INITIAL INTEREST CONFUSION IN METATAG CASES: THE MOVE FROM CONFUSION TO DIVERSION

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Initial interest confusion occurs in trademark law when a consumer is momentarily diverted to a competitor's product due to the competitor's use of a trademark. Current case law reveals that courts are loosely applying this doctrine to internet cases where a trademark is used in website metatags in a way that runs contrary to the purpose of trademark protection and is harmful to the market. Courts in these cases are overly focused on the misappropriation of goodwill when they should be focused on whether there actually exists a likelihood of confusion. In response to concerns about free-riding, courts have essentially turned initial interest confusion into a substitute test for likelihood of confusion, making it easier for trademark owners to prove trademark infringement in these cases.

Recently, initial interest confusion has been applied in the internet context including in metatag cases. The issue of trademark infringement arises in metatag cases when parties use a trademarked term in their website metatags to attract more customers by improving their ranking within search engine results.[1] Metatags are descriptive words embedded in HTML code that website owners use to describe the contents of the website.[2] These words are used to determine which websites should appear on keyword search engine results, based on how often the corresponding keyword appears in the metatags of the website.[3] Currently, however, few search engines actually use metatags to determine the relevancy of websites.[4] In fact, it is now more common for search engines to use content-based algorithms to rank websites.[5] Despite this change in technology,

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1. *See, e.g.*, Brookfield Commc'ns, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1045 (9th Cir. 1999).

2. *See id.* at 1045; *see also*, World Wide Web Consortium, HTML 4.01 Specification § 7.4.4, http://www.w3.org/TR/REC-html40 (last visited Jan. 25, 2007); Wikipedia, Meta element, http://en.wikipedia.org/wiki/Meta_element (last visited Dec. 20, 2006).

3. *See* World Wide Web Consortium, *supra* note 2, §§ 7.4.4, app. B.4; Wikipedia, *supra* note 2.

4. Zachary J. Zweihorn, Note, *Searching for Confusion: The Initial Interest Confusion Doctrine and its Misapplication to Search Engine Sponsored Links*, 91 CORNELL L. REV. 1343, 1362-63, n.142 (2006); *see also* Wikipedia, *supra* note 2.

5. *See* Zweihorn, *supra* note 4; *see also* Wikipedia, *supra* note 2.

courts are still addressing the use of metatags as though they matter a great deal to competition and marketing.[6] Thus, some of the criticisms of initial interest confusion on the internet are not just legal analytic concerns, these criticisms also question the usefulness of the doctrine as applied to the internet.[7]

This Note argues against using initial interest confusion as a less stringent substitute test in the trademark infringement analysis and urges courts to revert to the traditional likelihood of confusion test. It does not argue for or against the doctrine of initial interest confusion as originally conceptualized in the brick-and-mortar world, but rather, argues against its broad application in the internet context. Part I gives background on trademark law and the doctrinal development of initial interest confusion from brick-and-mortar cases to internet cases. In particular, *Brookfield Communications v. West Coast Video* set in motion the expansion of the initial interest confusion doctrine into internet cases, leaving in its wake precedent for straying from the traditional Lanham Act evaluation. Part II follows the initial interest confusion doctrine through an analysis of several recent cases following *Brookfield* from 2002 to 2006, which represent a growing trend of misapplication and undue broadening of the doctrine. These cases illustrate a doctrinal change for the worse in trademark law by misinterpreting the interplay between the initial interest confusion doctrine and the internet, misapplying the doctrine, and broadening the scope of the doctrine. Part III discusses why the misguided evolution of initial interest confusion is of great policy concern. In particular, this doctrinal development is harmful to both consumers and competition. In Part IV, this Note urges courts to limit the application of initial interest confusion and instead apply the traditional likelihood of confusion analysis when dealing with trademark abuses on the internet.

I. FROM LIKELIHOOD OF CONFUSION TO INITIAL INTEREST CONFUSION

Trademarks identify goods and services. The Lanham Act protects trademarks by creating a private right of action by a trademark owner

6. Although abusing trademarks in domain names should have been adequately addressed by the Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d) (2002), courts are still applying the initial interest confusion test in domain-name cases. *See* SMC Promotions, Inc. v. SMC Promotions, 355 F. Supp. 2d 1127, 1136 n.14 (C.D. Cal. 2005) (holding that because defendant's use of plaintiff's trademark in its registered domain name led to initial interest confusion, it constituted trademark infringement, thus finding it unnecessary to address ACPA claims).

7. *See infra* Part III.

against any person who, without the owner's consent, uses that trademark in commerce in a way that is likely to confuse potential consumers as to the source of the product associated with the trademark.[8] Trademark protection serves two main functions: first, it prevents consumers from being confused as to the source of a product; and second, it protects the goodwill of the trademark owner.[9] Eliminating consumer confusion reduces consumer searching and purchasing costs, which leads to efficiency in the marketplace. Protection of a trademark owner's goodwill provides an incentive to invest in business development.

A. Proving Trademark Infringement

A party alleging trademark infringement must prove that the defendant used the trademark in commerce in a way that is likely to confuse consumers as to the source of the product on which the mark is being used. The first threshold requirement is "use in commerce." Once this has been established, the main crux of an infringement claim is consumers' likelihood of confusion when encountering the allegedly infringing mark.[10] Traditionally, courts look for whether the consumer was confused at the time of purchase. The Restatement (Third) of Unfair Competition delineates a number of factors that can be used by courts to evaluate the likelihood of confusion.[11] Each circuit employs a similar test. The Ninth Circuit, for example, employs the factors established in *AMF Inc. v. Sleekcraft Boats* (the "*Sleekcraft* factors").[12] The factors are:

> (1) Strength of the [trademark owner's] mark, (2) proximity of the goods, (3) similarity of the marks, (4) evidence of actual confusion, (5) marketing channels used, (6) type of goods and the degree of care likely to be exercised by the purchaser, (7) defendant's intent in selecting the mark, and (8) the likelihood of expansion of the product lines.[13]

In *Sleekcraft*, both plaintiff and defendant manufactured recreational boats.[14] Plaintiff used the trademarked term "Slickcraft" and defendant used the term "Sleekcraft" for their respective boats.[15]

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8. 15 U.S.C. §§ 1051-1127 (2006).

