document or piece of information is only one of several user goals. As Andre Broder^{15} explains,

[in the web [Internet] context the ‘need behind the query’ is often not informational in nature. We classify web queries into three classes based on their intent: 1. Navigational. The immediate intent is to reach a particular site. 2. Informational. The intent is to acquire some information assumed to be present on one or more web pages. 3. Transactional. The intent is to perform some web-mediated activity.

All three are relevant to this article. Often in navigational search, users desire to reach a particular company’s website. To do so, they may enter a search term representing the industry of interest, but equally likely they may enter the company name itself (i.e., the trade name or trademark). Informational searches may also focus on specific company or brand names, or even on groups of companies, to the extent that the user is specifically seeking information about that company or seeking to compare multiple companies. Similarly, in transactional searches users may wish to enter into a transaction with a particular company, and in order to locate that company’s products or services they may enter the company name as the search term (i.e., the trademark).

The number of web queries, in general, has grown dramatically since 2000, as the Internet has developed into a major commercial channel through which consumers learn about, compare, and purchase all manner of products and services. This use is substantial, and the growth seen in this channel is expected to continue into the future.^{16} The most common mechanisms used by consumers to locate information about products and services are Internet-based search engines, which are widely and freely
available to Internet users. There are nearly 20 billion searches conducted by consumers monthly using the top five search engines. In terms of popularity, in the United States, Google is the search engine market leader (64.5% of searches) followed by Microsoft (20.1% of searches) and Yahoo! (12.7% of searches).

To use a search engine, the user types one or more descriptive words into a search window and then hits a “search” button. An Internet-based search engine then uses a computer algorithm to search the World Wide Web for websites that contain content relevant to the term (or terms) entered into the “search window” by the user. The search engine then presents a list of web pages and web “hyperlinks,” along with brief descriptions (sometimes referred to as abstracts) of those pages. These are presented on a search engine results page. Searches typically result in the creation of multiple search results pages that the searcher can browse through in order to find a particular website. The lower a link appears in the listing, the less likely it will be opened by the user. Thus, it is vital that a listing appear on the first page and near the top of that page. The user may click on a web link in order to visit one of the web pages presented on the search results page by the search engine.

Search engines typically devote a certain amount of screen space at the top of the search results page to sponsored results, often showing two, three, or more abstracts in that portion of the page. According to one research study, the amount of space that popular search engines devote to sponsored results is between 30% and 40% of the search results page. The search engine places

17. DoubleClick, Search Before the Purchase, Understanding Buyer Search Activity as it Builds to Online Purchase (Feb. 2005); Deborah Fallows, Search Engine Users: Internet Searches are confident, satisfied and trusting — but they are also unaware and naïve, Pew Internet & American Life Project (Jan. 23, 2005) (hereinafter “Fallows (2005)”).


19. Id.


22. Percentages are based on total screen real estate available at standard resolution (1024 x 768).
these results on the search engine results page because a third party has agreed to pay the previously described advertising fee to the search engine and not as the result of the search algorithm’s “organic” findings. What this means is that the presence of organic search results visible on the screen is correspondingly diminished. This has a striking impact in terms of both visibility and click-throughs. Internet users pay a significant amount of attention to the top sections of search results pages, and research has shown that as more of this space is allocated to sponsored results, the likelihood of web users clicking on organic links decreases dramatically.

1. Search Engine Revenues

Search engines offer their services at no cost to end-users. In order to do so, search engine companies rely on advertising as their sole or primary source of revenue. Thus, search engines are similar to a great many other digital products wherein the essential digital service is provided for free to users and in return users are periodically shown advertisements. Unlike many other “free” digital products, search engines do not provide the user with a mechanism for paying for search in order to avoid seeing advertising in the course of using the search engine.

Search engine advertising is part of a broader rubric of “search engine marketing” (“SEM”), where the goal is to optimize the placement of the client’s listing (abstract) on the search results page. This article does not focus on various “search engine optimization” (“SEO”) techniques designed to cause a website to appear high among the “organic” or “algorithmic” listings on a search results page, but rather on “search engine advertising” in which advertisers pay search engines directly to cause specified links to appear prominently on a search results page. There are two components to the search engine advertising model: One concerns the process whereby companies bid on “keywords” through an auction. A successful bidder purchases the right to have its company’s abstract appear on the search results page when the user enters that particular keyword or a term that the search engine’s internal algorithms associate with that keyword.


24. Id.

25. For example, in 2014, Google’s advertising revenue was more than $59 billion—approximately 90% of the company’s total revenues. Google, 2015 Financial Tables (https://investor.google.com/financial/tables.html) (showing that $59,634 out of $66,001 billion total revenues came from advertising).

26. In some cases such digital products or services are offered under a business model that has been labeled a “freemium,” wherein the product is provided for free and where the user can pay for either a version that offers additional features or where the user can pay for a version that does not show advertisements.
Keywords are offered and can be sold to more than one bidder. The second part of the model concerns the search engine user’s behavior; upon entering a search term, the search engine typically presents a page to the user that contains some abstracts that are paid placements that appear as a result of the keyword auction. The advertiser pays a fee to the search engine company each time a user clicks on one of these sponsored results (i.e., a cost-per-click model) or performs some other desired action the bidder was hoping would occur (i.e., a cost-for-action model). Thus, the dominant SEM model today does not present advertisements per se, but rather presents listings (abstracts) on the search results page. These “paid listings” are referred to by different terms by different search engines and the nomenclature has evolved over time. Nevertheless, a common term used to describe these listings is “sponsored results” and we use that terminology here.

2. Likelihood of Confusion through SEM

One consequence of the SEM system is that there are numerous instances where trademarks are sold as keywords for third parties’ products and services to be listed as sponsored results. For example, a third party such as 1-800-CONTACTS (a retailer of contact lenses) could bid on the keyword “LENSCRAFTERS” (a strong competitor in the contact lens market), so that when a user conducted a search by entering the term “LENSCRAFTERS” into a search window a paid listing for “1-800-CONTACTS” would appear on the page. Each time a user then clicked on the link for “1-800-CONTACTS,” the search engine company would receive payment. The search engine company is paid for “click-through” regardless of what transpires after the consumer has clicked through to the sponsored site. Some agreements include terms wherein the advertiser pays the search...


29. Here we refer to the notion of a “typical advertisement” that might appear in a digital medium such as a banner ad, or the type of ad that might appear in a print magazine, or even an audio/visual ad as might appear on television.

30. Google now uses the term “Ads” to designate sponsored results. It switched to “Ads” from “Sponsored links” in 2010. Emil Protalinski, Google changes Sponsored links to Ads, TechSpot (Nov. 8, 2010) (http://www.techspot.com/news/41038-google-changes-sponsored-links-to-ads.html). This change may have been caused, at least in part, by “an internal Google study,” subsequently described in the Fourth Circuit’s decision in Rosetta Stone v. Google, Inc., which “reflect[ed] that even well-educated, seasoned Internet consumers are confused by the nature of Google’s sponsored links and are sometimes even unaware that sponsored links are, in actuality, advertisements.” 676 F.3d 144, 160 (4th Cir. 2012).
engine companies based on the actions taken on the advertiser’s site.

Although search engine practices have varied over time, they have at times mandated that advertisers include the search keywords in the title line or summary description of sponsored results. Thus, sponsored results have contained the competitor’s trademark as part of the search listing. There are two important outcomes arising from this advertising method: first, when searching for options within a product category consumers are presented with potential alternative sources for a product or services. Thus, a consumer who is seeking to book a hotel room for an upcoming vacation might enter “hotels” in a search engine and be presented with a listing of organic and sponsored results showing numerous different brands of hotel. However, when searching for a specific brand of hotel, consumers will also be presented with sponsored results for other hotels or for web-based companies that sell hotel rooms. For example, a user who enters “KIMPTON HOTELS” into a search engine might be presented with three types of sponsored results: the actual Kimpton Hotel Company’s website (if Kimpton has paid the search engine to appear in the sponsored results), third-party websites where the user may ultimately book a range of hotel rooms, and the specific websites of competitors. A recent search (on April 15, 2015) for “KIMPTON HOTELS” using the three top search engines (Bing, Google, and Yahoo!) yielded sponsored results that included the websites for Orbitz, TripAdvisor, eTrip, and Magellan Hotels.31

In the first example, the user is searching within a generic category: hotels. But, in the second case, the user is searching for a specific brand within the product category. By presenting sponsored results for other brands, the search engine and the sponsored advertisers that bought that specific brand mark as a keyword are inviting users to be diverted from one brand offering to another. Independent research confirms that when Internet users start searching for a product or service generally, they tend to use generic terms that allow them to explore their options. When they approach the moment of purchase, they start to search using specific trademark terms to locate the brand or brands they are most interested in.32 This is known in the industry as the


“funnel effect” and the ability to exploit the “funnel effect” is what search engines sell to advertisers. In fact, in its keyword advertising promotion, Yahoo! stated that “[y]ou can put your business in front of potential customers at the precise moment they’re searching for what you sell.”

