INITIAL INTEREST CONFUSION

Excerpted from Chapter 7 (Rights in Internet Domain Names) of
E-Commerce and Internet Law: A Legal Treatise With Forms, Second Edition,
a 4-volume legal treatise by Ian C. Ballon (Thomson/West Publishing 2014)

LAIPLEA SPRING SEMINAR
OJAI VALLEY INN
OJAI, CA
JUNE 6-8, 2014

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are analyzed in sections 9.10 and 9.11.

A threshold question in any domain name dispute is whether a name is being used “in commerce” in connection with the sale, offering for sale, advertising or distribution of goods or services (as required generally in trademark infringement and dilution cases and related claims under the Lanham Act, but not under the Anticybersquatting Consumer Protection Act). This issue is separately addressed in sections 7.10. Fair use of a domain name, which also arises frequently in litigation, is likewise separately addressed in section 7.12 and analyzed more extensively in section 6.14. Similarly, in addition to the material addressed later in this section, sections 7.22 and 6.02 consider the question of when a domain name itself may be entitled to trademark protection (which may be relevant in suits where the plaintiff’s rights are based in whole or part on online use).

Other issues that frequently arise in domain name disputes—and which are considered in this section—include initial interest confusion (section 7.08[2]) and the related question of whether website disclaimers may mitigate confusion (section 7.08[3]), whether and under what circumstances preexisting uses of analogous marks may be tacked onto domain names protected as marks (section 7.08[4]) and how to evaluate likelihood of confusion cases involving names registered in different TLDs (section 7.08[5]). Section 7.08[6] addresses deceptive domain names, which may be the subject of false advertising claims.

Likelihood of confusion analysis in consumer criticism and other potential First Amendment cases is discussed in section 7.12, which should be read in conjunction with section 6.14 (fair use under the Lanham Act) and in particular section 6.14[5]. Domain name destruction—or the reverse confusion that may arise when a junior user overwhelms a senior owner’s use of a mark—is considered in section 6.02[4]. Likelihood of confusion in cases involving as-yet unissued intent-to-use applications is considered in section 7.08[7]. Likelihood of confusion is also analyzed more extensively in section 6.08. Trademark rights, if any, based on first registration of a domain name are considered in section 7.08[8]. Finally, the use of a trademark in the post-domain path of a URL is discussed in section 7.08[9].

7.08[2] Initial Interest Confusion

The Lanham Act potentially protects against point of sale
confusion, initial interest confusion and post-sale confusion.\textsuperscript{1} The initial interest confusion doctrine, while originally developed in physical world cases,\textsuperscript{2} has particular application to cyberspace given the way people navigate online and the economic value of traffic (as represented by page views or impressions) in generating advertising revenue. The doctrine recognizes that a trademark (and the goodwill associated with it) may be used to lure visitors to a location that is not sponsored or endorsed by or affiliated with the brand owner or its mark. Initial interest confusion presupposes

[Section 7.08[2]]

\textsuperscript{1}See Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp., 426 F.3d 532, 537 n.2 (2d Cir. 2005) (citing earlier cases and noting that the test for likelihood of confusion “must be applied with an eye toward each of these.”); see also, e.g., 1-800-Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1239 (10th Cir. 2013) (noting that confusion need not “occur at the point of sale; postsale confusion may propagate among consumers who see the relevant product after the original buyer has purchased it.”). The Second Circuit emphasized “[t]he need for a contextual analysis, rather than a simple focus on whether simultaneous viewing is likely to cause confusion.” \textit{Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp.}, 426 F.3d 532, 539 (2d Cir. 2005) (remanding the case for further consideration consistent with the court’s opinion). It further elaborated that where initial interest (or post-sale) confusion is alleged “market conditions must be examined closely to see whether the differences between the marks are ‘likely to be memorable enough to dispel confusion on serial viewing.’” \textit{Louis Vuitton Malletier v. Dooney & Bourke, Inc.}, 454 F.3d 108, 117 (2d Cir. 2006), quoting \textit{Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp.}, 426 F.3d 532, 538 (2d Cir. 2005).

Post-sale confusion, in the words of the Sixth Circuit, “occurs when use of a trademark leads individuals (other than the purchaser) mistakenly to believe that a product was manufactured by the trademark-holder.” \textit{Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP}, 423 F.3d 539, 550 (6th Cir. 2005); see also, e.g., \textit{Georgia-Pacific Consumer Products LP v. Von Drehle Corp.}, 618 F.3d 411 (4th Cir. 2010) (reversing the district court’s entry of summary judgment because a reasonable jury could have found the defendant liable for contributory trademark infringement and unfair competition under the Lanham Act and contributory unfair competition under North Carolina common law based on post-sale confusion, in a case involving physical goods brought by the manufacturer of a paper town dispenser against a vendor of a generic paper towel that was intended for use in plaintiff’s branded dispenser). \textit{But see Georgia-Pacific Consumer Products LP v. Myers Supply, Inc.}, 621 F.3d 771 (8th Cir. 2010) (affirming the entry of judgment on plaintiff’s contributory trademark infringement claim brought on similar grounds following a bench trial involving the same plaintiff and a different defendant).