9. *See, e.g.*, Bosley Medical Institute, Inc. v. Kremer, 403 F.3d 672, 677 (9th Cir. 2005); Lisa M. Sharrock, *Realigning the Initial Interest Confusion with the Lanham Act*, 25 WHITTIER L. REV. 53, 74-75 (2003).

10. *See* Lamparello v. Fawell, 420 F.3d 309, 314 (4th Cir. 2005).

11. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21 (1995).

12. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979).

13. *Id.* at 348-49.

14. *Id.* at 346.

The Ninth Circuit ruled that there was a likelihood of confusion, and therefore trademark infringement, basing its finding on an analysis of the *Sleekcraft* factors.[16] When examining the strength of an owner's mark, the more inherently distinctive—meaning arbitrary or fanciful—the mark is, the more deserving it is of trademark protection. If a mark is suggestive, on the other hand, it requires some acquired secondary meaning to warrant protection. In this case, the court found "Slickcraft" to be a suggestive mark because it connoted the image of its product, a boat.[17] It had an acquired secondary meaning, but because it was a weaker mark than if it had been purely arbitrary or fanciful, it was only entitled to a more restricted scope of protection.[18] On proximity of the goods, the court found that the products were not directly competing, but closely related in use and function, which increased the likelihood of confusion.[19]

Generally, when examining the similarity of trade or service marks, courts consider the marks as a whole and examine whether they look alike, sound the same and mean the same thing. The court in *Sleekcraft* found that the marks similar in appearance, sound, and meaning, which increased the likelihood of confusion.[20] The court also looked for evidence of actual confusion,[21] but because this evidence is difficult to come by, its absence does not weigh significantly in defendant's favor.[22] The evidence introduced in *Sleekcraft* was deemed negligible.[23] The court found the parties used similar marketing channels, which increased the likelihood of confusion because they were likely to both reach the same set of consumers.[24]

On the degree of purchaser care, the court found the goods were high-quality and expensive, leading to a higher degree of purchaser care because consumers are more likely to pay attention to features of a product, such as the source, when the product is expensive.[25] This reduced the likelihood of confusion. The court then considered the defendant's intent because such intent to use another's mark can indicate an attempt to deceive the public.[26] In this case, no intent was established, which also decreased

15. *Id.*
16. *Id.*
17. *Id.* at 349.
18. *Id.* at 350.
19. *Id.*
20. *Id.* at 350-51.
21. *Id.* at 352.
22. *Id.* at 353.
23. *Id.* at 352.
24. *Id.* at 353.
25. *Id.* at 353-54.
26. *Id.* at 354.

the likelihood of confusion.[27] Upon examining the likelihood of expansion of either product line, the court found both product lines were likely to expand, which meant the goods were more likely to compete in the future, which also increased the likelihood of confusion.[28]

B. Initial Interest Confusion in the Brick-and-Mortar World

Initial interest confusion is temporary, pre-sale confusion that occurs when a consumer is drawn to a product believing it to be affiliated with another company because the product somehow evokes that company's trademark.[29] The doctrine assumes that the consumer is no longer confused at the time of purchase, but the use of the trademark has drawn the consumer to the product and away from the trademark owner's product. The Second Circuit established this doctrine in *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons* by shifting the focus of the likelihood of confusion analysis from the time of purchase to earlier in the consumer's search for products.[30] *Grotrian* concerned the possibility of confusion as to the source of pianos by competing manufacturers.[31] The dispute centered on the likelihood that consumers may have entered the Gotrian-Stenweg store, believing it to be affiliated with Steinway & Sons.[32] The Second Circuit found it was unlikely that a potential customer would actually buy a Grotrian-Stenweg piano still believing it to be a Steinway, but it "decline[d] to hold . . . that actual or potential confusion *at the time of purchase* necessarily must be demonstrated to establish trademark infringement under the circumstances of this case."[33] Instead, the court turned to the idea of initial interest confusion, which it defined as

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27. *Id.*

28. *Id.*

29. *See, e.g.*, Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 464 (7th Cir. 2000) ("Such confusion, which is actionable under the Lanham Act, occurs when a consumer is lured to a product by its similarity to a known mark, even though the consumer realizes the true identity and origin of the product before consummating a purchase."); Playboy Enters., Inc. v. Netscape Commc'ns Corp., 354 F.3d 1020, 1025 (9th Cir. 2004) ("Initial 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 an actionable trademark infringement.").

30. Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 523 F.2d 1331, 1342 (2d Cir. 1975).

31. *Id.* at 1334. The two disputed trademarks were similar because Steinweg was founded by the same family that later moved to the U.S., changed their names to Steinway and started Steinway & Sons.

32. *Id.*

33. *Id.* at 1342 (emphasis in original).

the initial attraction that draws a potential customer to a product based on the recognition of the trademark being used, even if that mistaken belief is corrected before the purchase is actually made.[34] The court considered even this temporary confusion to be misappropriation of the trademark owner's goodwill, a factor which it used to support a finding of trademark infringement.[35]

After *Grotrian*, the initial interest confusion doctrine did not catch hold until *Mobil Oil Corp. v. Pegasus Petroleum Corp.*[36] In this case, the Second Circuit in this case relied on the initial interest confusion doctrine and ruled that the word "Pegasus" infringed Mobil's "flying horse" mark.[37] Mobil manufactured and sold petroleum products and used a "flying horse" symbol representing the mythological Pegasus as its trademark.[38] Pegasus Petroleum dealt in oil trading and did not sell directly to the general public.[39] Upon evaluation of the likelihood of confusion, the court noted Mobil and Pegasus were not direct competitors, but they did both compete in the petroleum industry.[40] Pegasus Petroleum did not actually use a pictorial symbol of a flying horse, but the court found that "the word 'Pegasus' evokes the symbol of the flying red horse and that the flying horse is associated in the mind with Mobil."[41] The Second Circuit affirmed explaining that:

> "[A] likelihood of confusion not in the fact that a third party would do business with Pegasus Petroleum believing it related to Mobil, but rather in the likelihood that Pegasus Petroleum would gain crucial credibility during initial phases of a deal. For example, an oil trader might listen to a cold phone call from Pegasus Petroleum—an admittedly oft used procedure in the oil trading

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34. *Id.*
35. *Id.* at 1341.