To the extent that this diversion results from consumers’ mistaken belief that the link clicked will lead to the trademark owner’s website or to a website sponsored by or affiliated with that trademark, then, as a factual matter, consumers have been confused. Such confusion could be due to the presence of the trademarked term in the sponsored results, or to the fact that the search engine has published the sponsored result in response to a search for the trademarked term. The latter example bears some explanation: a user may be confused because having typed the trademarked term into the search engine, the user may believe that results are responsive to that search request and that results are ordered in terms of their relevance to the search. Thus, regardless whether the trademarked term appears in the sponsored results listings, the user may nonetheless believe that the highest-ranked result is sponsored by or affiliated with the trademark holder. A user who clicks on a sponsored result believing that the link contained therein will take him to the trademark holder’s website can be said to be confused. There are two types of confusion that are relevant to this discussion, namely ongoing confusion and initial interest confusion. The difference in the type of confusion is determined by the user’s behavior upon arriving at the sponsor’s website.

**Ongoing confusion.** Some users may be oblivious to the fact that they are not at the actual trademark holder’s website or a website that is sponsored by or affiliated with the trademark holder and may continue to conduct their transaction. For example, our hypothetical user who enters a hotel’s trademark in a search engine with the specific intent to reach that company’s website to book a hotel room may instead decide to book a hotel room through a third party and may thereby book a room (1) in the trademark holder’s property at the same or lower price than would normally be offered in booking directly with the hotel company or (2) may book a room in a competitor’s hotel. This user—who had

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34. 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 23:6 (4th ed. 2012) (hereinafter “McCarthy”) (“Infringement can be based upon confusion that creates initial customer interest, even though no actual sale is finally completed as a result of the confusion.”).

35. Both represent a form of “bait and switch” tactic, since the buying decision was affected: case #2 is obvious, but in case #1, the product obtained may not, in fact, be the same as that obtained from the trademark holder directly. In the travel industry, for example, additional services available through an airline or hotel chain directly may not
initially set out to book a room at a particular hotel through that hotel’s website—exhibits ongoing confusion and behavior that is not consistent with his original intention, which was to locate the trademark holder’s website and book a room at one of its hotels.

*Initial interest confusion.* Some users may realize upon arrival at the third-party sponsor’s website that it is not the website of the trademark holder, nor sponsored by or affiliated with the trademark holder, and return to their search results page to seek out the desired website. This user has experienced initial interest confusion in that the confusion was only temporary. Confusion, of either type, is a real possibility given that many consumers may not know the difference between sponsored and non-sponsored links.

For example, first considering certain older research, a Princeton Survey Research Associates study from 2002 concluded that more than 60% of respondents were unaware that search engines accept payment to list certain sites more prominently than others in search results.\(^{36}\) Similarly, a 2003 Context-Based Research Group study concluded that “consumers can’t always discern paid search from pure search results” and “[e]ven well informed or Web-savvy users may not know whether a listing is a paid ad.” This is because for most users of search engines, “[p]aid search disclosures were overlooked in every case.”\(^{37}\) A 2004 Enquiro Search Solutions study, restated in 2006, reports that “30% of the participants couldn’t properly identify the sponsored links on a page” and that this confusion level jumped to 43% for non-Google users.\(^{38}\) A 2005 Pew Internet & American Life Project research study concluded that 62% of consumers cannot differentiate between sponsored and non-sponsored links.\(^{39}\)

More recent developments in how search engines results are displayed include the use of “Carousel Listings” (sequential slide

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\(^{39}\) Fallows (2005), supra note 17.
shows) of sponsored results, as well as the use of “Local Listings” (placed both above and below the organic listings). While these tactics may improve consumers’ search experiences, they do not necessarily reduce their confusion. A 2014 study points out that while the organic listing that appears first still attracts the most click activity, regardless of what new elements are presented, the click activity on those organic listings is still only 32.8% of consumers who reach the results page. The top sponsored results have stood the test of time, with very little change in click-through rates in the nine-year period from 2005 to 2014, suggesting the ability of paid listings to capture not only attention, but also traffic. Results show that the best-performing sponsored results were (1) paid ads for branded searches, (2) paid ads for a non-branded search that exactly met the searchers’ intent, and (3) paid ads combined with an organic listing for a non-branded search.40

Finally, a 2012 SEO Book study in which 1,000 Internet searchers were shown search results pages with between three and four sponsored links and asked, “Does this search result have ads on it?” showed that between 37% and 55% of respondents answered “no” based on the particular search engine results page shown.41 As noted by the researchers: “For most search engines, people are generally unaware of ads vs. organic results if there are no ads in the right column . . . most of these yes/no questions came down to about a 50/50 vote.”42 The opportunity for confusion is clearly present. However, court decisions remain mixed in their opinions regarding initial interest confusion, citing, among other factors, the degree of care exercised by buyers, as well as the increased sophistication of consumers using the Internet. Court decisions notwithstanding, the empirical evidence continues to support the theory that many consumers do not distinguish sponsored from organic results and are therefore prone to confusion.

Several potential consequences arise from this confusion, whether it is ongoing or temporary. First, the search engine company has profited directly from the sale of the trademark term because the company is paid for all click-throughs regardless of the user’s subsequent behavior. Second, diversion often results in consumer frustration, which paradoxically may be directed not at

40. Rebecca Maynes & Ian Everdall, The Evolution of Google Search Results Pages and their Effects on User Behavior (Meditative, Oct., 2014) (http://pages.mediative.com/SERP-Research) (hereinafter, “Maynes & Everdall”). More specifically, the authors state, “[b]y virtue of the fact that searchers are finding it increasingly difficult to predict the location of the most relevant result, they have a tendency to scan through elements more quickly and linearly than before.”

41. For Google, these results are 37% (with sidebar showing results arrayed down the right-hand side of the page) to 46% (no sidebar) and for Yahoo! these results are 40% (with sidebar) to 43% (without sidebar).

the source of the diversion, but at the company that the consumer originally sought. Even if the consumer ultimately purchases at the original company’s website, the consumer may well be in a negative mood at the time of purchase, resulting in a diminution of the company’s brand equity. “If consumers feel that they are blocked from obtaining the necessary information needed to make a commitment to a specific technology or to decide when to make their purchase, they are likely to experience frustration. This frustration during the purchase process is likely to lead to increased purchase deliberation time, delay of purchase, or exiting the market, each of which will help the consumer return to a state of emotional equilibrium” but hurts the brand originally sought. When ongoing confusion or frustration results in a transaction with a competitor, there has been a diversion of trade and monetary loss for the trademark holder.

Of course, search engine companies would likely counter by pointing out that they identify sponsored results as such through the use of labels, although the terms used vary by search engine company and have varied over time. Search engine companies might also note that they “set apart” sponsored results through the use of color shading or the use of small bullet points or other designators to the left of the abstract. Nevertheless, such efforts are weak, vary by search engine and are likely not sufficient to clearly indicate to users the distinction between sponsored results and organic results. In one review, Consumer Reports WebWatch concluded that search engines have made the distinctions between paid and natural results less conspicuous to consumers and thereby increased confusion. For example, one report noted that Yahoo! had changed “once bright red headings” of “sponsor results” to “light gray,” removed hyperlinks to web pages that explained its paid placement and paid inclusion programs, and that its remaining disclosure was “easy to miss.” Since then, Yahoo! has made further changes to its results page that make it more difficult to distinguish between paid and organic results. Yahoo! formerly used bullet points for certain sponsor results and numbering to denote algorithmic results. It has removed those

additional distinctions in what may be a calculated move to confuse more consumers into clicking on the sponsored results.47

III. THE COURTS WEIGH IN

Some trademark owners have responded to sale of their trademarks as keywords by suing search engines and advertisers who use their trademarks. To succeed in the United States, they must prove that third-party use of their trademarks as keywords is likely to cause confusion about the “affiliation, sponsorship, or association” of goods or services.48 As courts around the world consider whether the sale and use of trademarked terms as keywords is trademark infringement, they have increasingly encouraged further factual analysis—most importantly whether sale and use of trademarked keywords is likely to cause confusion. Courts consider a variety of factors in this highly fact-specific analysis. But no consensus has yet emerged as to what factors should be considered in these cases, much less which factors should be considered controlling.

