INITIAL INTEREST CONFUSION VIS-À-VIS TRADEMARK LAW

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ABSTRACT

The turn of the new century brought with it plenty of technological advancements and, as a result, a slew of legal difficulties. In recent years, courts have been bombarded by several internet-related legal dilemmas. Websites have introduced a new set of challenges for trademark owners, because of domain names, meta tags, and keyword advertising. In order to establish a cause of action for trademark infringement, the conditions of 'use in commerce' and 'consumer confusion' must be met. While these conditions may easily be proved in the real world, proving them in the virtual world can be much more complex. The likelihood of confusion is thought to be the most important factor in determining whether or not a trademark has been infringed. As a court-created subcategory of possibility of confusion, initial interest confusion arose. In this paper, we look at the judicial perspective on these issues. When dealing with cases involving keywords, the courts have gone into great detail about the issues of use in commerce, actual confusion, and initial interest confusion. Nonetheless, several critical issues are currently receiving little attention. What should be the definition of initial interest confusion? How much confusion is required to warrant a solution? Who should be perplexed, when, and for how long? When initial interest confusion is sufficient to support a finding of trademark infringement, how should courts decide? A slew of new cases are emerging, and the courts are delving into the issue.

Keywords: Keyword Advertising, Trademark Infringement, Initial Interest Confusion

Over the last 2 decades the advertising industry has transformed radically. With the rise of Internet services and its users worldwide, it has become the prime medium for businesses to reach consumers. Businesses use various ways of advertising over the internet to market their products and seek customer attention, for example, pop ups , banner ads etc. As these new forms of advertising emerged, (Ab)use of trademarks has also increased. When domain names were introduced and businesses advertised these to identify themselves, unauthorized use of one's trademarks in domain names was rampant which was controlled by enacting specific legislations and creating a central authority to regulate the use of domain names. Later the use of trademarks in internal programming emerged as a big problem and frequently the open sale and purchase through auctioning of trademarks as keywords by various search engines has posed fresh challenges to businesses, consumers and legal community. Every new technology has brought new challenges before law. Google's Ads (Formerly known as adwords) and its active search engine optimization tools has its own complex issues involving Trademarks, technology and law.

In order to establish a cause of action for trademark infringement, the conditions of 'use in commerce' and 'consumer confusion' must be met. These conditions, on the other hand, can be easily proven in the real world, but proving them in the virtual world may be more complex. It is difficult to establish them. However, the standards for 'use in commerce' which courts use to establish whether a trademark is being used for commercial purposes, are quite wide and hence easy to satisfy. The 'use in commerce' criteria can be satisfied simply by selling advertising space. However, proving the possibility of confusion can be challenging. The likelihood of confusion is thought to be the most important factor in determining whether or not a trademark has been infringed.[1]

CONSUMER CONFUSION- INITIAL INTEREST CONFUSION

The matter of 'Use in Commerce' has mostly been resolved by the courts. Especially after the Second Circuit ruled in Rescuecom Corp. v. Google Inc. that the sale of the trademarked word 'Rescuecom' was a 'use in commerce' within the meaning of the Act in *Rescuecom Corp. v. Google Inc.*[2] The court in this case, however, did not rule on whether Google's conduct

[1] Nissan Motor v. Nissan Computer, 89 F. Supp. 2d 1154, 1162 (C.D. Cal. 2000)
[2]Rescuecom Corp. v. Google, Inc.456 F. Supp. 2d 393 (N.D.N.Y. 2006), rev'd, ___ F.3d ____, 2009 WL 875447 (2nd Cir. Apr. 3, 2009) Available at http://www.finnegan.com/RescuecomCorpvGoogleInc/

constituted trademark infringement. This is due to the other criterion of trademark infringement, which is that the plaintiff must establish consumer confusion in order to win the case. However, none of these cases have gone beyond the issue of 'use in commerce'. There is no precedent that the selling of a trademarked keyword is considered trademark infringement. Keyword sales, according to search engines like Google, do not constitute infringement. However, Google has a vested commercial interest in reaching an out-of-court settlement in order to avoid the risk of a negative ruling that could jeopardize its business model. Though the outcomes of these out-of-court agreements are unknown, they are undeniably better for Google than a trademark infringement verdict.[3]