> Misled into an initial interest, a potential Steinway buyer may satisfy himself that the less expensive Grotrian-Steinweg is at least as good, if not better, than a Steinway. Deception and confusion thus work to appropriate defendant's good will [sic]. This confusion, or mistaken beliefs as to the companies' interrelationships, can destroy the value of the trademark which is intended to point only to one company.

Id. (citation omitted)

36. Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254 (2d Cir. 1987).
37. *See id.* at 255-56.
38. *Id.* at 255.
39. *Id.* at 256.
40. *See id.* at 257-58.
41. *Id.* at 257.

> business—when otherwise he might not, because of the possibility that Pegasus Petroleum is related to Mobil"[42]

Thus, the court's concern over the possibility of free-riding led to a finding of trademark infringement based on initial interest confusion.

C. Initial Interest Confusion on the Internet

Brookfield Communications, Inc. v. West Coast Entertainment Corp., where the Ninth Circuit first applied the doctrine of initial interest confusion to the use of metatags on the internet, has been often criticized by the academic community.[43] In this case, Brookfield Communications alleged that West Coast Entertainment, a video rental store, was using its trademark in its metatags.[44] Brookfield offered a software database of the entertainment industry on the internet under its "MovieBuff" trademark.[45] West Coast used the domain name moviebuff.com to offer its own internet-based entertainment industry database and used the term MovieBuff in its website metatags.[46] Although the parties were not direct competitors because the products were not identical and there was no evidence of actual confusion, the Ninth Circuit found West Coast liable under the theory of initial interest confusion for both uses.[47] The court found that "by using 'moviebuff.com' or 'MovieBuff' to divert people looking for 'MovieBuff' to its website, West Coast improperly benefits from the goodwill that Brookfield developed in its mark."[48] The court disapproved of what it perceived to be West Coast's free-riding on Brookfield's goodwill with consumers.[49] Even though consumers would no longer be mistaken as to the origin of the business, they might decide to remain on the site and shop there anyway due to the improper use of plaintiff's trademark.[50]

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42. *Id.* at 259.

43. Brookfield Commc'ns, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1045 (9th Cir. 1999); *see, e.g.*, Jennifer Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 117-18 (2005) ("The holding in *Brookfield* ignited a firestorm that has spread the initial interest confusion doctrine to nearly every federal circuit"); Zweihorn, *supra* note 4, at 1357-58 (2006) (lamenting the popularity of *Brookfield's* holding despite criticism); Shannon N. King, Note, *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 15 BERKELEY TECH. L.J. 313 (2000) (criticizing the *Brookfield* court's misunderstanding of internet consumer behavior).

44. *Brookfield Commc'ns*, 174 F.3d at 1041.

45. *Id.* at 1042.

46. *Id.* at 1041-43.

47. *Id.* at 1050, 1056, 1062.

48. *Id.* at 1062.

49. *Id.* at 1064.

50. *Id.*

In *Playboy Enterprises v. Netscape Communications*, the Ninth Circuit also found trademark infringement under the initial interest confusion doctrine.[51] In that case, the court held the defendants' "keying" its own internet banner advertisements to a trademarked term constitutes infringement.[52] When consumers typed the words "playmate" or "playboy" into a search engine, two words trademarked by Playboy Enterprises, Inc. ("PEI"), the defendants' banner ads appeared next to the search engine results and looked as though they were sponsored by PEI.[53] The court found that consumers were likely to be confused as to the source or sponsorship of these ads.[54] While the court found initial interest confusion in this case, it also found other factors to weigh heavily in plaintiff's favor, such as strength of the marks, similarity of the marks, marketing channels used, type of goods being marketed and degree of consumer care, and defendant's intent in using the mark.[55]

As indicated by the aforementioned cases, the Ninth Circuit laid the foundation for initial interest confusion on the internet. Since then, courts in other circuits have been relying on this doctrine as support for allowing the presence of initial interest confusion to assume undue influence over the outcome in metatag cases.

II. A DISTURBING TREND IN TRADEMARK LAW

Recent decisions evince a troublesome development in trademark infringement analysis. Despite criticisms of the *Brookfield* opinion, courts have continued to use the initial interest confusion doctrine. Courts have transformed initial interest confusion into a substitute test for the likelihood of confusion multifactor test, creating a much lower burden for trademark owners to establish trademark infringement. Through an analysis of cases from 2002 to 2006, this Part discusses the evolution of initial interest confusion in trademark law. Section II.A describes how courts misunderstand the workings of the internet and the types of possible intent behind metatag usage. Section II.B discusses ways in which courts are misapplying the doctrine by essentially allowing the existence of initial interest confusion to act as a de facto substitute for likelihood of confusion or by using initial interest confusion as a substitute for evidence of actual confu-

51. Playboy Enters., Inc. v. Netscape Commc'ns Corp., 354 F.3d 1020 (9th Cir. 2004).

52. *Id.*

53. *Id.* at 1023.

54. *Id.*

55. *Id.*

sion. Section II.C describes how courts are broadening the scope of the doctrine by giving increased importance to the alleged misappropriation of a trademark owner's goodwill.

A. Misunderstanding the Internet

Courts have misunderstood the workings of the internet in two important ways. First, they have failed to recognize the substantial practical differences between shopping in the traditional sense and shopping online. These differences make the initial interest confusion doctrine a poor fit in the internet context. Second, they have characterized metatag usage of a trademark as necessarily indicative of intent to deceive the public. In doing so, they have failed to acknowledge legitimate reasons why a website owner might use trademarked metatags in her website. This opens up the possibility of inferring intent to deceive the public, lessening the burden of proof for trademark owners alleging infringement.