\textsuperscript{2}See, e.g., \textit{Mobil Oil Corp. v. Pegasus Petroleum Corp.}, 818 F.2d 254, 260 (2d Cir. 1987).
that ultimately there may be no confusion once a visitor arrives at a particular location.³ The doctrine therefore can be especially important to brand owners in Internet disputes where a mark is used to divert traffic to a website that obviously has no connection to the trademark or its owner (and thus on its own might not support a finding of likelihood of confusion). “Initial interest confusion in the internet context derives from the unauthorized use of trademarks to divert internet traffic, thereby capitalizing on a trademark holder’s goodwill.”⁴ Initial interest confusion is not universally recognized, however, and is better suited to some Internet disputes than others.

Initial interest confusion has been expressly adopted in the Second,⁵ Third,⁶ Fifth,⁷ Seventh,⁸ Ninth,⁹ and Tenth¹⁰

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³As explained by the Ninth Circuit, “[i]nitial interest confusion is customer confusion that creates initial interest in a competitor’s product. Although dispelled before an actual sale occurs, initial interest confusion impermissibly capitalizes on the goodwill associated with a mark and is therefore actionable trademark infringement.” Playboy Enterprises, Inc. v. Netscape Communications Corp., 354 F.3d 1020, 1025 (9th Cir. 2004).

⁴Initial interest confusion “occurs when a customer is lured to a product by the similarity of the mark, even if the customer realizes the true source of the goods before the sale is consummated.” Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 812 (7th Cir. 2002). The court in Promatek explained that that the fact that confusion about the source of a product or service is eventually dispelled does not detract from the fact that infringement has occurred. “What is important is not the duration of the confusion, it is the misappropriation of goodwill.” Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 812–13 (7th Cir. 2002).

⁵Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1239 (10th Cir. 2006).

⁶See, e.g., Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 260 (2d Cir. 1987).

⁷See McNeil Nutritionalals, LLC v. Heartland Sweeteners, LLC, 511 F.3d 350, 358 (3d Cir. 2007) (reaffirming “that initial interest confusion is an independently sufficient theory that may be used to prove likelihood of confusion” in a trade dress case and reiterating that the Third Circuit’s Lapp test for finding likelihood of confusion must be applied in initial interest confusion cases); Checkpoint Systems, Inc. v. Check Point Software Technologies, Inc., 269 F.3d 270, 292, 297 (3d Cir. 2001) (holding initial interest confusion actionable under the Lanham Act but ruling that “where confusion has little or no meaningful effect in the marketplace, it is of little or no consequence in our analysis.”).

⁸See Elvis Presley Enterprises, Inc. v. Capece, 141 F.3d 188 (5th Cir. 1998). In that case, Elvis Presley Enterprises, the owner of copyrights, trademarks, and publicity rights in the well-known deceased singer, sued
Circuits and is widely recognized by district courts in many other circuits. The Fourth Circuit, however, has made it clear that likelihood of confusion in that circuit must be based on the entire contents of a website, and not merely the initial confusion created during the path used to divert traf-

the owner of “The Velvet Elvis,” a restaurant and bar. The court found initial interest confusion based in part on evidence of actual confusion that brought patrons in the door of the establishment, even though that confusion dissipated once they went inside. The court wrote that “[o]nce in the door, the confusion has succeeded because some patrons may stay, despite realizing that the bar has no relationship with EPE. This initial interest confusion is even more significant because the defendants’ bar sometimes charges a cover charge for entry, which allows the defendants to benefit from initial interest confusion before it can be dissipated by entry into the bar. Additionally, the finding by the district court that the defendants’ advertising practices caused actual confusion shows that actual confusion occurred when consumers first observed the mark in commerce.” *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 204 (5th Cir. 1998).

8 *See Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 812 (7th Cir. 2002) (holding that by placing the trademarked term in its metatags, defendant diverted consumers to its site, reaping the goodwill associated with plaintiff’s mark).

9 *See Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137 (9th Cir. 2011); *Perfumebay.com, Inc. v. eBay, Inc.*, 506 F.3d 1165 (9th Cir. 2007); *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002 (9th Cir. 2004), cert. denied, 544 U.S. 974 (2005); *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004); *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 304 F.3d 936 (9th Cir. 2002); *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 184 F.3d 1107 (9th Cir. 1999); *Brookfield Communications, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036 (9th Cir. 1999).