As a preliminary matter, a plaintiff must prove that the use of the trademark is “in commerce.”49 Since 2009, the law “seems settled that the sale and purchase of trademarks as keywords meets the ‘use in commerce’ element of the Lanham Act.”50 Before 2009, district courts in the Second Circuit ruled that a use of trademarked keywords was not a “use” under the Lanham Act because the use was “strictly internal” and was not visible to the public.51 The Second Circuit overturned this position in 2009, bringing the circuit into agreement with the majority of courts by concluding that search engine keyword advertising programs are “use in commerce” because search engines make trademarked keywords available for purchase and display them in the search results.52 It further held that use of the trademark in an internal

47. For this series, see Wouters (2005), supra note 37; Jørgen J. Wouters, Still in Search of Disclosure: Re-evaluating How Search Engines Explain the Presence of Advertising in Search Results, Consumer Reps. WebWatch (Nov. 8, 2004).
48. 4 McCarthy § 23:1.
49. Id. See also, e.g., Rescuecom Corp. v. Google Inc., 562, F.3d 123, 127 (2009).
52. Rescuecom Corp., 562 F.3d at 130; see also, e.g., Network Automation Inc. v. Advanced Sys. Concepts Inc., 638 F.3d 1137, 1144 (9th Cir. 2011); Australian Gold Inc. v. Hatfield, 436, F.3d 1228, 1239 (10th Cir. 2006) (finding a “violation of the Lanham Act”)
software program need not be immune from charges of infringement. This is because keyword programs had often actually suggested the purchase of competitor’s trademarks for purchase as keywords.53 Courts in the European Union (EU) have also concluded that use of a trademark as a keyword is “use . . . in the course of trade.”54

A. Evidence of Confusion

With the “in commerce” element decided, the key question has become whether keyword advertising is likely to cause confusion. In general, courts assess likelihood of confusion by considering several familiar factors. The factors vary slightly by jurisdiction, but generally they include: (1) the strength of the mark, (2) the proximity of the goods, (3) the similarity of the marks, (4) any evidence of actual confusion, (5) what marketing channels were used, (6) the typical degree of care purchasers use when purchasing the particular type of goods or services, (7) whether the defendant intended to confuse consumers, and (8) the likelihood that product lines will expand to directly compete.55

Courts have struggled to apply this framework in the keyword advertising context. So far, they have not spoken with one voice regarding what kinds of confusion are actionable, what factors courts should consider when evaluating confusion, or what types of evidence are most relevant to proving confusion in the keyword advertising context. Defendants in keyword advertising suits (particularly search engines) often settle these cases before they go to trial, which has minimized courts’ ability to clarify the law. For example, in one of the most publicized cases on this matter, Google settled with Rosetta Stone before trial—a trial that might have allowed the finder of fact to evaluate proof of confusion in keyword advertising cases.56 The parties settled after the Fourth Circuit held that summary judgment was not appropriate in the case because Rosetta Stone had proffered sufficient evidence to create a genuine issue of material fact as to whether Google was causing

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53. Rescuecom Corp., 562 F.3d at 129-30.
consumer confusion by using trademark terms to trigger keyword advertising for parties other than the trademark owner.\textsuperscript{57} This settlement benefited the search engine because it meant that potential plaintiffs must continue to develop their own proof factors without further specific guidance from the courts. As search advertising accounts for almost 95\% of search engines’ revenues, search engines have enough resources to fight these cases vigorously, whereas plaintiffs are less likely to be able to afford extended legal battles.\textsuperscript{58} Unsurprisingly, after the Rosetta Stone settlement, several keyword advertising cases against Google in the United States also settled, and courts have not resolved the many questions the case left unanswered.\textsuperscript{59}

First, courts have not defined the boundaries of initial interest confusion. In fact, some courts and scholars have debated whether initial interest confusion is a valid cause of action online,\textsuperscript{60} because it “can be dispelled at the speed of a mouse click.”\textsuperscript{61} Among courts that recognize initial interest confusion in keywords cases, there is no set standard of proof accepted by all courts, with some courts ruling that even a brief diversion is enough to constitute initial interest confusion and others requiring a more significant time interval.\textsuperscript{62}

\textsuperscript{57} Rosetta Stone, 676 F.3d 144 (4th Cir. 2012).

\textsuperscript{58} Id. Google is estimated to have earned over $50 billion in revenues from their search advertising program in 2013. Irene Sulaiman, Proving a Likelihood of Confusion Remains an Uphill Battle for Trademark Owners in Keyword Advertising Cases, Berkeley Tech. L. J. The Bolt (Apr. 20, 2014) (http://btlj.org/2014/04/20/proving-a-likelihood-of-confusion-remains-an-uphill-battle-for-trademark-owners-in-keyword-advertising-cases/).

See also Matthew Saltmarsh, Google Will Sell Brand Names as Keywords in Europe, NYTimes.com (Aug. 4, 2010), http://www.nytimes.com/2010/08/05/technology/05google.html?emc=eta1&r=0.


\textsuperscript{60} Compare J.G. Wentworth S.S.C. L.P. v. Settlement Funding LLC, No. 06-0597, 2007 WL 30115 at *7-8 (E.D. Pa. Jan. 4, 2007) (reasoning that, because of “the separate and distinct nature of the links created on . . . search results pages . . . , potential consumers have no opportunity to confuse defendant’s services, goods, advertisements, links or websites for those of plaintiff” and concluding that “initial interest protection does not apply” in keyword cases), with Network Automation, 638 F.3d at 1149 (assuming that initial interest conclusion is sufficient for trademark liability in a keyword advertising case, but noting that “when we examine initial interest confusion, the owner of the mark must demonstrate likely confusion, not mere diversion”) and 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229 (10th Cir. 2013) (recognizing the validity of initial interest confusion but finding that plaintiffs had failed to prove it). See also Trademarks as Keywords, 505 (listing articles) (noting that “articles and notes have increasingly focused on whether the initial interest confusion doctrine fits in the online world”).

\textsuperscript{61} Hogan & Smith, supra note 50, at 3.

\textsuperscript{62} Compare Morningware Inc. v. Hearthware Home Prods. Inc., 673 F. Supp. 2d 630, 637 (N.D. Ill. 2009) (concluding that although consumers may not be confused when they reach a competitor’s website, “if a user searches for the [trademark] in Google,” and a competitor’s “advertisement appears,” and the advertisement “thus ‘misleads and/or confuses consumers, the result is actionable initial interest confusion” and the fact that
Initial interest confusion is highly controversial in Europe. The European Union’s highest court, the Court of Justice of the European Union (“CJEU”), has not spoken explicitly on whether initial interest confusion is actionable under EU law. But in *Interflora v. Marks & Spencer*, a dispute concerning Marks & Spencer’s use of INTERFLORA as a keyword in Google Adwords, the High Court of Justice of the United Kingdom (the court of appeal) recently said, “In our judgment it is not helpful to seek to import the doctrine of initial interest confusion into EU trade mark law, at least so far as it applies to the use of a sign the same as or similar to a trade mark as a keyword in an Internet referencing service.” The court concluded that “initial interest confusion is . . . an unnecessary and potentially misleading gloss on the tests the [Court of Justice] has articulated and we think it should perform no part of the analysis of our national courts in claims of the kind before us.”

But traditional justifications for trademark law support the validity of initial interest confusion online. The doctrine protects consumers from bait-and-switch tactics, which are used to draw consumers to products in which they are not interested. It also prevents companies from capitalizing on their competitors’ goodwill in the ever-growing world of online sales. When consumers click through to websites because they are confused about the source and sponsorship of the sites, they are confused as a factual matter, their time is wasted, and the companies they seek to patronize potentially lose sales. The same protections for consumers and companies that exist in the brick-and-mortar world are necessary online, and just as consumers do not like to end up at the wrong store, they do not like to end up at the wrong website.

Second, courts have been inconsistent in enunciating which factors should be considered in keyword advertising trademark cases. This area is evolving, but seems to be trending toward a fact-specific analysis and away from any rigid or theoretical...
For example, the Ninth Circuit initially focused on a subset of factors—the “Internet troika”—when evaluating trademark infringement on the Internet. Those factors were the “appearance of the advertisements and their surrounding context,” the “similarity of the marks,” and “the shared use of a ubiquitous marketing channel.” In 2011, the circuit rejected that approach, emphasizing that courts should be “acutely aware of excessive rigidity when applying the law in the Internet context; emerging technologies require a flexible approach.” “Depending on the facts of each specific case arising on the Internet,” the court held, other factors may emerge as more illuminating on the question of consumer confusion.” In that case, the court found that the “most relevant factors” were “1) the strength of the mark; 2) the evidence of actual confusion; 3) the type of goods and degree of care likely to be exercised by the purchaser; and 4) the labeling and appearance of the advertisements and the surrounding context on the screen displaying the results page.” Similarly, in Rosetta Stone, although the Fourth Circuit encouraged courts to apply the full traditional multi-factor likelihood-of-confusion test in keyword advertising cases, it found that the district court had not erred by limiting its analysis to (1) intent, (2) actual confusion, and (3) the consumers’ sophistication, as there is no “hard and fast rule” requiring courts to analyze the same factors in every case.