1. Misunderstanding How Web Browsing Works

Courts are failing to recognize the differences between shopping online and shopping in the brick-and-mortar world. This first became apparent with the oft-cited "*Brookfield* analogy."[56] The *Brookfield* court analogized initial interest confusion on the internet to a situation where a billboard along the freeway advertises a store, but it was the store owner's competitor who sponsored the billboard.[57] Consumers take the exit indicated and stop there only to find the store owned by the competitor.[58] Having stopped, customers may choose to shop at this store because getting back on the freeway and looking for the store they intended to shop at is less convenient than shopping where they are.[59] However, the court failed to acknowledge that the time and effort it takes to get back into the car, drive back to the freeway and drive around looking for the store they originally intended to go to is far greater than the little time and effort it takes to click on the "back" button when browsing the web.[60] In other words, the initial interest confusion doctrine makes more sense when applied in a brick-and-mortar case such as *Grotrian*, where a consumer might decide

56. *Brookfield*, 174 F.3d at 1064. This analogy has become well-cited in cases applying initial interest confusion in the internet context. *See, e.g.*, Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 465 (7th Cir. 2000).

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

58. *Id.*

59. *Id.*

60. King, *supra* note 43, at 325 ("The court's analogy over-emphasizes the costs involved in getting off at the wrong 'cyber-exit' compared with a real highway exit. It takes just a few mouse clicks and a couple of seconds to 'go back' on the Internet.").

to purchase a Grotrian-Stenweg, even if she originally wanted a Steinway simply because she expended so much time and energy getting to the store and looking around. Searching is not nearly as costly on the internet, however, making the court's analogy unconvincing.

In *Nissan Motor Co. v. Nissan Computer Corp.*, the Ninth Circuit's reasoning punches a hole in the *Brookfield* analogy—the ease of navigating the internet—to support its finding of trademark infringement under the initial interest confusion doctrine. This was not a metatag case, but its outcome affected the development of the doctrine. In this case, Nissan Computer Corp., named after the business owner Uzi Nissan, had registered the domain "nissan.com" and used the website, in part, to sell advertising links to automobile-related products and services.[61] Advertisers paid Nissan Computer per click on advertiser links.[62] The Ninth Circuit held as a matter of law that initial interest confusion existed with regard to the initial interest of consumers to the website. Consumers, intending to visit Nissan Motors' website, instead arrived at the Computer Company website. This misdirection, coupled with the automobile-related advertisements on the site, provided sufficient grounds for the Court to hold Nissan Computer liable for trademark infringement.[63] The court found that although Nissan Computer was not offering the competing products itself, it was offering a remarkably easy way to access the competing products. Accordingly, "the ease of clicking on a link" was a sufficient reason for the court to find Nissan Computer liable.[64] However, this reasoning could be used to support an opposite finding: "the ease of clicking on a link" also means that it is far easier to hit the "back" button, making the links less significant to consumer choice than if an analogous situation had existed in the brick-and-mortar world.

The *Nissan* holding is also problematic because it relied on the *Brookfield* analogy—the idea that consumers, once diverted to a website other than the one they were looking for, will find it easier to remain and patronize there.[65] Thus, in one case the court failed to take into account the ease of navigating the internet in its analysis and in another case the court used that factor to support its finding of trademark infringement. This inconsistent reasoning is indicative of courts' poor understanding of how the internet works.

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61. Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1006 (9th Cir. 2004).

62. *Id.*

63. *Id.* at 1007.

64. *Id.* at 1019.

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

2. *Misunderstanding the Intent Behind Metatag Use*

Some courts consider the use of trademarks in metatags to evince intent to deceive the public. In doing so, courts are overlooking some legitimate reasons why a person might use a trademarked term in a metatag. This is problematic because inferring intent to deceive because a person used a trademark in a metatag sets up a presumption against that person before the analysis has begun, thereby weakening the traditional likelihood of confusion test in favor of trademark owners.

The Seventh Circuit found evidence of intent to deceive based on metatag usage of a trademark in *Promatek Industries, Ltd. v. Equitrac Corp.*[66] In this case, plaintiff Promatek and defendant Equitrac both offered cost-recovery equipment.[67] Equitrac used the word "Copitrack" in its metatags because Copitrak is a product commonly used in the cost-recovery business, and Equitrac serviced Copitrak equipment.[68] Promatek owns the Copitrak trademark and brought suit against Equitrac for trademark infringement.[69]

The district court granted Promatek's motion for a preliminary injunction, which required Equitrac to place on its website language disavowing any connection between its website and Copitrak and to provide information about where Promatek could be found online.[70] On appeal, Equitrac argued this would give Promatek an unfair advantage because providing this information would encourage consumers to go to Promatek's website when they might not have done so before.[71] Nevertheless, the Seventh Circuit affirmed the lower court's holding and upheld the injunction based on a likelihood of initial interest confusion.[72]

The Seventh Circuit considered the following factors: "similarity of the marks, similarity of the products, the area and manner of concurrent use of the products, the degree of care likely to be exercised by consumers, the strength of the plaintiff's marks, any evidence of actual confusion, and the defendant's intent."[73] The court found a strong similarity in the

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66. Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808 (7th Cir. 2002).

67. *Id.* Cost-recovery equipment allows a company to charge the person using the relevant machine for the costs of using it; i.e., a user-pays company printer.

68. *Promatek*, 300 F.3d at 810.

69. *Id.* at 811.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 812. Equitrac admitted that it had intended to use the correct spelling of "Copitrak" in its metatags. *Id.*

marks.[74] The parties were also direct competitors.[75] Although there was no evidence of actual confusion, the court found the other factors weighed strongly in favor of a likelihood of confusion.

Upon considering Equitrac's intent in using the mark, the court found the fact that the mark was used in Equitrac's metatags strongly supported a finding of intent to deceive, indicating a likelihood of confusion.[76] The court determined that the fact that trademarks were used in metatags negated defendant's denial of intent to deceive the public stating: "[a]lthough Equitrac claims that it did not intend to mislead consumers with respect to Copitrak, the fact remains that there is a strong likelihood of consumer confusion as a result of its use of the Copitrack metatag."[77] The Seventh Circuit essentially held that unauthorized use of a trademark in a metatag creates an inference of intent to deceive.