10 *See 1-800-Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013) (finding no likelihood of initial interest confusion in a sponsored links case where initial interest confusion occurred at most 1.5% of the time that a Lens.com advertisement was generated by one of nine challenged keywords and therefore could not be said to likely lure consumers in search of the plaintiff’s product those of the defendant); *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1238–39 (10th Cir. 2006) (finding initial interest confusing based on the defendant’s use of plaintiff’s mark on its website and in metatags). In Hatfield, the court wrote that “[t]he federal courts, though not using the phrase ‘initial interest confusion,’ have acknowledged the potential for such confusion for decades . . . . Initial interest confusion in the Internet context derives from the unauthorized use of trademarks to divert internet traffic, thereby capitalizing on a trademark holder’s goodwill.” *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1239 (10th Cir. 2006).
This approach essentially vitiates the doctrine, which is focused on the confusion caused in the first instance when a user navigating the Web, clicks on a link or otherwise voluntarily proceeds to a location based on the misperception that it is somehow connected to the mark used to draw the person there, rather than the contents of the actual site or the landing page where the user arrives after being diverted.

In the Third Circuit, a claim is not actionable where the market impact of initial interest confusion is limited or de minimis. As the court explained, “where confusion has little or no meaningful effect in the marketplace, it is of little or

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11See Lamparello v. Falwell, 420 F.3d 309 (4th Cir. 2005), cert. denied, 547 U.S. 1069 (2006). In that case, a critic of the Reverend Jerry Falwell registered a close misspelling of his name as a domain name, fallwell.com, and sought declaratory relief that he was not infringing Dr. Falwell’s trademark in his name or engaging in cybersquatting. Reverend Falwell sought injunctive relief under the initial interest confusion doctrine, arguing that the plaintiff’s use of a domain name nearly identical to his name caused people who misspelled the minister’s name to visit plaintiff’s site instead of defendant’s. The Fourth Circuit noted that it had never adopted what it termed “the initial interest confusion theory” (which it characterized as a “relatively new and sporadically applied doctrine”) and instead “followed a very different mode of analysis, requiring courts to determine whether a likelihood of confusion exists by ‘examining’ the allegedly infringing use in the context in which it is seen by the ordinary consumer.” Lamparello v. Falwell, 420 F.3d 309, 315–16 (4th Cir. 2005), cert. denied, 547 U.S. 1069 (2006) (emphasis in original; quoting an earlier case). The court explained that in the Fourth Circuit “a court should not consider how closely a fragment of a given use duplicates the trademark, but must instead consider whether the use in its entirety creates a likelihood of confusion.” Lamparello v. Falwell, 420 F.3d 309, 316 (4th Cir. 2005), cert. denied, 547 U.S. 1069 (2006) (emphasis in original; quoting an earlier case). Most significantly, the court held that “[w]hen dealing with domain names, this means a court must evaluate an allegedly infringing domain name in conjunction with the content of the website identified by the domain name.” Lamparello v. Falwell, 420 F.3d 309, 316 (4th Cir. 2005), cert. denied, 547 U.S. 1069 (2006).

For good measure, the court also concluded that even if the initial interest confusion doctrine were to be applied, the plaintiff still would have been entitled to a declaratory judgment of noninfringement because profiting financially is a key element for the imposition of liability for initial interest confusion and the fallwell.com was a gripe site, not a commercial venture. The court noted that “profiting financially from initial interest confusion is thus a key element for imposition of liability under this theory.” 420 F.3d at 317.
no consequence in our analysis.” The Third Circuit suggested that in initial interest confusion cases, product relatedness (i.e., whether the goods or services are similar; whether the products at issue directly compete), the level of care exercised by consumers in making purchasing decisions, the sophistication of the consumer and the intent of the alleged infringer in adopting the mark, are particularly relevant factors. It emphasized, however, that the significance of initial interest confusion “will vary, and must be determined on a case-by-case basis.”

The First Circuit, while neither expressly endorsing nor rejecting the doctrine, suggested in one case that initial interest confusion may be inapplicable in a case involving disparate products and services.

12 Checkpoint Sys., Inc. v. Check Point Software Technologies, Inc., 269 F.3d 270, 292, 297, 298–99 (3d Cir. 2001) (affirming the district court’s finding of no initial interest confusion in a domain name dispute because “the handful of emails and other anecdotal evidence of mistaken consumer inquiries . . . was de minimis when viewed in light of the length of time the parties operated together in the United States without significant evidence of confusion.”). The Third Circuit in Checkpoint Systems affirmed and quoted the district court’s ruling that while the initial interest confusion doctrine may be applicable even if the parties are not competitors, “the parties’ competition or strong interrelatedness” are important to the overall analysis under the balancing test for likelihood of confusion. Checkpoint Sys., Inc. v. Check Point Software Technologies, Inc., 269 F.3d 270, 297 (3d Cir. 2001).