One factor that courts have identified as important is what keywords have been purchased—in particular, how clearly keywords are associated with a particular brand. Customers who search for a strong mark are “likely searching for [the plaintiff’s] products in particular.” As discussed above, advertisers use trademarked keywords to exploit the “funnel effect”—customers’ tendency to use generic terms when they are exploring their options but specific brands as they approach the moment of

66. Mayberry & Brownlow, supra note 50, at 1398 ("[T]here seems to be general agreement that district courts should consider the list of factors to be non-exhaustive, and that the factors should not be applied mechanically. The Ninth, Fourth, and Tenth Circuits all have stressed that the weight given to the factors depends upon the context . . . ").

67. See Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp., 174 F.3d 1036 (9th Cir. 1999)

68. Id.

69. Network Automation Inc., 638 F.3d at 1144 (citing, inter alia, Jonathan Moskin, Virtual Trademark Use—The Parallel World of Keyword Ads, 98 TMR 873 (2008)).

70. Id.

71. Id.


73. Network Automation, 638 F.3d at 1147 (citing Playboy Enters., Inc. v. Netscape Commc’n’s Corp., 354 F.3d 1020,1028) (explaining that expert reports showing that certain terms had strong secondary meaning suggested that users searching for those terms were looking for a particular company).
purchase. The difference between generic and specific searches becomes more pronounced when a mark is distinctive. A mark is distinctive if “consumers immediately and consistently associate [it] with specific goods and services.”74 Distinctive marks generally do not merely describe the good or service the business provides, but descriptive terms can be distinctive if they acquire secondary meaning.75 A mark is famous if it is distinctive and “has been used and heavily advertised or widely accepted in the channels of trade over a long time.”76 It is reasonable to assume that, when a consumer searches for a distinctive and/or famous mark, it is less likely the consumer is looking for information regarding competitors’ products, and one would expect that sponsored links are therefore more likely to be confusing. The more unique a mark is, the less likely it is that an Internet user will enter it as a search term when searching for a category of goods or searching for a term in a generic, dictionary sense.

The Ninth Circuit recognized this fact in Network Automation, finding that the strength of the plaintiff’s mark is among “the most relevant factors” in keyword cases.77 Applying Network Automation, the U.S. District Court for the Southern District of California found that the strength-of-the-mark factor favored the defendant when the plaintiff’s name, “Escondido Metal Supply,” was not “inherently distinctive” or “fanciful or suggestive” but was merely “a combination of a geographic term and a description of a category of goods” that showed “an obvious connection to the goods to which it refers.”78 This makes sense. Consumers searching for “city + service” could easily be searching for a variety of businesses when the mark is not famous. On the other hand, in Rosetta Stone the Fourth Circuit held that, in that case, the strength of the mark was of limited value because “in the nominative use context [i.e., when an advertisement expressly references another company’s goods or services], the defendant is not passing off its products under the plaintiff’s mark but rather is using plaintiff’s mark to refer to plaintiff’s own products.”79

Other important factors include whether the mark is used in the resulting sponsored link advertisements, the appearance of sponsored link advertisements on a search results page and their proximity to the search terms and other elements of the page design, and the intent behind connecting certain types of ads with

75. Id.
76. Id.
77. Network Automation, Inc., 638 F.3d at 1154.
79. Rosetta Stone, 676 F.3d at 154-55.
certain types of searches. But in the courts that have considered whether keyword advertising is likely to cause confusion, the “one factor that receive[d] the most play in all the cases . . . was the presence or absence of actual confusion.” As discussed below, courts have varied in terms of what evidence they consider as proving actual confusion.

European courts have also developed a fact-heavy analysis for proving likelihood of confusion. Courts “assess, on a case-by-case basis, whether the use . . . affects the functions of the trade mark.” Whether a mark’s function is adversely affected “depends in particular on the manner in which the ad is presented.” If “the ad does not enable normally informed and reasonably attentive [I]nternet users or enables them only with difficulty, to ascertain whether the goods or services referred to in the ad originate from or are connected with the proprietor of the mark or, on the other hand, from a third party,” the trademark is infringed.

Third, courts have not been clear about what evidence plaintiffs must produce to prove actual confusion—arguably the most important factor in the likelihood-of-confusion analysis in keyword advertising cases. Typically, this question has been addressed in the context of litigation through empirical findings. Surveys have “played a prominent role” in proving actual confusion, as has anecdotal evidence. For example, in Rosetta Stone, the Fourth Circuit found that “survey and anecdotal evidence of actual confusion in connection with [the] Adwords program” were sufficient to support a finding of liability. There, the court reviewed “deposition testimony of five consumers who inadvertently bought counterfeit” products, evidence that Rosetta Stone had received 123 complaints from consumers who accidentally bought counterfeits, evidence of “various in-house studies conducted by Google ‘to analyze user confusion (if any) associated with ads using [trademark] terms,’” including one study of reactions to sponsored links with a trademark in the text or title which concluded that “94% of users were confused at least once,” testimony of two in-house Google trademark attorneys who were shown a search results page for “Rosetta Stone,” and were “unable to determine without more research which sponsored links were authorized resellers of ROSETTA STONE products,” and an expert witness’s consumer confusion survey report showing a 17% net

80. Hogan & Smith, supra note 50, at 2.
81. Mayberry & Brownlow, supra note 50, at 1398.
83. Id.
84. Id.
85. Mayberry & Brownlow, supra note 50, at 1398.
86. Rosetta Stone, 676 F.3d at 156-60.
confusion rate, which the court called “clear evidence of actual confusion for purposes of summary judgment.” In that survey, consumers viewed a Google results page generated by the search term “Rosetta Stone,” and answered the questions, “Which link or links if any do you think sells Rosetta Stone language software products?; “Of the links you just mentioned, which link or links, if any, are a Rosetta Stone company Web site?” and “Of the links you mentioned, which link or links, if any, are endorsed by the Rosetta Stone company?” The court found that a jury relying on this evidence could reasonably find likelihood of confusion.

But minimal evidence of actual confusion is not enough to establish the factor and can even weigh against a finding of likelihood of confusion. In 1-800 Contacts v. Lens.com, the Tenth Circuit determined that the plaintiff could not prove a likelihood of (initial interest) confusion because the search engine’s own data showed that only twenty five Internet users (1.5% of the total number who viewed the advertisement) clicked on its competitor’s sponsored link, and plaintiff’s own survey showed a maximum of 7.4% user confusion. The Southern District of California has also stated that showing a single case of confusion is not sufficient to prove likelihood of confusion and that even if confusion were more substantial, its effects must be proven harmful to the brand mark owner.

**B. Different Standards for Search Engine and Advertiser Liability**

Numerous courts have found that advertisers that buy and use others’ trademarks as keywords may be liable for trademark infringement as a matter of law and increasingly allow evidence on the likelihood of confusion. On the other hand, proving a likelihood of confusion case against the search engine that sold a trademarked term to the advertiser as a key word remains an “uphill battle.”

Several foreign courts have ruled that as long as search engines remain neutral in terms of how keyword purchasers utilize

87. Id.
88. Id.
89. 722 F.3d 1229, 1242 (10th Cir. 2013).
92. Sulaiman, supra note 58.
the marks, then the search engines are protected against trademark suits. The CJEU has concluded that search engines do not use the marks they sell as keywords in their own commercial communications and are not liable for trademark infringement in keyword advertising cases. In 2010, the CJEU dismissed four important cases that identified Google as a trademark infringement defendant because of its keywords and search advertising programs, opining that the search engine company provides technology services to advertisers who then are responsible for how they utilize that technology. The Court exempted Google from liability going forward as long as the search engine remained passive in how the advertisers used the trademarks. The Court stated that “creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign.” In 2013, the Australian High Court also determined that Google is not liable for the way in which keyword purchasers use competitors’ branded marks. The decision was partially based upon the fact that Google did not benefit from the purchasers’ usage behavior, but only from selling the keywords. The court also stated that the evidence against Google “never rose so high as to prove that Google personnel, as distinct from the advertisers, had chosen the relevant keywords, or otherwise created, endorsed, or adopted the sponsored links.”