The court in *Tdata Inc. v. Aircraft Technical Publishers* also considered the use of trademarks in metatags to show intent to deceive.[78] Tdata and ATP were direct competitors in the aircraft maintenance and repair software industry.[79] Tdata used ATP's aircraft maintenance-related trademarks in it metatags.[80] The *Tdata* court found that the unauthorized use of trademarks in metatags was evidence of intent to deceive, stating, "the hidden-from-public-eye use of the mark lends itself to an inference disfavoring Tdata."[81] In other words, the fact that the metatags were not seen by the general public necessarily meant that they were used to deceive the general public.

These findings oversimplify the reasons a website owner might use a protected mark in its metatags. For example, someone offering a product similar to the downloadable music offered by Apple Computer's iTunes Music Store might want to use "iTunes" in her website's metatags, not to capitalize on the goodwill of Apple Computer's mark, but rather to aid in describing her product.[82] A potential consumer looking for such a product, but not certain she wants to use iTunes, might type "iTunes" into a search

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Tdata Inc. v. Aircraft Technical Publishers, 411 F. Supp. 2d 901, 910 (S.D. Ohio 2006).

79. *Id.* at 903.

80. *Id.*

81. *Id.* at 907 (noting that the Seventh Circuit in *Eli Lilly and Co. v. Natural Answers, Inc.* 233 F.3d 456, 465-66 (7th Cir. 2000) gave "significant weight to the inclusion of the mark in metatags as evidence of intent to deceive").

82. *See* Rothman, *supra* note 43.

engine simply because the phrase "digital media player" is not used by the average consumer.[83] In this way, a website owner could be using a trademark to provide information to potential consumers, which ultimately benefits the marketplace by reducing informational asymmetries.

Furthermore, metatags are not apparent to the general web browsing public because of the way websites are developed, not because the technology was necessarily created with deception in mind. By failing to acknowledge the possibility of a legitimate use of a trademark in a metatag, courts have exhibited a poor understanding of the use of this technology, which makes it difficult to have confidence in the body of law that arises out of these cases. Presuming that the use of trademarks in metatags constitutes intent to deceive creates an uphill battle for defendants who may have legitimate reasons for using those trademarks. This unduly weakens the traditional likelihood of confusion analysis in favor of trademark owners.

B. Misapplying the Doctrine

Courts have also been misapplying the doctrine by applying initial interest confusion not within the traditional likelihood of confusion framework but instead as a shortcut to finding trademark infringement. Some cases merely pay lip service to likelihood of confusion, while considering initial interest confusion a presumption in favor of trademark infringement. This effectively allows initial interest confusion to act as a substitute for the likelihood of confusion analysis. Other cases have modified the likelihood of confusion analysis by allowing initial interest confusion to substitute for evidence of actual confusion, which weakens the traditional test. Both of these misapplications of the doctrine serve to lower the bar for trademark owners in proving infringement.

1. Substituting Initial Interest Confusion for Likelihood of Confusion

Australian Gold, Inc. v. Hatfield, which relied heavily on *Promatek*, represents one of the latest in a line of cases misapplying the initial interest confusion doctrine in internet cases.[84] In this case, the defendants (collectively "Hatfield") sold tanning products over the internet from Australian Gold, Inc. and Advanced Technology Systems, Inc. ("ATS"), despite not being authorized to sell those products.[85] Hatfield initially acquired those products from authorized distributors who had violated their distrib-

83. *See id.*
84. Australian Gold, Inc. v. Hatfield, 436 F.3d 1228 (10th Cir. 2006).
85. *Id.* at 1232.

utor agreements with Australian Gold and ATS by selling the products to the defendant.[86] Hatfield also used the Australian Gold and ATS trademarks within the plain text of its websites, in the metatags of its websites, and paid a search engine, Overture.com, for search engine result priority.[87] The Tenth Circuit found Hatfield liable for trademark infringement for all of its uses.[88]

In its analysis of likelihood of confusion, the court looked at similarity of the marks, Hatfield's intent in using the marks, evidence of actual confusion, similarity of products and manner of marketing, the degree of care consumers were likely to exercise, and the strength of the marks.[89] Because the marks used by Hatfield were identical to the plaintiffs' marks, the first factor weighed heavily in favor of the plaintiffs.[90] Intent weighed in favor of plaintiffs as well because Hatfield deliberately used the marks to capture consumers.[91] The court also found the parties to have similar products in that they were both tanning-related and there was a low degree of care likely to be exercised by consumers because of the low cost of the products.[92] The strength of the plaintiffs' marks weighed in favor of the plaintiffs as well.[93] The plaintiffs did not offer any evidence of actual confusion.[94]

Upon applying initial interest confusion to the case, the court found diversion to be inherently damaging. It considered "the original diversion of the prospective customer's interest to a source that he or she erroneously believes is authorized" to be a harm caused by initial interest confusion.[95] By considering "the original diversion of a prospective customer's

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86. *Id.* at 1233.

87. *Id.* The trademarks on the websites were removed two years after the suit was brought.

88. *Id.* at 1246.

89. *Id.* at 1239-40.

90. *Id.* at 1240.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1239. Specifically, the court delineated three types of potential damage from initial interest confusion:

> (1) the original diversion of the prospective customer's interest to a source that he or she erroneously believes is authorized; (2) the potential consequent effect of that diversion on the customer's ultimate decision whether to purchase caused by an erroneous impression that two sources of a product may be associated; and (3) the initial credibility that the would-be buyer may accord to the infringer's products—customer consideration that otherwise may be unwarranted and that

interest" to be a type of damage in its own right, the court essentially proposed that initial interest is intrinsically damaging, even if no actual confusion is likely. This set up a presumption in favor of finding infringement when initial interest confusion is found, and thus lowered the bar from "confusion" to "diversion" in the infringement analysis. The issue was framed in such a way that initial interest confusion became a shortcut to a finding of trademark infringement while the likelihood of confusion analysis was merely paid lip service.