15 See Hasbro, Inc. v. Clue Computing, Inc., 232 F.3d 1, 2 (1st Cir. 2000). In that case, Hasbro, Inc., owner of the CLUE trademark used in connection with the well known board game, sued a Colorado internet company, Clue Computing, over its registration and use of the clue.com domain name. The district court had declined to apply the initial interest confusion doctrine where Hasbro had argued that Clue Computing offered online help for users of the CD-ROM version of its CLUE board game. In so ruling, District Judge Woodcock emphasized that the logo used by the defendant on its website, and the explanation of its services posted there, undermined any potential claim of confusion. He wrote that, “although the need to search for Hasbro’s site may rise to the level of inconvenience, it is not sufficient to raise a dispute as to actual confusion.” Hasbro, Inc. v. Clue Computing, Inc., 66 F. Supp. 2d 117 (D. Mass. 1999), aff’d, 232 F.3d 1 (1st Cir. 2000). The First Circuit, in approving of the district court’s ruling on this point, wrote that “[c]ertainly in a case involving such disparate products and services as this, the court’s refusal to enter the ‘initial inter-
The Second Circuit, in *dicta* in one case, suggested that a higher showing (evidence of actual deception) was required to prove initial interest confusion in an Internet case because the harm could be quickly corrected.\(^{16}\)

In *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*,\(^{17}\) the Sixth Circuit held that the initial interest confusion doctrine was inapplicable to a trademark claim based on the shape of the plaintiff’s guitar, at least based on the facts before it. The court further suggested in *dicta* that the doctrine applies to domain names disputes but that this fact does not mean it has broad application to all types of trademark infringement.\(^{18}\) Subsequently, in *Audi AG v. D’Amato*,\(^{19}\) the Sixth Circuit rejected a defendant’s argument that a disclaimer on its website rebutted any evidence of est confusion’ thicket is well taken given the unlikelihood of ‘legally significant’ confusion.” 232 F.3d at 2.

While different streams of commerce could well undermine a claim of likelihood of confusion (including likelihood of initial interest confusion), that fact alone should not be viewed as determinative. In view of the role that brands may play in driving traffic to or away from websites—and the fact that companies often offer promotions or incentives online to garner attention or reach a new demographic group that may appear far afield from a company’s core brand, the fact that a third party using a plaintiff’s brand may not presently be a competitor should not be determinative.

The Clue.com opinion also may be understood for what it is—a 2000 opinion issued at a time when only one other circuit, the Ninth Circuit, had expressly applied the doctrine in an Internet case.

16See *Savin Corp. v. Savin Group*, 391 F.3d 439, 462 n.13 (2d Cir. 2004). In that case, the court held that a group of professional engineering consultants who were using the same name as the plaintiff, a business equipment seller, was not likely to cause confusion. The district court had also found that defendant’s use was not likely to cause initial interest confusion. This issue was not specifically raised on appeal. Nonetheless, the court, in a footnote, cited with approval the standard applied by the district court, writing that “[b]ecause consumers diverted on the Internet can more readily get back on track than those in actual space, thus minimizing the harm to the owner of the searched-for site from consumers becoming trapped in a competing site, Internet initial interest confusion requires a showing of intentional deception.” *Savin Corp. v. Savin Group*, 391 F.3d 439, 462 n.13 (2d Cir. 2004), citing Bihari v. Gross, 119 F. Supp. 2d 309, 319 (S.D.N.Y. 2000).

17Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP, 423 F.3d 539, 549 (6th Cir. 2005).

18See *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539, 551 n.15 (6th Cir. 2005).

19*Audi AG v. D’Amato*, 469 F.3d 534 (6th Cir. 2006).
consumer confusion based in part on the fact that use of a competitor’s mark as a domain name could cause initial interest confusion.  

The Seventh Circuit has equated initial interest confusion with a “bait and switch scheme.”

The Eighth Circuit declined to adopt the doctrine in a case involving sophisticated customers who exercised a relatively high degree of care in making their purchase decisions, holding that even if the doctrine applied generally in the circuit it would not apply in the case presented.

The Eleventh Circuit has recognized the existence of the doctrine but, in *North American Medical Corp. v. Axiom Worldwide, Inc.*, found it unnecessary decide whether initial interest confusion alone would be actionable in a case where the defendant used the plaintiff’s marks in metatags on its website because plaintiffs presented evidence of likelihood of actual source confusion, making the issue unnecessary to decide.

The initial interest confusion doctrine was first applied to

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20 See Audi AG v. D’Amato, 469 F.3d 534, 546 (6th Cir. 2006). In an earlier case, *PACCAR Inc. v. TeleScan Technologies, Inc., LLC*, 319 F.3d 243, 253 (6th Cir. 2003), the Sixth Circuit acknowledged that “[a]n infringing domain name has the potential to misdirect consumers as they search for websites associated with the owner of a trademark,” but ultimately found likelihood of confusion without regard to initial interest confusion. See *Gibson Guitar Corp.*, 423 F.3d at 550–51 (explaining *PACCAR*).

21 *Dorr-Oliver, Inc. v. Fluid Quip, Inc.*, 94 F.3d 376, 382 (7th Cir. 1996). The court explained that:

The Lanham Act forbids a competitor from luring potential customers away from a producer by initially passing off its goods as those of the producer’s, even if confusion as to the source of the goods is dispelled by the time any sales are consummated. This “bait and switch” of producers, also known as “initial interest” confusion, will affect the buying decisions of consumers in the market for the goods, effectively allowing the competitor to get his foot in the door by confusing consumers.

*Dorr-Oliver, Inc. v. Fluid Quip, Inc.*, 94 F.3d 376, 382 (7th Cir. 1996).