In the likelihood of confusion elements not functioning well in the situation of keyword advertising, plaintiffs rely on the concept of first interest confusion to argue that search engines are infringing on the Lanham Act. As a court-created subcategory of likelihood of confusion, initial interest confusion arose. According to the initial interest confusion theory, competitors try to entice customers to buy their product instead of the one they were looking for.[4] Prior to the sale, there is initial interest confusion. Before the purchase, the customer realizes his error, but instead of correcting it, he purchases the item that he initially confused for the original. When a vendor intentionally diverts consumer attention away from his competitor by using the competitor's trademark, or something that could be mistaken for the competitor's trademark, courts agree that the vendor benefits unfairly from the competitor's goodwill and can be charged with trademark infringement.

The risk is that potential consumers of a website (website 1) may be diverted and distracted to a competitor website (website 2) while searching the product on the internet. The risk is that potential customers would mistakenly believe that website 2 is related to website 1 and will be too lazy to continue their search for website 1. Alternatively, even if they don't feel there's a link between websites 1 and 2, they can choose to stay on website 2 because the products or goods are compelling enough to make them abandon their initial quest. In either case, potential customers will be diverted away from their original search.[5] Trademark infringement may

[3]Kristin Kemnitzer, *Beyond Rescuecom v. Google: The Future of Keyword Advertising*, 25 Berkeley Tech. L.J. 401 (2010) Available at: http://scholarship.law.berkeley.edu/btlj/vol25/iss1/16

[4]Kemnitzer, *Supra* note 3

[5] Yelena Dunaevsky, *Don't Confuse Meta Tags with Initial Interest Confusion,* Fordham Urban Law Journal, Volume 29, Issue 3 2001 Article 24

apply even if the consumer is aware of the origin before the point of sale as competitors try to entice customers to buy their product instead of the one they were looking for.

The Lanham Act does not specify initial interest confusion; however, revisions to the act in 1962 spurred courts' recognition of the doctrine.[6] In that year, Congress amended the statute to remove the reference to 'purchasers' which had previously required that "purchasers" be misled or confused about the origin of a product or service before trademark infringement could be discovered. The measure applies to both potential and actual purchasers, according to the Senate report on the modifications.

> *"Courts properly interpreted the change in the Lanham Act as broadening the concept of trademark infringement to include consideration not only of confusion at the time of sale, but also of confusion that exists prior to the time of sale, and that which emerges after a sale is completed.*"

Therefore, a trademark infringement claim can be based on initial interest confusion in many cases, even if the confusion is eventually done away with or no actual sale occurred.[7] The Second Circuit first used initial interest confusion in *Grottian, Helfferich, Schuly, Th. SteinwegNachf v. Steinway & Sons*[8], a case involving the sale of pianos.[9] The Second Circuit

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[6] Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 Cardozo L.Rev. 105, 160 (2005).

[7] Aleasha J.Boling *Confusion Or Mere Diversion ? Rosetta Stone V. Google's Impact On Expanding Initial Interest Confusion To Trademark Use In Search Engine Sponsored Ads* Indiana Law Review [Vol. 47:279-300] 2014