Commentators who assert that these decisions mean that “Google has won the trademark and keyword advertising battle, paving the way for the company and its competitors to continue selling trademarks as keywords, unfettered and without legal consequence . . . exaggerate[d]” their significance. The decisions were based on factual determinations that the search engine was neutral as to how advertisers used the keyword technology—determinations that, as discussed below, are questionable. In the United States, the legal consequences of selling trademarks as keywords are even less settled.

95. Id.
96. Id.
98. Id.
99. Id.
In the United States, courts apply the same test to determine likelihood of confusion regardless of whether the defendant is an advertiser who purchased a trademarked keyword or a search engine who sold it.\textsuperscript{101} So far, no court has found a search engine liable for trademark infringement for keyword advertising, but that may be the result of the litigants’ willingness to settle before judgment is rendered, and not because courts have refused to find search engines liable as a matter of law.\textsuperscript{102} In fact, in Rosetta Stone, the Fourth Circuit overturned a district court’s holding that the assertion of trademark liability was inapplicable because “there [wa]s no evidence that Google [wa]s attempting to pass off its goods or services as Rosetta Stone’s.”\textsuperscript{103} The Ninth Circuit concluded instead that “there is sufficient evidence in the record to create a question of fact . . . to preclude summary judgment.”\textsuperscript{104} Importantly, the Fourth Circuit held that “[m]ore than just source confusion is at issue in an infringement claim” and emphasized that confusion as to “sponsorship of the goods” can give rise to a claim under the Lanham Act.\textsuperscript{105} The court ultimately remanded so that the lower court could consider evidence on likelihood of confusion.\textsuperscript{106}

Some plaintiffs may have been successful in reaching meaningful settlements with search engines in keyword advertising cases. After the Rosetta Stone settlement, for example, Rosetta Stone general counsel Michael C. Wu was quoted as saying that he was very pleased with this settlement, that it was “a significant victory for consumer protection, and it goes a long way toward advancing our goal to strengthen the Rosetta Stone brand and trademarks around the world.”\textsuperscript{107} And although the specific terms of the settlement are confidential, Rosetta Stone may have been successful in getting Google to agree to stop using its mark in keyword advertising—a recent search for “Rosetta Stone” revealed

\textsuperscript{101.} See Rosetta Stone, 676 F.3d at 160.
\textsuperscript{104.} Rosetta Stone, 676 F.3d at 160.
\textsuperscript{105.} Id. at 157 (quoting PETA v. Doughney, 263 F.3d 359, 366 (4th Cir. 2001)) (emphasis added by the court).
\textsuperscript{106.} Id.; see also Rescuecom Corp. v. Google, Inc., 562 F.3d 123 (2d Cir. 2009) (noting that the court had “no idea” whether plaintiff could prove likelihood of confusion and remanding for further proceedings).
no advertising results other than Rosetta Stone’s official website.\footnote{Search results, “Rosetta Stone,” Apr. 14, 2015; \textit{see also} Eric Goldman, \textit{American Airlines Sues Yahoo for Selling Keyword Advertising}, Tech. \& Marketing L. Blog (Oct. 20, 2008) (noting that, shortly after American Airlines settled with Google, Google searches for American’s trademarks did not bring up any advertising results).}

Search engines are not neutral in the keyword advertising context—they are paid based on the number of consumers who click through to advertisers’ websites. And search engines have adopted alternative pay-per-action models whereby their compensation is dependent upon the actions that users perform on an advertised website rather than simply paying for clicks.\footnote{See, \textit{e.g.}, Christine Laubenstein, \textit{What Is Cost Per Action Advertising?}, WordStream (Mar. 17, 2010), http://searchengineland.com/google-launches-pay-per-action-ads-10772; http://www.wordstream.com/blog/ws/2010/03/17/cost-per-action-advertising#. Michael Helft, \textit{Google Tests an Ad Idea: Pay Only for Results}, NYTimes.com (Mar. 20, 2007) (http://www.nytimes.com/2007/03/21/business/media/21google.html?ref=business&).} Google, for example, has developed a cost-per-acquisition program in which Google’s revenues increase along with advertisers’ conversions of customers. Yahoo! has also experimented with a similar model in its search advertising program.\footnote{See, \textit{e.g.}, Mohammad Mahdian, \& Kerem Tomak, \textit{Pay-per-action model for online advertising}, Proceedings of the First International Workshop on Data Mining and Audience Intelligence for Advertising (ADKDD, Aug. 2007).} Yahoo!, in fact, pioneered the “cost per lead” model in 2013 in order to provide qualified leads to clients who pay for this information rather than simple pay per click results.\footnote{See, \textit{e.g.}, Kris McCaslin, \textit{Yahoo Launches New Cost-Per-Lead Advertising}, WebProsDallas (Mar. 4, 2013) (http://www.webprosdallas.com/search-engine-news/yahoo-launches-new-cost-per-lead-advertising/).} This increases search engines’ incentives to funnel consumers to advertisers’ websites and may be seen as circumstantial evidence of intent to cause confusion in later cases. Search engines are businesses, not charities, and a significant portion of their revenue comes from keyword advertising. Search engines are therefore designed to get people to click on one part of their search results page—the advertisements—rather than on another part of their search results page—the website for which consumers are actually searching. Courts have also emphasized the importance of the design and layout of the search results page for establishing likelihood of confusion.\footnote{\textit{Network Automation, Inc.}, 638 F.3d at 1154.} And search engines, not advertisers, decide how search results appear. They pick advertisements’ font size, coloring, and labeling, and, as discussed above, they have chosen to use layouts and designs that have been demonstrated to confuse consumers.\footnote{\textit{See supra} note 30.} In some instances, they have even required advertisers who purchase trademarked terms as keywords to use...
those trademarks in the text of their advertisements, a tactic studies have shown increases consumer confusion. Search engines have also proactively assigned trademarked keywords to passive third-party competitors through “broad match” programs. For popular brands, on the other hand, it would be unnecessarily expensive and prohibitively complicated to go after all the advertisers that use their trademarks separately. For brands that are most popular, and thus most likely to be the subject of attempts to exploit or free ride on their popularity, it may be cost prohibitive to bring separate actions against numerous advertisers who are all buying the brand’s mark as a keyword and causing consumer confusion in the same way. Indeed, if it is the search engine that is responsible for setting up the design of the web page in a way that contributes to and exploits the resulting confusion, then there may be good reason to hold the search engine accountable. Consumers, after all, may not be conscious of (or may not be able to accurately report) whether they are being confused by the text that a specific advertiser has selected for the sponsored link or the layout of the results and the act of seeing a sponsored link in response to a particular search.

The Fourth Circuit’s opinion in Rosetta Stone acknowledged that search engines have an incentive to create confusing advertisements. In evaluating whether Google intended to confuse, the Fourth Circuit reviewed evidence that Google had made a conscious decision to allow the use of trademarks in its keyword advertising program even though it was aware of “significant source confusion among Internet searchers” when trademarks were used in search advertising, out of a “largely financial” motive. The court concluded “that a reasonable trier of fact could find that Google intended to cause confusion in that it acted with the knowledge that confusion was very likely to result from its use of the marks.”

With the advent of pay-per-action compensation, it is even clearer that search engines are not neutral in terms of how advertisers utilize others’ brand marks. Search engines have a financial incentive to suggest ways in which to utilize these marks in order to increase their own revenues. Thus, now is a ripe time to re-examine whether likelihood of confusion studies can establish the significant levels of confusion that are required to prove trademark infringement by search engines.

114. See Rosetta Stone, 676 F.3d at 151.
116. Rosetta Stone, 676 F.3d at 155-56.
117. Id. at 156.
IV. EMPIRICAL STUDIES

A. Overview

Two field studies were conducted to determine the likelihood of consumer confusion: (1) when trademarks are placed in sponsored results and (2) what impact the placement position of sponsored links on the search results page has on the likelihood of consumer confusion.\textsuperscript{118} Confusion as to source and affiliation were measured. The two experiments were conducted using AMERICAN AIRLINES as the stimulus tested, and the studies were done using Google and Yahoo! searches, respectively. Both experiments were conducted in order to develop evidence for a lawsuit brought by American Airlines against Google and Yahoo!.\textsuperscript{119} The experiments employed essentially the same methodology with some minor variations as detailed below.