22 See *Sensient Technologies Corp. v. Sensoreffects Flavor Co.*, 613 F.3d 754, 766 (8th Cir. 2010). In describing the doctrine, the court cited *Checkpoint Systems, Inc. v. Check Point Software Technologies, Inc.*, 269 F.3d 270, 296 (3d Cir. 2001) for the proposition that courts applying it look to factors such as product relatedness and the level of care exercised by consumers to determine whether initial interest confusion exists.

23 *North American Medical Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211 (11th Cir. 2008).

24 *North American Medical Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1222 (11th Cir. 2008).
Internet cases by the Ninth Circuit, which also has applied the doctrine in more reported opinions than any other circuit. In *Brookfield Communications, Inc. v. West Coast Entm't Corp.*, the court ruled that even though there was no “source confusion in the sense that consumers know they are patronizing [the defendant] rather than [the plaintiff], there is nevertheless initial interest confusion in the sense that by using 'moviebuff.com' or ‘MovieBuff’ to divert people looking for ‘MovieBuff’ to its website, [defendant] improperly benefits from the goodwill that [plaintiff] developed in its mark.”

In *Brookfield*, the Ninth Circuit recognized that different forms of confusion existed on the Internet. For example, Internet surfers could assume that a sought-after service had been replaced by the site actually accessed. Alternatively, even when a visitor realizes that he or she has reached an unintended location, the visitor may remain there and the site “will have gained a customer by appropriating the goodwill that [a mark owner] has developed in its . . . mark.”

On the other hand, many sites are merely encountered at random through unrelated links or search engine queries. Consumers frequently navigate by pointing and clicking through successive buttons, banner advertisements and more generic links. The allure of flashing messages and the promise of interesting content or valuable resources make many web surfers impatient and easily distracted (potentially diverting them to unintended locations). In many cases, these traffic-diverting distractions constitute fair competition. Where the goodwill associated with a mark, however, is used to siphon traffic intended for the mark

25 *Brookfield Communications, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036 (9th Cir. 1999).
26 *Brookfield Communications, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1062 (9th Cir. 1999).
27 *Brookfield Communications, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036 (9th Cir. 1999).
28 An evaluation of website statistics generated for typical e-commerce sites should reveal the origin of most visitors, which in turn may permit an assessment of likelihood of confusion. Where a certain percentage of visitors access a site via a particular link on another site, information on the linking site may be relevant. Where people type a URL directly, the risk of initial interest confusion may be greater. By contrast, if most people access a site via search engine queries it may be difficult to evaluate the extent of confusion without survey evidence (since statistics alone would not reveal the specific query posited).
owner's own site, efforts at traffic diversion may be actionable if they cause either source or initial interest confusion.

The Ninth Circuit implicitly recognized this fact as well in *Interstellar Starship Services, Ltd. v. Epix, Inc.* In that case, the appellate panel reversed the district court's entry of summary judgment for Interstellar Starship Services, Ltd. (ISS), the domain name registrant, and remanded the case for further proceedings. ISS had presented evidence that it had selected the *epix.com* domain name as an abbreviation for electronic pictures (e-pix), although some evidence also was presented that it was aware of Epix, Inc.'s use of the name and the two companies potentially offered competing consulting services. The content on the site at various times during the course of the lawsuit, however, was seemingly unrelated to the “epix” name.

In reversing and remanding the case, Judge Stephen S. Trott (on behalf of himself and Judges Dorothy W. Nelson and Stephen Reinhardt) wrote that “initial interest” confusion “permits a finding of a likelihood of confusion although a consumer quickly becomes aware of the source's actual identity and no purchase is made as a result of the confusion.” Although the Ninth Circuit concluded that Epix, Inc.'s customers were “sophisticated industry and university researchers . . . of expensive goods [who] should eventually be able to find exactly what they are searching for,” it nonetheless found that various content previously on the site that described what appeared to be competing video imaging services was relevant, especially in light of the doctrine of initial interest confusion:

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29 *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 184 F.3d 1107 (9th Cir. 1999).

30 The Ninth Circuit noted that “[t]he record does not make crystal clear the precise nature of ISS's business or its use of the 'epix.com' Web page.” *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1109 (9th Cir. 1999).

Epix Inc. owned an incontestable registered mark in “EPIX” first used in 1984 in connection with printed circuit boards and computer programs for image acquisition, processing, display and transmission—manufactured and sold video imaging hardware and software and provided various consulting services.

31 *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1110 (9th Cir. 1999) (citing other cases).

32 *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1110 (9th Cir. 1999).
An Epix customer might read about ISS on the “epix.com” site and decide to give ISS’s services a try, permitting ISS to capitalize on the goodwill Epix developed in its trademark—even if the customer is never confused about Epix’s lack of connection to the “epix.com.”

The case came back to the Ninth Circuit three years later. At that time, the appellate court held that “in the context of the Web, the three most important Sleekcraft factors in evaluating a likelihood of confusion are (1) the similarity of the marks, (2) the relatedness of the goods or services, and (3) the parties’ simultaneous use of the Web as a marketing channel.” This modified test was later reaffirmed by the Ninth Circuit as appropriate for evaluating domain name disputes, but not necessarily applicable to all Internet cases (and ill suited to search engine advertising).