[8]Grotrian, Helfferich, Schulz, Th. SteinwegNachf v. Steinway & Sons, 523 F.2d 1331 (2d Cir. 1975).
It is a Second Circuit case often credited with coining the term "initial interest confusion." In Grotrian, a dispute arose from the use of the "Grotrian-Steinweg" name on pianos imported from Germany and sold in the United States. The plaintiff, Steinway & Sons, contended that the mark infringed its Steinway mark for pianos. The Grotrian-Steinweg pianos had a historical relationship with the Steinway pianos. In 1835, Heinrich E. Steinweg, the founder of Steinway & Sons, began making pianos in Germany under the name Steinweg. In 1850 he emigrated to New York, changed his name to Steinway and began selling pianos under the name Steinway & Sons. His oldest son, C.F. Theodor Steinweg, remained in Germany and continued making pianos under the Steinweg name. In 1866, Theodor sold his business to his three employees., and moved to the United States to join his father at Steinway & Sons. Theodor gave his successors the right to use the name "Steinweg." The new owners of Steinweg sold their pianos in Germany under the "Grotrian- Steinweg" mark.When Grotrian began selling pianos under the Grotrian- Steinweg mark in the United States, Steinway & Sons threatened to sue for trademark infringement. The Second Circuit Court of Appeals held that even though there was no confusion as to who manufactured the piano at the time of sale, a customer might initially think there was some relationship between Grotrian-Steinweg and Steinway & Sons. The court was confident that consumers would not be confused at the time of purchase because piano purchasers were highly sophisticated, the product very expensive, and the appearance of the marks in context were quite different. Nevertheless, both the district court and the Second Circuit concluded that Grotrian had infringed Steinway's trademark because people would be more likely to buy the Grotrian-Steinweg piano under the logic that Grotrian would be afforded credibility early in the transaction as a result of a consumer's positive mental "association" with "Steinway." The district court found that Grotrian had committed trademark infringement because consumers were "misled into an initial interest" in the Grotrian-Steinweg pianos because of "subliminal confusion" as to the companies' relationship.

[9]Kemnitzer, *Supra* note 3.

showed, however, that its wariness of initial interest confusion in the internet context in *Savin Corp. v. Savin Group*[10]. The Savin court noted that internet initial interest confusion is quite different from 'brick and mortar' initial interest confusion. This is because 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 and from consumers becoming trapped in a competing site. Internet initial interest confusion thus requires a showing of intentional deception. This higher standard protects defendants in internet cases from inauthentic initial interest confusion claims.[11]

While deciding the issue of likelihood of confusion in *Hearts on Fire Co., LLC v. Blue Nile, Inc.*[12] The court analyzed Hearts on Fire's allegations of initial interest confusion. Despite the fact that the First Circuit has yet to examine the question of early interest confusion, the District Court of Massachusetts ruled that Hearts on Fire had standing to sue under the Lanham Act for initial interest confusion. The court did warn, however, that showing initial interest uncertainty in internet instances can be difficult because once a user clicks on a link, she can easily click back if it isn't what she was looking for. The ease with which an internet buyer might change their mind warns against over-expansive trademark protection, as any confusion is likely to be

[10]Savin Corporation v. The Savin Group, 391 F.3d 439, 2004 U.S. App. Lexis 25479 (2d Cir., December 10, 2004) Plaintiff Savin Corporation is engaged in the business of selling photocopiers, printers, fax machines and other equipment. Since 1959, plaintiff has used the trade name "Savin" in its marketing efforts. In 2002, plaintiff spent over $20 million advertising its products in many media. Plaintiff operates a web site at 'www.savin.com.'
Defendants the Savin Group, Savin Engineers, Savin Consultants and JMOA Engineering are New York based professional engineering corporations that provide services in the areas of environmental waste management, and building inspection and maintenance. Defendants have been using the 'Savin' name to promote these services since 1987.
Second Circuit affirms the dismissal of trademark infringement claims brought by Savin Corporation, a maker of photocopiers, printers, fax machines, and other office equipment, against the Savin Group, Savin Engineers and Savin Consultants arising out of defendants' use of plaintiff's 'Savin' trademark in, among other things, website domain names, to market their professional engineering companies. The Second Circuit held that consumers were unlikely to be confused by these competing uses of the 'Savin' mark, in part because of the differing services and products the parties offer to the public.
The Second Circuit reversed so much of the District Court's decision that dismissed claims brought under the Federal Trademark Dilution Act (FTDA) and its New York State counterpart, New York Gen. Bus. Law §360-1, and remanded those claims to the District Court for reconsideration. The Second Circuit held that the District Court had improperly concluded that the Supreme Court's decision in Moseley mandated, in the instant case, that the plaintiff must provide evidence of actual dilution to proceed with claims under either statute. As to the FTDA, the Second Circuit held that such a showing is not necessary where the junior user used a mark identical to the famous mark owned by the senior user. As to New York law, the Second Circuit held that Moseley's pronouncement did not affect the showing necessary under New York State law. Under New York State law, a claim for dilution could proceed on a showing of a mere likelihood of dilution -- the submission of evidence of actual dilution mandated by the Supreme Court in Moseley was not required.
[11]Kemnitzer, *Supra* note 3.
[12] Hearts on Fire Co., LLC v. Blue Nile, Inc.33F. Supp. 2d, 2009 WL 794482 (D. Mass. Mar. 27, 2009) available at
http://www.finnegan.com/HeartsonFireCoLLCvBlueNileInc/