The court's treatment of Hatfield's disclaimers provide further evidence that the court believed that diversion is inherently damaging. Hatfield had placed disclaimers on its websites disavowing any connection with plaintiffs and clarifying the true source of the website.[96] The court found this irrelevant, however, because the "damage" done to plaintiffs through initial interest confusion—the diversion of consumers to defendant's websites—could not be undone once consumers reached the website.[97] In other words, although the disclaimers had been put in place to clear up any consumer confusion, the court considered the original diversion, and not any actual confusion, to be actionable damage. This is problematic because it means a party alleging infringement can win based solely on the possibility of diversion, even if tools like disclaimers are used to make actual confusion unlikely.

The *Australian Gold* court did not need to rely on initial interest confusion to find trademark infringement. Because of the other factors that weighed heavily in the plaintiffs' favor, including strength of the mark, the bad intent of defendants, the low degree of consumer care for these products and the identical appearance of the marks, the court may have found a likelihood of confusion at least in all the other uses of the trademark besides the metatag uses. Trademark infringement based on Hatfield's metatag usage could have been dismissed without letting the defendants off the hook. By treating the initial interest confusion doctrine this way, the court allowed consumer diversion to act as a de facto substitute for likelihood of confusion. Although perhaps in *Australian Gold*, the defendants were infringing Australian Gold's trademark in other ways, the misapplied reasoning will have more serious implications when a case arises in which a defendant is not necessarily using the metatags in a deceptive way and no

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> may be built on the strength of the protected mark, reputation and goodwill.

Id.

96. *Id.* at 1240.
97. *Id.*

actual confusion is likely, but the usage nevertheless causes a momentary diversion.

Playboy was another case where the court did not have to rely on initial interest confusion to reach its conclusion.[98] In that case, Judge Berzon criticized the outcome in *Brookfield* in her concurring opinion, urging the court to rely on a traditional likelihood of confusion analysis. It is quite likely that the outcome in *Playboy* would have been identical. A majority of the *Sleekcraft* factors, including strength of PEI's mark, the defendant's intent in using the mark, the proximity of the products, and the similarity of the products weighed heavily in PEI's favor.[99] The court found that consumers were likely to believe the websites were sponsored by PEI because the banner advertisements did not clearly identify their source and because of the way they were arranged on the search engine results page.[100] Judge Berzon criticized the use of the initial interest confusion doctrine in this case because it was unnecessary to reach the correct outcome based on a traditional likelihood of confusion analysis. Her concern was that by relying on the doctrine in cases like this, future cases would find trademark infringement under the initial interest confusion doctrine even if no actual confusion would be likely.[101] This review of recent case law reveals that her concern was not unfounded.

Furthermore, some recent decisions have stood for the proposition that metatag usage is *prima facie* evidence of trademark infringement. For example, in *Horphag Research Ltd. v. Pellegrini*, the defendant advertised and sold the plaintiff's trademarked and patented pharmaceutical product on the defendant's website and used the mark in website metatags.[102] In upholding the lower court's finding of trademark infringement, the Ninth

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98. Playboy Enters., Inc. v. Netscape Commc'ns Corp., 354 F.3d 1020 (9th Cir. 2004).

99. *Id.*

100. *Id.* at 1025 n.16 ("Note that if a banner advertisement clearly identified its source or, even better, overtly compared PEI products to the sponsor's own, no confusion would occur under PEI's theory.").

101. *Playboy Enters.*, 354 F.3d at 1034-35 (Berzon, J., concurring)

> So read, the metatag holding in *Brookfield* would expand the reach of initial interest confusion from situations in which a party is initially confused to situations in which a party is never confused. I do not think it is reasonable to find initial interest confusion when a consumer is never confused as to source or affiliation, but instead knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the list produced by the search engine so informs him.

Id.

102. Horphag Research Ltd. v. Pellegrini, 337 F.3d 1036 (9th Cir. 2003).

Circuit stated, "Because [defendant] specifically admit[ted] to using Pycnogenol mark in the meta-tags [sic] for his websites, his use satisfie[d] the terms of trademark infringement in the first place."[103] In other words, the court set up a presumption of finding trademark infringement based solely on the use of trademarks in metatags. This is problematic because it cut short the likelihood of confusion analysis and unduly modified the traditional test.

2. *Substituting Initial Interest Confusion for Evidence of Actual Confusion*

Taking the doctrine of initial interest confusion even further than previous courts, the *Tdata* court actually used evidence of initial interest confusion as a substitute for evidence of actual confusion in its multifactor test for likelihood of confusion.[104] Because diversion is easier to prove than confusion, it follows that the likelihood of confusion test is now easier to prove, thereby weakening the initial interest confusion analysis in favor of trademark owners.

The *Tdata* court relied on the Sixth Circuit's decision in *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP* in adopting the initial interest confusion doctrine.[105] Specifically, the *Tdata* court used *Gibson* to support that initial interest confusion can serve as a substitute for evidence of actual confusion in the likelihood of confusion analysis. However, the court appears to have mischaracterized *Gibson*'s determination on initial interest confusion.

In *Gibson*, the court declined to find trademark infringement where defendant guitar manufacturer offered guitars with a design similar to plaintiff's guitar.[106] Plaintiff had trademarked a two-dimensional drawing of the guitar, but the court found the actual three-dimensional guitar to be merely trade dress and, therefore, not in dispute.[107] The court went on to conclude there was no likelihood of confusion resulting from the potential infringement of defendant's guitar on the trademarked drawing of the guitar shape.[108]

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103. *Id.* at 1040.

104. Tdata Inc. v. Aircraft Technical Publishers, 411 F. Supp. 2d 901, 908 (S.D. Ohio 2006).

105. *Id.* at 906.

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

107. *Id.* at 546.