In holding there was no actionable initial interest confusion in that case, the court in the second Interstellar Starship appeal observed that “actionable initial interest confusion on the Internet is determined, in large part, by the relatedness of the goods offered and the level of care exercised by the consumer.”

In Perfumebay.com Inc. v. eBay Inc., the court also applied the three factor test in evaluating initial interest confusion. In that case, the owner of Perfumebay had sought a declaratory judgment that its name did not infringe on eBay’s trademark. The Ninth Circuit ruled, however, that the district court had a valid basis for finding initial interest confusion with respect to the conjoined form of “perfumebay,” but that the non-conjoined form (Perfume Bay) did not create a likelihood of confusion.

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33 Interstellar Starship Services, Ltd. v. Epix, Inc., 184 F.3d 1107, 1111 (9th Cir. 1999), citing Brookfield Communications, Inc. v. West Coast Entm’t Corp., 174 F.3d 1036, 1061–62 (9th Cir. 1999).
34 Interstellar Starship Servs. v. Epix, Inc., 304 F.3d 936 (9th Cir. 2002).
35 Interstellar Starship Servs. v. Epix, Inc., 304 F.3d 936, 942 (9th Cir. 2002).
37 Interstellar Starship Servs. v. Epix, Inc., 304 F.3d 936, 945 (9th Cir. 2002).
38 Perfumebay.com Inc. v. eBay Inc., 506 F.3d 1165 (9th Cir. 2007).
In *Nissan Motor Co. v. Nissan Computer Corp.*, Nissan Motor Co. sued the owner of internet websites *nissan.com* and *nissan.net*, a man named Uzi Nissan, who operated a computer company, Nissan Computer Corp. and a related entity. Mr. Nissan plainly had the right to use his own name, *Nissan*, on the Internet, but he ultimately was enjoined after he began running banner advertisements on his site, including automobile-related advertisements and links. The Ninth Circuit ultimately approved the defendant’s continued use of the domain names, but affirmed an injunction barring him from running automobile-related advertisements on his sites. The Ninth Circuit held that initial interest confusion “exists as a matter of law as to Nissan Computer’s automobile-related use of ‘nissan.com’ because use of the mark for automobiles captures the attention of consumers interested in Nissan vehicles. To this extent, ‘nissan.com’ trades on Nissan Motor’s goodwill in the NISSAN mark and infringes it.” The court held that other uses were not infringing because there was no possibility of confusion where automobiles were not involved.

In *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, the Ninth Circuit reversed the lower court’s entry of summary judgment for the defendants, which had sold advertising triggered by the keywords “Playboy” and “Playmate” to adult entertainment sites unaffiliated with Playboy, including hard core porno sites. The search engines sued by PEI had required that adult banner advertisements be run only in response to a list of over 400 words associated with adult entertainment, including the plaintiff’s trademarks, PLAYBOY and PLAYMATE. The Ninth Circuit ruled

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42 The Ninth Circuit left open the possibility that on remand Nissan Motor Co. could obtain an injunction against other uses based on dilution, if it could establish that its mark was famous before the defendant began using NISSAN in commerce, which the trial court had concluded was a disputed fact precluding summary judgment and therefore could not be decided on appeal.

43 *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1023 (9th Cir. 2004).
that Playboy had at least raised a factual question precluding summary judgment on the issue of whether the banner advertisements created likelihood of initial interest confusion by luring people who were searching for “Playboy” or “Playmate” to competing sites.

Netscape involved unlabeled banner ads that appeared immediately after a user typed “PLAYBOY” or “PLAYMATE” into the search engine. Some of the unlabeled banner advertisements included the message “Click Here.” Playboy argued that, because of their confusion, users might follow the instruction, believing they would be connected to a PEI site, rather than to the website of an unaffiliated advertiser. Even if they realized immediately upon accessing the competitor’s site that they have reached a location wholly unrelated to PEI’s, PEI argued that the damage had been done: Through initial consumer confusion, the competitor would still have gained a customer by appropriating the goodwill that PEI developed in its mark.

In reversing and remanding the case, the Ninth Circuit emphasized that initial interest confusion was the only grounds on which likelihood of confusion could be based.\footnote{Playboy Enterprises, Inc. v. Netscape Communications Corp., 354 F.3d 1020, 1025 n.13 (9th Cir. 2004).} It also made clear that it was not addressing a situation in which Playboy marks were used to trigger listings to genuine Playboy sites. Nor was it considering a case where the banner advertisements delivered clearly identified their source and sponsor’s name. Further, the court explained that it was not addressing a situation in which advertisers or search engines overtly compared Playboy products to those of competitors, “for example, ‘if you are interested in Playboy, you may also be interested in the following message from [a different named company].’”\footnote{Playboy Enterprises, Inc. v. Netscape Communications Corp., 354 F.3d 1020 (9th Cir. 2004) (brackets in original).} The court clarified that it was only “evaluating a situation in which defendants display competitors’ unlabeled banner advertisements, with no label or overt comparison to PEI, after Internet users type in PEI’s trademarks.”\footnote{Playboy Enterprises, Inc. v. Netscape Communications Corp., 354 F.3d 1020 (9th Cir. 2004).}