fleeting and easily resolved. The district court also questioned whether a competitor's link affects customers in a meaningful sense by confusing them, or whether it benefits consumers by giving buyers more choices in a market.[13]

However, the courts have found that Google's use of its trademark produced initial interest confusion in *Netscsape communications[14], GEICO, Inc[15], American blind & Wallpapers[16]*. The court made it clear that its decision only applies to the facts of this case, which included the unique business strategy, surveys, and similarity of goods and services, among other things.

The Court devised a new standard for online cases, based on the material the user viewed on the screen and the context of the advertisemment, in addition to the traditional likelihood of confusion factors. These factors include:

(1) the consumer's ability to return to a previous page if what she clicked on was not what she was looking for,

(2) the mechanics of the specific search the consumer conducted,

(3) the content of the sponsored link and the corresponding webpage,

(4) additional content on the defendant's webpage that could potentially add additional confusion, and

(5) the technological sophistication of the defendant's webpage.

(6) the content the user wanted to find, and

(7) the length of time the confusion lasted.

While the court devised a potentially useful approach, it appeared to combine the first interest confusion analysis with the usual eight-factor likelihood of confusion test. Such a standard has not been adopted by any circuit courts or the Supreme Court. It's uncertain whether the

[13]Kemnitzer, *Supra* note 3
[14]Playboy Enterprises, Inc. v. Netscape Communications Corp. 354 F.3d 1020 (9th Cir., Jan. 14, 2004) Available at http://www.internetlibrary.com/cases/lib_case336.cfm
[15]Government Employees Insurance Co. (GEICO) v. Google, Inc. 330 F. Supp. 2d 700 (E.D. Va. 2004) (Google's motion to dismiss); 77 U.S.P.Q.2d 1841 (E.D. Va. Aug. 8, 2005) available at http://www.finnegan.com/GovernmentEmployeesInsuranceCovGoogleInc/
[16] Google Inc. v. American Blind & Wallpaper Factory, Inc. 74 U.S.P.Q. 2d 1385 (N.D. Cal. 2007) (Google's motion to dismiss); U.S. Dist. LEXIS 32450 (N.D. Cal. Apr. 18, 2007) (Cross-motion for summary judgment) Available at http://www.finnegan.com/GoogleIncvAmericanBlindandWallpaperFactoryInc/

Massachusetts District Court will find infringement based on traditional likelihood of confusion or initial interest confusion in the end.[17]

In *Australian Gold Inc. v. Hatfield*,**[18]** The court purported to recognize and to accept the initial interest confusion doctrine as a method of proving trademark infringement, however it circled back to the same question of consumer confusion.

The court recognized that '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'. The court then applied the concept of the initial interest confusion doctrine to this case and determined that it did apply because paying Overture.com for the plaintiff's trademarks was an attempt to divert consumers to the defendant's websites. However, after recognizing that initial interest confusion was in fact present in this case, the court decided to 'evaluate plaintiff's claim for initial interest confusion according to the six-prong test it announced in Sally Beauty Co. v. Beautyco, Inc.[19]' This six-prong test that the court purported to use to evaluate the initial interest confusion claim is merely a traditional likelihood of confusion balancing test and does not take into account initial interest confusion or diversion. Thus even though the defendants intended to divert consumers, because the plaintiffs could not show any actual consumer confusion, they lost on this claim.