AMERICAN AIRLINES is a brand that has high equity within its product category and is thus a good example of the issues at hand. As noted above, a brand is said to have achieved equity if it is endowed with four vital components that combine to determine the value of the brand. These components are (1) brand awareness, (2) a loyal franchise, (3) positive perceived quality, and (4) positive associations related to the brand. While each of these components is important on its own, it is the combination of all four that yields positive equity.\textsuperscript{120} AMERICAN AIRLINES is a brand that has had positive reviews in all four components of equity. At the time of this study, the AMERICAN AIRLINES brand was listed in the Global 250 of the world’s best brands.\textsuperscript{121} In fact, in 2010 American Airlines won multiple industry and consumer awards, including North America’s Leading Airline and U.S. Traveler’s Choice Award for best international airline.\textsuperscript{122}

\textsuperscript{118} The first experiment was conducted in 2008 by NERA Economic Consulting. The second experiment was conducted in 2009 by Mind/Share, Inc. Despite the passage of time, the relevance of the data remains high in 2015 (see Maynes & Everdall, supra note 40, and Wall, supra note 42).

\textsuperscript{119} In the interest of disclosure, the authors have served as, respectively, outside consultants to or attorneys for American Airlines, but all content contained in this article is drawn from publicly available sources. American Airlines has not played any role in the creation of this article, and has not approved or endorsed the content of this article. The views expressed herein are solely those of the authors and do not reflect the views of American Airlines.

\textsuperscript{120} Aaker (1991), supra note 5.


\textsuperscript{122} American Airlines, Awards and Recognition, AA.com (http://www.aa.com/i18n/amrcorp/corporateInformation/facts/awards.jsp#twenty10).
Independent sources that determine brand strength rankings as part of their business also attest to the strength of the AMERICAN AIRLINES brand. For instance, in a year in which top competitors United Airlines and British Airways fell significantly in brand value rankings, American Airlines had the second highest brand value of any airlines brand. Despite a down year for the entire airline industry, AMERICAN AIRLINES held steady on the BrandFinance “Global 500” list of the world’s top brands, ahead of well established brands like VISA and MARRIOTT.\textsuperscript{123} American Airlines had more than 60 million members in its customer loyalty program, AAdvantage, accounting for nearly 15% of airline loyalty program members worldwide.\textsuperscript{124}

Having established AMERICAN AIRLINES as a brand endowed with high equity, we now turn to a more general description of the studies. We describe the methods and interview procedures first and then provide descriptions of the stimuli used in each experiment along with the results obtained with those stimuli.\textsuperscript{125}

\textbf{B. Methodology}

The research designs reported here followed generally accepted practice in studies of potential trademark confusion.\textsuperscript{126} The studies were conducted using a double-blind procedure such that neither the respondents nor interviewers were aware of the actual purpose of the study. In addition, “filler” questions were used to indicate to respondents that there were additional potential matters of concern to the researchers other than just one particular search engine or one particular brand or one particular product category.

The sampling procedures used followed standard procedures in research concerning potential consumer trademark confusion.\textsuperscript{127} For this product category, the relevant population was defined as adult consumers 18 years or older in the United States who use search engines, who use the Internet to purchase products in the product category of the trademark in question, and who have in


\textsuperscript{124} Mintel International Group, Airlines – International – June 2009, the Major Players Section.

\textsuperscript{125} The studies are provided in the Appendices appearing at the end of this article. The studies are described more generically herein in order to talk about the general issues rather than a specific case. The data were collected as part of litigation and are used with permission. We thank NERA for making the data available for this article.


\textsuperscript{127} Id.
the past or plan in the future to purchase those products and services. Age and gender were matched to U.S. census demographics and to product category usage. Interviews were conducted in mall interview facilities that were equipped with appropriate computer equipment and that were dispersed across the United States.

Interviews were conducted in two parts: first, screener questions were asked that would determine whether or not a prospective respondent was qualified to participate in the research. Second, the main questions of the study were asked only of those prospective respondents who had qualified to participate in the research. Interviews were conducted by trained interviewers in appropriate mall facilities located in the cities used in the research. All of the information collected from respondents was entered into a computer system by the interviewer using a computer-assisted personal interview (“CAPI”) system. The stimulus pages that were shown on the respondent’s computer monitor were loaded through a web browser window as they would appear normally when using a search engine. When the opening search page appeared on the respondent’s monitor, a card showing the trademark term was handed to the respondent and he or she was asked to type in the search term exactly as it appeared on the card. The search results page remained visible on the respondent’s computer screen for the remainder of the interview.

Respondents were instructed to look at the search results page as they would normally. After viewing the page, the respondent was first asked: “Which link or links, if any, do you think would take you to an American Airlines company website?” Interviewers recorded each of the links pointed to and/or identified verbally by the respondent. The interviewer then asked the respondent to: “Now please look at the links that you did not mention. Which link or links, if any, do you think are endorsed by American Airlines?” Respondents were then asked follow-up questions

128. Horrigan (2008), supra note 16. According to the United States Census Bureau there are more than 235 million adults 18 years of age or older in the United States (http://quickfacts.census.gov/qfd/states/00000.html).

129. Eight cities were used in Experiment 1 and nine in Experiment 2, these included the six regions into which the trademark holder divides the United States and included those cities in which the bulk of the company’s business is conducted.

130. Appropriate randomization of stimulus conditions and question orders was accomplished by the CAPI system.

131. The Court of Appeals for the Fifth Circuit has used the terms approved, sponsored, and endorsed interchangeably in evaluating claims of trademark infringement. Elvis Presley Enters., Inc. v Capece, 141 F.3d 188 (5th Cir. 1998); Pebble Beach Co. v. Tour 18 I, 550 F.3d 465 (5th Cir. 1998); Bd. of Supervisors for La. State Univ. Agric. Mech. College v. Amack Apparel Co., 155 F.3d 526 (5th Cir. 2008); see also Rosetta Stone, 676 F.3d at 159 (holding that a survey designed to test whether “Google 'endorsed' a Sponsored Link” provided admissible evidence of trademark confusion). In the event that respondents asked
concerning why they had chosen a link as one that would either take them to an American Airlines’ website or as one that was endorsed by the company. Responses to these follow-up questions were recorded verbatim by the interviewer.

C. Experiment 1

1. Stimuli Tested

The first experiment tested two stimulus conditions, each of which represented naturally occurring search results pages produced by using the search engine being tested (i.e., Google). In the first test condition (Test 1), the search result page showed one sponsored result in the first position followed by ten organic results and five sponsored results shown in the upper right-hand position on the search results page. The sponsored result shown in the top left position on the page contained the trademark term that had been entered into the search engine. The organic results showed three listings that were not owned or affiliated with American Airlines: one was a Wikipedia site (approved of by American Airlines), another was a news organization, and the third an industry rating site. These links all contained the trademark term. Test 1 used a page generated by an actual user search for the trademark term.

In the second test condition (Test 2) a search results page was used that showed two sponsored results (that did not contain the trademark term) in the first two left-hand positions on the page just above the organic results. This page also showed four sponsored results on the upper right-hand portion of the page. The organic results were the same as in Test 1. In contrast to Test 1, the sponsored results shown in the top two left-hand positions of the Test 2 page showed the names of two competing airlines. As with Test 1, the organic results showed three listings that were not owned or affiliated with the trademark holder: one was a Wikipedia site (approved of by American Airlines), another was a news organization and the third an industry rating site. These links all contained the trademark term. Test 2 was a page generated by an actual user search for the AMERICAN AIRLINES trademark.

As is typically the case in studies conducted for the purpose of trademark litigation to ascertain the likelihood of consumer confusion, control stimuli were also used. Control 1 showed the ten

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for clarification of the term “endorsed,” interviewers provided the following response: “Which link or links, if any, do you think are approved of by American Airlines?”

132. Experiment 1 was conducted by Dr. Kent Van Liere of NERA Economic Consulting.

133. These showed the names of two other companies in the same product category as the trademark holder.
organic results as they appeared on the Test 1 but with all of the sponsored results removed. Similarly, the second control stimulus (used for Test 2) was a search engine results page that showed only the organic results as they appeared on the Test 2 results page. As noted earlier, respondents were asked to look at the test stimuli and to identify which link or links, if any, would take them to American Airlines company websites and also to identify the link or links that were endorsed by or affiliated with American Airlines. A respondent was counted as confused if he or she identified any sponsored links in response to these either of these two questions. Any respondent in the control conditions who identified one of the three organic links as a link that would take him or her to an American Airlines website was counted as confused.134 As is typical in trademark litigation matters, net confusion was measured as the difference between test and control levels of confusion.