Judge Berzon concurred, articulating his discomfort with the potentially broad scope of Brookfield Communications,
Inc. v. West Coast Entertainment Corp.,\textsuperscript{47} while expressing complete confidence in Judge Nelson’s “careful opinion in this case.”\textsuperscript{48} He explained:

There is a big difference between hijacking a customer to another website by making the customer think he or she is visiting the trademark holder’s website (even if only briefly), which is what may be happening in this case when the banner advertisements are not labeled, and just distracting a potential customer with another choice, when it is clear that it is a choice.\textsuperscript{49}

Initial interest confusion ultimately involves trading on the goodwill of a mark owner.

In \textit{Network Automation, Inc. v. Advanced Systems Concepts, Inc.},\textsuperscript{50} the Ninth Circuit clarified that the initial interest confusion doctrine and so-called Internet troika test should not be applied mechanically or in a wooden fashion merely because a case involves an Internet dispute. In \textit{Network Automation}, the district court had preliminarily enjoined a defendant from using the plaintiff’s trademark to trigger sponsored link advertisements for its competing products. In reversing and vacating the order, the court provided broad guidance about the limits of both the initial interest confusion doctrine and Internet troika test in the Ninth Circuit.

While the initial interest confusion doctrine was first articulated by the Ninth Circuit at the dawn of the Internet era in the 1990s, the court observed that Internet users in 2011 were more sophisticated and therefore exercised a greater degree of care.\textsuperscript{51} Quoting an earlier nominative fair use case, the panel explained that:

\begin{flushright}
\textsuperscript{47}Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036 (9th Cir. 1999).
\textsuperscript{48}354 F.3d at 1034 (Berzon, J. concurring).
\textsuperscript{49}354 F.3d at 1035 (Berzon, J. concurring); see generally infra §§ 9.10, 9.11 (analyzing metatag and banner ad cases, respectively).
\textsuperscript{50}Network Automation, Inc. v. Advanced Systems Concepts, Inc., 638 F.3d 1137 (9th Cir. 2011).
\textsuperscript{51}See Network Automation, Inc. v. Advanced Systems Concepts, Inc., 638 F.3d 1137, 1152 (9th Cir. 2011) (“We have recently acknowledged that the default degree of consumer care is becoming more heightened as the novelty of the Internet evaporates and online commerce becomes commonplace.”). The court cited the Ninth Circuit’s then-recently decided case of Toyota Motor Sales v. Tabari, 610 F.3d 1171 (9th Cir. 2010), in which the court vacated a preliminary injunction based on its conclusion that it was unlikely that reasonably prudent consumers would be confused.
\end{flushright}
In the age of FIOS, cable modems, DSL and T1 lines, reasonable, prudent and experienced internet consumers are accustomed to such exploration by trial and error. They skip from site or site, ready to hit the back button whenever they're not satisfied with a site's contents. They fully expect to find some sites that aren't what they imagine based on a glance at the domain name or search engine summary. Outside the special case of . . . domains that actively claim affiliation with the trademark holder, consumers don't form any firm expectations about the sponsorship of a website until they've seen the landing page—if then.52

In Network Automation, the panel explained that the court “did not intend Brookfield to be read so expansively as to forever enshrine the three factors—now often referred to as the 'Internet trinity' or 'Internet troika'—as the test for trademark infringement on the Internet.”53 The panel concluded that the use of the troika would be a “particularly poor fit” for evaluating likelihood confusion in a sponsored link case given the relative sophistication of Internet users in 2011, although the panel suggested in dicta that it may still be appropriate for domain name disputes.54 The court explained that “[g]iven the multifaceted nature of the Internet and the ever-expanding ways in which we all use the technology, . . . it makes no sense to prioritize the same three factors for every type of potential online commercial activity.”55

The Network Automation court stressed that the various tests potentially applicable for evaluating Lanham Act violations online should be applied flexibly to focus on the ultimate issue of consumer confusion. In the context of keyword advertising, the panel emphasized that what a consumer saw on the screen and reasonably believed given into believing that a domain name that included “Lexus” would necessarily have an affiliation with the manufacturer. Although Tabari was a nominative fair use case, the court considered the Sleekcraft factors as analogous.


the context was most important. In the case before it, the panel held that the surrounding context—with sponsored link advertisements placed in a separately labeled area by both Google and Bing—and the sophistication of Internet consumers, among other things, showed that the plaintiff had not established likelihood of confusion and on that basis reversed and vacated the preliminary injunction.