This case is illustrative of the problems that both initial interest confusion and likelihood of confusion cause in keyword advertising and Internet cases. There is no clear test in applying the initial interest confusion doctrine and the only one that courts have fashioned thus far, is almost identical to the likelihood of confusion balancing tests. The only difference is that courts

[17]*Id.*
[18] Australian Gold, Inc. v. Hatfield, 436 F.3d 1228 (10th Cir. 2006).
Plaintiffs are three related businesses that manufacture and distribute indoor tanning lotions. Plaintiff Australian Gold, Inc., manufactures Australian Gold and Caribbean Gold tanning lotions and owns all trademarks related to those two brands. Defendants resell Products over the internet without Plaintiffs' authorization. Husband and wife Mark and Brenda Hatfield; their son, Matthew; and Matthew's wife, Joanna, all play a role in their business. In this case, as noted above, Defendants used Plaintiffs' trademarks on Defendants' Web sites. Defendants also placed Plaintiffs' trademarks in the metatags of Defendants' Websites. Further, Defendants paid Overture.com to list Defendants in a preferred position whenever a computer user searched for Plaintiffs' trademarks. All of these actions were attempts to divert traffic to Defendants' Web sites. While viewing Defendants' Web sites, consumers had the opportunity to purchase Products, but also to purchase lotions from Plaintiffs' competitors. Moreover, Defendants continued to use the trademarks to divert internet traffic to their Web sites even when they were not selling Products. Thus, Defendants used the goodwill associated with Plaintiffs' trademarks in such a way that consumers might be lured to the lotions from Plaintiffs' competitors. This is a violation of the Lanham Act.
[19] No. 01-6049, 01-6075 (September 3, 2002)

recognize that initial interest confusion is 'possible' but they never truly analyze whether this possibility is actually present.[20]

The Ninth circuit court in **Network Automation, Inc. v. Advanced Sys. Concepts, Inc.[21],** has devised a new four factor test to determine Initial interest confusion

Under the AUTOMATE mark, the plaintiff Network Automation, Inc. (Network) sold job-scheduling software. Under the federally registered mark ACTIVEBATCH, Advanced Systems Concepts, Inc. (Systems) (Defendant) provided competing job-scheduling software. ACTIVEBATCH was acquired as a search-engine term by Network, which resulted in Network's sponsored adverts appearing in the search results. The ACTIVEBATCH mark was not present in the title or content of Network's sponsored commercials. The URL in the fourth line of the ads was the only way for Network to be identified; neither the ad title nor the text did. 'Batch Job Scheduling' and 'Windows Job Scheduling' were among the titles of the adverts. Network filed a declaratory judgement that its conduct did not constitute trademark infringement after Systems protested to Network's actions. System's counterclaimed for trademark infringement and sought a preliminary injunction.

The district court ruled in favour of the defendant (Systems) and ordered a preliminary injunction prohibiting Network from using the search-engine keyword ACTIVEBATCH. It was first determined that Systems had a good chance of demonstrating Network's conduct constituted 'use' of the ACTIVEBATCH mark in commerce. The district court stressed the importance of the 'Internet Trinity' elements: (1) the resemblance of the marks, (2) the relatedness of the goods, and (3) the use of the internet as a marketing medium when it came to the merits and the likelihood-of-confusion aspects. It was discovered that Systems were favored by all three of these factors. The district court determined that Systems' mark was strong, internet customers likely employed a low degree of caution in purchasing both parties' products, and Network willfully utilized Systems' mark to sell its own product. The district

[20] Storus Corp. v. Aroa Mktg., Inc., No. C-06-2454 MMC, 2008 WL 449835 (N.D. Cal. Feb. 15, 2008). Similar to Australian Gold, Inc., a court in the Northern District of California recognized the presence of initial interest confusion, but segued straight into a traditional likelihood of confusion analysis without any modifications for initial interest confusion.After discussing the concept of initial interest confusion and accepting that it could be present in that case, the court, in determining whether the defendant's use created initial interest confusion, applied the traditional Sleekcraft factors. The only modification to this analysis was the recognition that in the Internet context, the first three Sleekcraft factors are the most important. However these factors were created for the purpose of traditional likelihood of confusion claims, not for initial interest confusion claims. Thus this case is yet another of many keyword advertising and Internet cases that fail to properly analyze initial interest confusion.