2. Results

Two hundred respondents were interviewed in each of the test and control conditions for a total of 800 completed interviews. For Test 1, 54% of respondents (108 respondents) were confused and believed that the trademark holder was either the source of or endorsed at least one of the sponsored links. For Control 1, 23.5% (47 respondents) of the 200 respondents were confused as to elements of the search results that were not at issue in the case; namely, the presence of the trademark term in the context of organic results. The net confusion rate for Test 1 was calculated by subtracting the confusion rate found in Control 1 from the confusion rate found in Test 1 and yields a statistically significant net confusion rate of 31.5%.135 Test 1 provides empirical support to the notion that when sponsored results contain a trademark term, respondents are significantly more confused than respondents in the control condition, where the trademark term appeared in an unrelated organic result.

134. Respondents who identified one of the two “news” links as being endorsed by the trademark holder were also counted as confused. The third organic link led to a Wikipedia page endorsed by the trademark holder.

135. Unless otherwise indicated, all findings reported here were statistically significant ($p < .01$) using a z-test for the comparison of two proportions.
Table 1: Summary Results of Test 1

<table>
<thead>
<tr>
<th>Source Confusion (&quot;Takes To&quot; Question)¹³⁶</th>
<th>Confusion as to Affiliation (&quot;Endorsed&quot; Question)¹³⁷</th>
<th>Total Confusion¹³⁸ (Source or Affiliation)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Test Stimulus 1 (N = 200)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>34.0% (68)</td>
<td>23.5% (47)</td>
</tr>
<tr>
<td>Control Stimulus 1 (N = 200)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>13.0% (26)</td>
<td>11.5% (23)</td>
</tr>
<tr>
<td>Net Confusion</td>
<td>21.0%</td>
<td>12.0%</td>
</tr>
</tbody>
</table>

Twenty-nine percent of respondents (58) were confused in Test 2, and believed that the trademark holder was either the source of or endorsed at least one of the sponsored links. For Control 2, 9% of respondents (18) were confused as to elements of the search results that were not at issue in this case. This is the overall rate of generalized confusion or the measure of “background noise.” The net confusion rate for Test 2 was calculated by subtracting the confusion rate found in Control 2 from the confusion rate found in Test 2 and yields a significant net confusion rate of 20%. Test 2 shows that even when sponsored results do not contain the trademarked term but do contain the name of a company in the same product category as that of the trademark holder, respondents are significantly more confused than respondents in the control condition.

¹³⁶ Z = 5.1, p < .00001.
¹³⁷ Z = 3.2, p < .0007.
¹³⁸ Z = 6.8, p < .00001.
Table 2: Confusion Levels for Test 2

<table>
<thead>
<tr>
<th>Source Confusion (&quot;Takes To&quot; Question)(^{139})</th>
<th>Confusion as to Affiliation (&quot;Endorsed&quot; Question)(^{140})</th>
<th>Total Confusion(^{141}) (Source or Affiliation)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Test Stimulus 2 (N = 200)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>19.5% (39)</td>
<td>13.0% (26)</td>
<td>28.5% (57)</td>
</tr>
<tr>
<td>Control Stimulus 2 (N = 200)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4.5% (9)</td>
<td>5.0% (10)</td>
<td>8.0% (16)</td>
</tr>
<tr>
<td>Net Confusion</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15.0%</td>
<td>8.0%</td>
<td>20.0%</td>
</tr>
</tbody>
</table>

3. Additional Analyses

Additional analysis revealed that when the trademark term is present in search results that are not relevant to the user’s search, whether or not these appear as sponsored or organic results,\(^{142}\) users are significantly more confused. That is to say, users will click on links contained in abstracts that are “irrelevant” to their search in that the links lead to websites other than those owned or endorsed by the trademark holder. Thirty-eight percent of respondents were confused as to source and/or affiliation when the trademark term appears in such irrelevant results, while only 18.3% are confused when the trademark term does not appear. Similar results were obtained when comparing the two test conditions and the two control conditions with each other; respondents are significantly more likely to show confusion when the trademark is present in test conditions (Test 1 = 54.0% v. Test 2 = 28.5%) and in the two control conditions (Control 1 = 22.5% v. Control 2 = 8.0%). The mere presence of the trademark in a search result, irrespective of the relevance (or lack thereof) of the abstract, leads a significant number of consumers to believe that there is some connection between the trademark holder’s company and the website shown in the search result.

Further, the mere presence of sponsored results also results in higher levels of confusion, whether or not the trademark term appears in the sponsored results. When sponsored results are

\(^{139}\) \(Z = 4.7, p < .00001.\)

\(^{140}\) \(Z = 1.6, p < .06.\)

\(^{141}\) \(Z = 5.5, p < .00001.\)

\(^{142}\) This comparison measures confusion in the sponsored results only for Test 1 and 2 conditions and in the three “irrelevant” organic links for Control 1 and 2.
present (whether or not they contain the trademark term), 41.3% of respondents are confused as to source and/or affiliation of the sponsored results, while only 15.3% are confused by the irrelevant results when only organic results are shown on the results page. Of course, higher levels of confusion are found when the sponsored results contain the trademark term (54.0%) than when those sponsored results do not contain the trademark term (22.5%).

To isolate the effect of mere page position, we also examined confusion levels by considering only those sponsored results that appeared above the organic results. For Test 1, there was one sponsored result shown in the top left position and for Test 2, there were two sponsored results in the top two positions above the organic results. Of the 108 respondents who were confused in Test 1, 90 showed confusion of source or affiliation for the sponsored result shown in the top left-hand positions and 45 respondents were confused about the top left-hand results in Test 2 (of the original 57 who were counted as confused). Thus, merely positioning sponsored results in the top left-hand position of the search results page above the organic results causes a significant amount of confusion (33.8%) when compared with organic results alone (16.0%). As noted earlier, this confusion is significantly more pronounced when the trademark term is present (Test 1) in the sponsored result (45.0%) than when it is absent (Control 1 = 22.5%).

4. Discussion

Our findings support the notion that users do not readily distinguish between sponsored and organic results and will tend to click on search results simply because of their position at the top of the search results page. Because this study focused on a strong trademark, the findings also suggest that the mere presence of a strong trademark may lead consumers to believe that a search results must either lead to that company’s website or to a website that is endorsed or affiliated with the trademark holder’s company. Further research is necessary to fully explore this possibility.

Respondents are confused even when organic results contain the trademark term being searched when that term appears in an organic result that is not the trademark holder’s company or an affiliated website. Of course, a fundamental feature of the search engine business model is the presentation of sponsored results that are relevant to the user’s search. And, if users follow those links in

143. See, for example, Laura Granka, Joachims, Thorsten, & Geri Gay, Eye-tracking analysis of user behavior in www search, Poster Session presented at the Conference on Research and Development in Information Retrieval (SIGIR 2004); Lorigo, et al., supra note 20.

144. Id.
full knowledge that the destination site is a third party then there is no confusion. However, as demonstrated by the findings of Experiment 1, users are in fact confused in that they believe such sponsored results will lead to the trademark holder's websites or to websites endorsed by the trademark holder when this is in fact not the case. Although the findings from Experiment 1 are compelling, Experiment 2 explores alternative methods for presenting sponsored results that might reduce consumer confusion.

**D. Experiment 2**

1. **Stimuli Tested**

In this study, the stimulus tested was a search results page that was obtained from an actual search using the trademarked term American Airlines. The search results page showed a total of seven “sponsored results,” each of which contained the trademark term. The sponsored results appeared at the top left-hand position above the organic results (2 listings), at the upper right-hand position of the page (3 listings) and at the bottom of the page below the organic results (2 listings). For Test 1, participants viewed the search engine results page with the naturally occurring positioning of the sponsored and organic results and with those results showing the trademark term that had been used in the search. For Test 2, the search results page was identical except that the trademark term was removed from the sponsored results listings.

Two additional conditions were tested in order to assess the impact of the topmost positions on the page (upper left- and upper right-hand sides) on likelihood of confusion. For each of these, the sponsored results were presented in a single list shown below the organic results. Test 3 showed these sponsored results as they had originally appeared (containing the trademark term) and Test 4 omitted the trademark term from these sponsored results.

A single control stimulus was created and used in all four tests. Since mere position on the page as well as the presence of the trademark term together led to high levels of confusion in Experiment 1, the control stimulus controlled for both. The control stimulus was a search results page that showed the sponsored results in a form that omitted the trademark term and placed the sponsored results in a small outlined rectangle on the lower right-hand side of the page.

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145. Experiment 2 was conducted by Drs. Basil Englis and Gary Bamossy of Mind/Share, Inc.

146. None of the sponsored results would either take the user to a company website or to a website endorsed or affiliated with the trademark holder.

147. Instead of the term “American Airlines” Test 2 showed the word “airlines” or “airline” as grammatically appropriate.
hand side of the search results page. The search engine used in this experiment commonly shows items running down the right-hand side of the page; these include local weather information, news items, and advertisements. The sponsored results were identified as “paid advertisements.”