108. *Id.*

The *Tdata* court mischaracterized *Gibson's* determination of how initial interest confusion should be applied. The *Tdata* court, quoting the *Gibson* court, that "evidence of initial-interest confusion comes into the eight-factor [Sixth Circuit] test as a substitute for evidence of actual confusion."[109] However, the sentence was not cited in its entirety and actually reads: "*To the extent we allow it to do so*, evidence of actual confusion comes into the eight-factor [Sixth Circuit] test as a substitute for evidence of actual confusion."[110] This statement in *Gibson* followed a lengthy discussion expressing concern over the extension of initial interest confusion beyond internet domain names.[111] Thus, the *Gibson* court was far more cautious about applying initial interest confusion in this context than the *Tdata* court interpreted. The Sixth Circuit in *Gibson* actually criticized the district court's reasoning in *Gibson* for using evidence of initial interest confusion to replace evidence of actual confusion:

> Having made this substitution of 'initial interest confusion' for actual confusion at the point of sale, the district court went on to determine that summary judgment in favor of Gibson was appropriate on Gibson's claim that the PRS Singlecut infringed the LP Trademark. We disagree with the district court's conclusion that 'initial confusion'. . .can apply in this case.[112]

Thus, the Sixth Circuit exercised far more care in replacing initial interest confusion for actual confusion than the *Tdata* court exercised in following *Gibson*. The *Gibson* court ultimately made clear its holding did not intend to move away from the traditional likelihood of confusion analysis.[113] The *Tdata* court, therefore, relied too heavily on *Gibson* for supporting the substitution of initial interest confusion for actual confusion because such a substitution changes the traditional analysis. Allowing evidence of initial interest confusion to substitute for evidence of actual confusion is problematic because it lessens the burden of proof for trademark owners alleging infringement. A momentary diversion is easier to show than actual confusion, which means one factor of the test is easier to prove under the *Tdata* decision. *Tdata*'s analysis indicates a willingness to alter

109. *Tdata*, 411 F. Supp. 2d at 908 (citing *Gibson*, 423 F.3d at 550 n.15).

110. *Gibson*, 423 F.3d at 550 n.15 (emphasis added).

111. *Id.*

112. *Id.* at 549.

113. *Id.* at 551 ("Other circuits applying the initial-interest confusion doctrine have generally focused on that same issue: whether the consumer might be misled about the source of the relevant product or service.").

the traditional factors in order to fit initial interest confusion into the framework in a way that unduly favors trademark owners.[114]

C. Broadening the Scope of the Doctrine by Giving Goodwill too Much Importance

Courts are also broadening the scope of the initial interest confusion doctrine by giving undue weight to the misappropriation of goodwill in these types of cases. To be sure, the second goal of trademark law is the protection of an owner's goodwill associated with the mark.[115] However, this protection of goodwill is intended to provide incentives for the development of business because it allows trademark owners to reap the rewards of and have some control over the use of their marks.[116] This in turn is beneficial to consumers because it spurs production of goods (not trademarks), which means consumers have a broader range of choices and increases consumer welfare.

Some argue that trademarks themselves, and the goodwill associated with them, should be treated as property because this encourages business owners to invest in these marks.[117] However, treating trademarks as property is not the same as treating copyrights or patents as property. Unlike the goal of copyright or patent law, which is to encourage the creation of more works, the goal of trademark law is not to foster the production of more trademarks.[118] The primary goal of trademark law is to provide a system in which products are easily identifiable to consumers. This goal is not served by severely limiting the use of marks by granting property rights for them.[119]

Thus, the scope of trademark protection, and the protection of the goodwill associated with a mark, extends only as far as the point where a user suggests affiliation with that mark.[120] Unfortunately, courts have been applying initial interest confusion because of a concern over the mi-

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114. *See also* 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273 (D.N.J. 2006) (establishing a multifactor test solely for determining initial interest confusion to be used alongside the likelihood of confusion analysis). This case was not discussed in this Note because it dealt only with the usage of a mark in a domain name.

115. Rothman, *supra* note 43, at 127.

116. *Id.*

117. *See, e.g.*, Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 371 (1999) (characterizing this notion as "property-based trademark").

118. Mark Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1695-96 (1999).

119. *Id.* at 1696.

120. Rothman, *supra* note 43, at 127.

sappropriation of goodwill without any consideration as to the limits or rationale for such protection.

1. *Protecting Trademarks' Goodwill Rather Than Looking for Confusion*

The Seventh Circuit in *Promatek* considered capitalizing on goodwill to be of greater importance than consumer confusion in the likelihood of confusion analysis. In concluding there was trademark infringement due to a likelihood of initial interest confusion, the court stated, "What is important is not the duration of the confusion; it is the misappropriation of Promatek's goodwill."[121] In doing so, the court heightened the misappropriation of goodwill above the requirement of consumer confusion in importance. This is doctrinally inappropriate because likelihood of confusion, and not the misappropriation of goodwill, is the "hallmark" of the trademark infringement analysis.[122] Finding trademark infringement based on misappropriation of goodwill rather than because of consumer confusion broadens the scope of the Lanham Act.

Such an expansion also has serious implications for business developers. Because a consumer could potentially click on a link of a competitor due to the goodwill of the trademarked keyword typed into the search engine, this is enough to constitute trademark infringement, even if this diversion is momentary and no actual confusion is likely.

2. *Allowing the Misappropriation of Goodwill to Constitute Use*

Courts have also allowed the misappropriation of goodwill to evince use in commerce. In *Nissan Motor Co. v. Nissan Computer Corp.*, the Ninth Circuit found that use of the domain name nissan.com did not infringe on Nissan Motors' trademark because Nissan was defendant's last name.[123] Rather, the court focused on the indirect benefit Nissan Computer received through the automobile-related advertisements on its website. The court found customers to be initially interested in the website due to the goodwill of Nissan Motors, and because of this initial interest customers would then be likely to explore the website and choose to click on the automobile-related websites rather than continue looking for Nissan Motors. Ultimately, the court found that this activity financially benefited

121. Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 812-13 (7th Cir. 2002).

122. Lamparello v. Falwell, 420 F.3d 309, 314 (4th Cir. 2005).

123. Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1019 (9th Cir. 2004). As mentioned earlier, this case was not a metatag case. However, its holding has implications for the initial interest confusion doctrine due to its treatment of the misappropriation of goodwill.

Nissan Computer.[124] The court found that although Nissan Computer did not sell automobiles on its website, it did capitalize on the goodwill of Nissan Motors.[125] Thus, the Ninth Circuit used the capitalization on the goodwill of the mark owner to indicate an actionable use of the mark. Rather than defining it as a damage to a mark owner, the court frontloaded the infringement analysis with a discussion of goodwill.