[21]2011 WL 815806 (9th Cir. Mar. 8, 2011) Available at http://www.finnegan.com/files/upload/Incontestable_MarApr11_4.html

court further remarked that the above-mentioned Network sponsored advertising were not ‘clearly labelled’ and hence ‘may first confuse consumers’ into clicking on them.

The Ninth Circuit reversed the order on appeal, ruling that Systems had failed to establish a sufficient likelihood of confusion to warrant preliminary injunctive relief. To begin, the Ninth Circuit agreed with the Second Circuit that using a trademark as a search engine phrase to trigger the display of a competitor's advertisement constituted a ‘use in commerce’ under the Lanham Act. As a result, the case revolved around whether or not this activity was likely to cause consumer confusion. The plaintiff (Network) claimed that its use of ACTIVEBATCH constituted legal ‘comparative, contextual advertising’ that gave smart customers clear options. Network’s use of ACTIVEBATCH, according to Systems, misled consumers by ‘hijacking their attention with intentionally unclear advertisements.’

The Ninth Circuit started its substantive analysis by emphasising that the eight classic Sleekcraft likelihood-of-confusion considerations are ‘not a rote checklist’ that must be followed to the letter. Rather, they were intended to be an ‘adaptable proxy for consumer confusion,’ therefore courts have misconstrued the Brookfield decision's emphasis on the ‘Internet Trinity’ likelihood-of-confusion elements as the most significant considerations in all internet-related infringement cases. The court noted that ‘we did not intend Brookfield to be read so expansively as to forever enshrine these three factors . . . as the test for trademark infringement on the Internet’. Other factors, according to the court, may be more ‘illuminating’ depending on the facts of each Internet-related case. For example, while the Ninth Circuit used the ‘Internet Trinity’ factors in Brookfield to analyse the likelihood of confusion generated by similar domain names, it did not emphasise these factors in its metatag analysis. Although the Ninth Circuit agreed with Professor McCarthy that the ‘Internet Trinity’ methodology was ‘appropriate’ for domain-name conflicts, it found that these considerations were ‘particularly poor fit’ for keyword matters.

The Ninth Circuit examined all of the Sleekcraft likelihood-of-confusion factors and concluded that

(1) the strength of the mark,

(2) evidence of actual confusion,

(3) the type of goods and degree of care likely to be exercised by the purchaser, and

(4) the labelling and appearance of the sponsored ads and the surrounding context on the search-results page.

These were the most relevant factors for keyword-advertising cases examined by the court. It further ruled that the trademark owner 'must demonstrate likely confusion, not mere diversion' when analysing initial-interest confusion.

The type of goods and degree of care exercised by consumers is 'very relevant' in determining the likelihood of confusion in keyword disputes, according to the Ninth Circuit. According to the court, a 'sophisticated consumer of business software exercising a high degree of care is more likely to understand the mechanics of internet search engines and the nature of sponsored links, whereas an un-savvy consumer exercising less care is more likely to be confused.' The district court determined that this factor supported the defendant because Internet users 'generally exercise a low degree of care,' but the Ninth Circuit disagreed, holding that this concept was out-of-date in most cases. Most internet shoppers are now fairly sophisticated about the process, according to the Ninth Circuit, because online commerce is routine, and consumers seeking for pricey software goods online are likely to be even more sophisticated. Internet consumers, in particular, are used to the 'trial and error' nature of online shopping, and 'skip from site to site, ready to hit the back button whenever they're not satisfied with a site's contents,' and 'don't form any firm expectations about a website's sponsorship until they've seen the landing page, if at all,' As a result, the district court erred in favouring Systems by weighing this factor in his favour.