We analyzed whether the highest levels of consumer confusion would be found when sponsored results included the trademark term that was the keyword used in the search. Second, we tested whether consumers, even when the sponsored results did not show the trademark term, would evince high levels of confusion relating to the sponsored results that appear in the upper left-hand portion of the search results page. Finally, we tested whether confusion could be significantly reduced by placing sponsored results in (1) a more distinct position on the page (i.e., not in proximity with organic results) and (2) where sponsored results were more clearly indicated to the user as such by identifying these as “paid advertisements.”

As in Experiment 1, respondents were asked to look at the test and control stimuli and to identify which link or links, if any, would take them to an American Airlines website. For the links not previously identified, the respondent was then asked to identify the link or links, if any, that were endorsed by American Airlines. A respondent was counted as confused if he or she identified any sponsored links in response to these either of these two questions. Net confusion was measured as the difference between test and control levels of confusion.

2. Results

A total of 1351 respondents were interviewed across the four tests and one control conditions in Experiment 2. In Test 1, 49.6% (134 respondents) of consumers were confused as to the source or endorsement of one or more of the sponsored results containing the trademark term. Only 9.6% (26 respondents) of consumers were confused as to the source or endorsement of one or more of the sponsored results on the control stimulus page. As is typically done in studies of trademark confusion, a measure of net confusion was computed. Net confusion is measured by subtracting the level of confusion found in the control condition from that found in the test condition. The net confusion in response to the Test 1 page was 40.0%. Consumers were significantly more confused when shown the original search results page (Test 1) than when shown the Control page.

In Test 2, 24.8% (67 respondents) of consumers were confused as to the source or endorsement of one or more of the sponsored

148. There were 270 respondents in Tests 1, 2, and 4 and in Control conditions, and 271 respondents in Test 3.
results presented on the search results page even though the trademark term was not present in those results. As before, net confusion was measured by subtracting the level of confusion found in response to the Control stimulus (9.6%) from that found in the test condition yielding a net confusion rate of 15.2% for Test 2. Significantly more respondents were confused by the Test 2 page as compared with the Control.

Because search engines have at times embedded sponsored results among the organic results, Experiment 2 tested two additional stimulus conditions in which the original sponsored results were placed below the organic results. These two stimulus conditions provided additional tests of page positioning on the likelihood that consumers would be confused by the presentation of sponsored results that appears in the context of the organic results, but shown at the bottom of those results. For Test 3 the sponsored results including the trademark term were used, and for Test 4 the sponsored results had the trademark term removed. In both cases, the sponsored results were placed below the organic results.

For Test 3, 28.4% (77 respondents) of respondents were confused as to source or endorsement of one or more of the sponsored results, which included the trademark term. The measure of net confusion was again computed as the difference between the level of confusion found in response to the Control Stimulus (9.6%) and that found in response to the test condition. The net confusion found was 18.8%; significantly more respondents were confused in response to Test 3 as compared with the Control.

For Test 4, 16.4% (44 respondents) of respondents were confused as to source or endorsement of one or more of the sponsored results, which in this case did not show the trademark term. The measure of net confusion was again computed as the difference between the level of confusion found in response to the Control Stimulus (9.6%) and yielded a net confusion rate of 6.7%; significantly more respondents were confused by the Test 4 page as compared with the Control. 149

3. Additional Analyses

Additional analysis indicated that when the trademark was shown in the sponsored results regardless of their placement on the results page (Test 1 and Test 3), respondents were significantly more confused (39.0% of respondents) than when the trademark was omitted from the sponsored results (Test 2 and Test 4) (20.5 of respondents); net confusion here was 18.5%. This pattern was even

149. Although this net confusion level was below the so-called 10% threshold the difference between test and control levels of confusion was statistically significant. See 6 McCarthy § 32:187-188.
more pronounced when trademark presence (Tests 1 and 3) was compared with the Control page, where the sponsored results were shown boxed, on the right-hand side of the page and labeled as “Paid Advertisements.” Significantly more respondents were confused when shown Test 1 or Test 3 (39.0%) than in response to the Control page (9.6%); net confusion was 28.4%.

A similar pattern was observed when comparing the Test 1 page (original search results with the sponsored results containing the trademark term) with Test 2 (original page with the trademark term omitted). Significantly more respondents were confused by the Test 1 page (49.6%) as compared with the Test 2 page (24.8%). We also conducted a comparison of trademark presence when the sponsored results were shown at the bottom of the page after the organic results. Confusion was again significantly higher when the trademark term was present (Test 3: 24.8%) than when it was absent (Test 4: 16.3%). Taken together, these results again indicate the power of a strong brand to serve as a cue indicating to consumers a potential relationship between the listing and the trademark holder’s company even when no such relationship exists.

A final analysis considered the impact of search page layout on likelihood of confusion. In order to isolate the impact of page position, these analyses examined only those instances of confusion involving the two sponsored results that appeared in the first and second top left-hand positions on the search results page just above the organic results. Respondents were significantly more confused when sponsored results appeared above the organic results (27.0%) than when those results appeared below the organic results (11.6%); net confusion was 15.4%. This pattern was observed whether or not the trademark term was present. Significantly more confusion was found when the trademark term was present and the sponsored results appeared in the top left-hand positions (36.7%) than when the sponsored results appeared under the organic results (14.0%); net confusion was 22.7%. We also found significantly higher confusion when the trademark was absent but when the sponsored results were presented in the top left-hand positions (17.4%) as compared with their presentation under the organic results (9.3%).

4. Discussion

Experiment 2 provides a strong replication of the findings of Experiment 1 in showing that the presence of a trademark that had been used as a keyword search term in sponsored results caused significant levels of consumer confusion. This supports the notion that trademarks in general, and strong brands in particular, are powerful cues that guide consumer’s cognitions and behaviors. The findings of Experiment 2 also show that merely
removing the trademark from the sponsored results is an insufficient remedy. It is insufficient in that consumers still evince significant levels of confusion. Moreover, the results show that mere page position is a powerful cue in that consumers tend to act as though the results presented at the top of a search results page must be the most relevant to their search and they behave in this manner whether or not the trademark is present as a cue.

V. CONCLUSION

The sale of trademarks through keyword search algorithms continues to be the dominant revenue model for online search engines, accounting for the majority of their sales and profits. It is unclear whether trademark owners can use trademark law to prevent search engines from selling their trademarks to third parties. So far, foreign court rulings have favored search engine owners and not trademark owners, and the litigants have settled out of court the largest legal challenges in U.S. courts. The foreign courts that have evaluated whether the sale and usage of trademarks by third parties constitutes trademark infringement have not come to the same conclusion on whether initial interest confusion is valid in keyword advertising suits or on the factors and proof required to prove either initial interest or ongoing trademark infringement. But actual confusion is among the most important factors courts commonly analyze, and survey evidence is a key part of proving actual confusion.

Foreign courts that have ruled in favor of search engines have reasoned that, as long as the search engine remains neutral as to how a keyword purchaser uses the trademark, then any infringement litigation should be targeted at the keyword purchaser rather than the search engine. But these rulings are controversial and have not stopped the debate as to whether keyword advertising is a violation of a trademark protection. Recent actions by search engine companies to adopt pay-per-action systems raise even more questions about whether search engines do in fact remain neutral as to how trademarks sold as keywords are used by their purchasers. The search engine companies have significant revenue to gain if the trademarks are used in a way that increases consumer action with respect to sponsored results, whether or not such usage causes confusion for consumers. If the search engines are neutral at all, it appears they are indifferent as to whether or not their practices cause consumer confusion. Given the lingering questions about search engine liability under U.S. law, and the potential that search engines’ new revenue models will upend existing law in different jurisdictions around the world on keyword advertising, this article suggests methods for adequately testing different types of consumer confusion and
identifies important advertising and placement factors that clearly influence levels of confusion.

While it would be beneficial for courts to draw clearer boundaries that delineate how use of a trademark in a keyword search program can or cannot lead to a finding of infringement, to date, no court has made such a definitive finding. The courts that grapple with this question in the future should take a hard look at the evidence of actual confusion summarized in this article and elsewhere as well as at search engines’ incentives to confuse consumers, and foreign court rulings citing search engine neutrality must be called into question based on search engines’ payment models. As pointed out in our introduction, “The goals of the advertising business model do not always correspond to providing quality search to users... we expect that advertising funded search engines will be inherently biased toward the advertiser and away from the needs of the consumers.” Pay-per-action models make this quote relevant once again and therefore testing of consumer confusion must continue.