While *Network Automation* could be viewed as a retrenchment by the Ninth Circuit, it more accurately should be seen a case underscoring that multi-part tests are merely proxies for determining the ultimate question of likelihood of confusion. As long noted in section 9.11 of this treatise, it has always been easier to allege confusion in a sponsored link case than to prove it (absent special factors not typically present when a suit is based on a non-deceptive advertisement posted by a major search engine company such as Google or Bing). This does not mean that in appropriate cases, including in particular domain name disputes, the initial interest confusion doctrine would not be applied in the Ninth Circuit to establish liability or grant preliminary injunctive relief.

Since *Network Automation*, the volume of initial interest confusion case law has waned. In *1-800-Contacts, Inc. v. Lens.com, Inc.*, the first circuit court case to apply initial interest confusion following *Network Automation*, the Tenth Circuit, in 2013, affirmed the entry of summary judgment for the defendant on the issue of direct liability based on initial interest confusion where initial interest confusion occurred at most 1.5% of the time that a Lens.com advertisement was generated by one of nine challenged keywords and therefore could not be said to likely lure consumers in search of the plaintiff’s product those of the defendant. Unlike the Ninth Circuit, the Tenth Circuit did not express reservations about applying the doctrine, although in that case (and likely many, if not most sponsored link cases) the plaintiff could not prove initial interest confusion.

The harm caused by initial interest confusion, as explained by the Seventh Circuit, is in using one brand to lure users

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57 1-800-Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229 (10th Cir. 2013).
who then are exposed to another (whether or not a sale or commercial transactions results at that time). Judge Williams, on behalf of himself and Judges Posner and Kanne, wrote (in completing an analogy first created by the Ninth Circuit):

“Using another’s trademark in one’s metatags is much like posting a sign with another’s trademark in front of one’s store.”

*Brookfield*, 174 F.3d at 1064. Customers, believing they are entering the first store rather than the second, are still likely to mill around before they leave. The same theory is true for websites. Consumers who are directed to Equitrac’s Web page are likely to learn more about Equitrac and its products before beginning a new search for Promatek and Copitrak. Therefore, given the likelihood of initial consumer confusion, the district court was correct in finding Promatek [the party whose mark was used in metatags of a competitor] could succeed on the merits.58

Critics of the doctrine argue that if taken to its logical extreme, initial interest confusion potentially subsumes fair use. In *HQM, Ltd. v. Hatfield*, 59 for example, a court in Maryland rejected the applicability of initial interest confusion as a basis for finding dilution by blurring (even though the doctrine applies to the issue of likelihood of confusion, not dilution). In that case, which involved a suit over the hatfield.com domain name, which was being used by a man whose family name was Hatfield, the court, in *dicta*, wrote that:

> Taken to its logical end, famous mark holders could bring lawsuits against every holder of a .com domain name which is arguably ‘the same’ as their mark, so that no Internet user would ever give up searching for their websites.

Needless to say, courts generally should not—and do not—apply initial interest confusion in a way so that any confusion would lead to liability. Many people who surf the Internet may be dazed and confused. The doctrine of initial interest confusion, however, presupposes that, to be actionable, initial interest confusion will be reasonable.

Indeed, the initial interest confusion doctrine may provide an important remedy to deter scams involving confusingly similar domain names and the use of metatags or other hid-

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58Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 813 (7th Cir. 2002); see generally infra § 9.10[3] (analyzing claims based on the use of a mark in metatags).

den text to divert traffic from an intended destination.

The initial interest confusion doctrine may be especially important to brand owners in domain name disputes and cases involving metatags, banner ads, links or sponsored links or other advertisements or notices that potentially lure a visitor to a site in the first instance. The doctrine may be inapplicable, however, in cases where a brand is used in metatags or other features intended to divert traffic if users in fact navigate directly to a site (by, for example, typing a non-confusing URL rather than using a search engine or link to access a site).

Relief similarly may be unavailable if a defendant attempted to divert traffic but was unsuccessful in doing so (if, for example, metatags or other code include famous brands but in fact do not trigger higher placement in response to search engine queries). On the other hand, the failure of an infringer to succeed with his plan of infringement may still leave open the risk of irreparable injury in the future, justifying relief against future attempts at infringement that may prove more successful.

The doctrine also may be inapplicable in certain cases where the confusion is presented on a landing page, rather than in a domain name or hidden text (although in that case likelihood of confusion, rather than initial interest confusion, still could be shown to obtain relief).

Given the importance of the doctrine in many Internet cases and the variations that exist among the circuits, where a party sues or is sued potentially can be outcome determinative.

7.08[3] Use of Disclaimers

The use of disclaimers sometimes, but not always, may be viewed as mitigating likelihood of confusion. Whether disclaimers are likely to be viewed as relevant online may depend in part on how consumers access a given site and whether a court accepts the doctrine of initial interest confusion. If a site is accessed by typing in a mark and a TLD extension such as .com, for example, a disclaimer on

[Section 7.08[3]]

1See, e.g., Taubman Co. v. Webfeats, 319 F.3d 770 (6th Cir. 2003) (finding the use of a disclaimer reducing the risk of likelihood of confusion).

2See supra § 7.08[2].
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