Finally, the Ninth Circuit looked at a criterion not included in the Sleekcraft factors: the sponsored advertising' labelling and appearance, as well as their context on the search-results page. The district court rightly evaluated the content of Network's sponsored advertisements and decided that they did not clearly indicate their source, but it failed to consider the context. The Ninth Circuit cited its judgement in *Playboy v. Netscape*[22] , which involved keyword-triggered banner advertisements and held that

(1) 'clear labelling' of the banner ads may have removed the risk of initial-interest confusion,

(2) the search-results page did not 'clearly segregate' the banner ads from the organic

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[22] *Supra*, note 14

search results.

The Ninth Circuit's judgement is significant because it abandons the 'Internet Trinity' likelihood-of-confusion test in favour of a new four-factor approach for keyword instances. The Ninth Circuit further clarified that when presenting infringement claims based on initial-interest confusion, trademark owners must show 'likely confusion,' not 'mere diversion,' in this judgement. In the United States, there is no definite position at this time. Despite the fact that a number of cases involving Google have been brought before US courts, many have been settled outside of court, setting no precedent. Even outside of the United States, the legal position on trademark infringement in search engine keyword advertising is unclear.

The study of above mentioned cases reveals that there is no unanimous view on the question of trademark infringement. Different circuit courts have reached differing conclusions. The doctrine of initial interest confusion was created in response to instances where customers were initially perplexed about a product's source or association, but the perplexity dissipated before they made a purchase. It was developed by the courts because consumer uncertainty affects purchasing decisions in the market for goods, thereby allowing a competitor to get a foot in the door by confusing consumers. This confusion, or incorrect perceptions about the companies' interrelationships, can devalue a trademark that is meant to point to only one entity. The doctrine is the court's; attempt to protect a trademark holder's goodwill, even if the confusion is only temporary.

Courts of different countries' have reached different conclusions about Google's responsibility and have found Google not to be responsible for trademark infringement. Courts have not come to a consensus on how to assess Initial Interest Confusion; they continued to decide the issue of Initial Interest as it came in different cases but were always careful to emphasize that its rulings applied only to the specific facts of the case. The courts have applied a lower standard of confusion than for traditional 'likelihood of confusion', the line between the two is unclear. Some courts are reluctant to apply this doctrine because it potentially takes trademark rights too far, beyond the fundamental goal of protecting consumers who may not necessarily be confused at the time of purchase under this doctrine. Trademarks serve as product identifiers for consumers, helping them find what they want and making the search process more efficient. However, when mere diversion is considered infringement, the doctrine potentially protects trademark owners at the expense of consumers. Sometimes competitor ads are honest and not misleading and provide good alternatives to consumers thus promoting healthy competition among businesses.[23]

In such instances, mere diversion should not be supposed for Initial Interest Confusion. Although the Second Circuit[24] has found that mere diversion constitutes Initial Interest Confusion, the Ninth Circuit[25] held that Initial Interest Confusion is still fundamentally concerned with consumer confusion, such that diversion without even a minimal amount of confusion should not lead to a finding of infringement. Initial Interest Confusion doctrine bases infringement not on consumer confusion over what is being bought, but on what is being sought.This indicates that courts are beginning to step away from requiring a traditional showing of consumer confusion in order to succeed on a claim. However, as more and more cases are brought to light, the law is steadily evolving.

[23] Winnie Hung, *Limiting Initial Interest Confusion Claims In Keyword Advertising*, 27 Berkeley Technology Law Journal
[24] Hearts on Fire Co., LLC v. Blue Nile, Inc.F. Supp. 2d, 2009 WL 794482 (D. Mass. Mar. 27, 2009)
[25] Network Automation, Inc. v. Advanced Sys. Concepts, Inc.2011 WL 815806 (9th Cir. Mar. 8, 2011)