This is problematic in the context of the initial interest confusion doctrine because courts have previously used the misappropriation of goodwill to justify a finding of trademark infringement based on initial interest confusion.[126] If these two propositions were applied in conjunction, this would essentially create a test where one factor, the misappropriation of goodwill, could satisfy both the threshold use requirement and the second step likelihood of confusion requirement for trademark infringement. This would mean trademark owners alleging infringement would have a much easier case to prove.

III. INITIAL INTEREST CONFUSION AS CURRENTLY APPLIED RUNS CONTRARY TO THE PURPOSE OF TRADEMARK PROTECTION

A number of policy considerations call into question the current trend in initial interest confusion. The primary goal of trademark protection is to provide a tool for consumers to identify and distinguish the sources of goods and services.[127] The other goal is the protection of trademark owners' goodwill associated with the marks.[128] Both of these goals work to encourage fair competition. These objectives must be kept in mind when evaluating trademark infringement claims. As currently interpreted, the initial interest confusion doctrine is harmful to competition and harmful to consumers.

A. Harmful to Competition

Providing business owners and creators with a monopoly over the use of their product or identifying mark has never been the goal of trademark law.[129] Intellectual property is a legal device that functions to spur produc-

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124. *Id.*
125. *Id.*
126. *See* discussion *infra* Section II.C.2.
127. Rothman, *supra* note 43, at 124-25.
128. *Id.* at 127.
129. Int'l Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 918 (9th Cir. 1980).

tion.[130] Thus, the scope of control that a trademark owner is given is only intended to extend as far as is necessary to encourage other potential business owners to engage in business development.[131] The misapplication of the initial interest doctrine exceeds this scope. In doing so, it gives certain business owners a monopoly over their trademarks that halt business development because competitors will become fearful of trademark infringement liability.[132]

Proponents of the doctrine argue that a liability system for trademark infringement based on initial interest confusion increases incentives for business developers to continue producing and to invest in their business.[133] This may be true to some degree, but it does not outweigh the disincentives caused by the doctrine with regard to new business owners. Business owners, fearing liability, are likely to provide less information on their websites, or not put up websites at all.[134] This means less accurate websites and fewer listings through search engines, and thus less choice available to consumers, which impedes competition.

Defenders of initial interest confusion have also argued that the loss of internet consumers due to diversion will cause internet business owners to close their internet shops and do their business in the brick-and-mortar

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> [O]ur reading of the Lanham Act and its legislative history reveals no congressional design to bestow such broad property rights on trademark owners. Its scope is much narrower: to protect consumers against deceptive designations of the origin of goods and, conversely, to enable producers to differentiate their products from those of others.

Id.

130. *See* Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J. L. & TECH. 187, 192 (2004) ("Sanctioning a monopolistic protection should only occur when there is substantial certainty that the particular monopoly sanctioned is truly the most effective way to promote a specific policy.").

131. *Int'l Order*, 633 F.2d at 918.

> [The] protection accorded a trademark owner can only be understood in the context of trademark law and its purposes. A trademark owner has a property right only insofar as is necessary to prevent consumer confusion as to who produced the goods and to facilitate differentiation of the trademark owner's goods.

Id.

132. Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777 (2004).

133. Harvard Law Review Association, Note, *Confusion in Cyberspace: Defending and Recalibrating the Initial Interest Confusion Doctrine*, 117 HARV. L. REV. 2387, 2401 n.81 (2004).

134. Bryce J. Maynard, Note, *The Initial Interest Confusion Doctrine and Trademark Infringement on the Internet*, 57 WASH. & LEE L. REV. 1303, 1343 (2000).

world.[135] This argument fails to take into account the low costs associated with conducting business online, especially compared to the costs of running a brick-and-mortar shop.[136] It is unlikely that the losses due to consumers being diverted to other websites would outweigh the costs of doing business offline, and thus cause business owners to close up their online shops.

Furthermore, this viewpoint overestimates the number of customers lost due to diversion.[137] It is unlikely that diversion alone would drive an internet business owner out of business. Most likely, other egregious acts of trademark infringement or unfair competition occurred if a business owner decided it was too costly to stay in business online. In *Australian Gold*, for example, Australian Gold put a considerable amount of money into marketing, business development and training, which they suffered as a loss when its trademark was used by Hatfield to lure customers to its website. However, Hatfield was not merely liable for confusing consumers, but was also held liable for trademark infringement based on other uses of the mark, as well as for trademark dilution and unfair competition. It was not simply the metatag usage that caused such a large loss to Australian Gold, but rather, the egregious unfair business practices undertaken by the defendant. Thus, courts can still find liability when appropriate, and protect business owners without resorting to relying on initial interest confusion.

To be sure, courts must strike a balance between spurring production by protecting trademarks from being used without permission and fostering a competitive market through low barriers to entry and freedom of expression. However, this balance has already been struck by giving trademark owners the right to enjoin trademark use in commerce when that use is likely to cause confusion.[138] Extending the reach of trademark law beyond the scope of the Lanham Act is unwarranted and unnecessary for healthy competition.

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135. Harvard Law Review Association, *supra* note 133, at 2401.

136. Zweihorn, *supra* note 4, at 1365.

137. Harvard Law Review Association, *supra* note 133, at 2401-02 (describing a hypothetical situation in which Hertz Rent-A-Car loses one third of its customers to Budget due to metatag usage trademark infringement and arguing for the use of the initial interest confusion doctrine based on this hypothetical situation).

138. *See* Sharrock, *supra* note 9, at 61 ("Society continues to be concerned with protecting goodwill and preventing marketplace confusion, but these goals are specifically linked to the source identification function of trademarks and are already subsumed within the Lanham Act.").

B. Harmful to Consumers

Trademark law's primary goal is to protect consumers by providing a system in which goods are easily identifiable.[139] A marketplace in which consumers can quickly and effortlessly determine the sources of goods and services reduces consumer decision-making costs. Finding trademark infringement based on a mere possibility of diversion will chill internet advertising and marketing activity, which ultimately leaves consumers with less choice and less information, thus raising consumer searching costs.[140]

In *Promatek*, the court defined the harm to the plaintiff: "Consumers who are directed to Equitrac's webpage are likely to learn more about Equitrac and its products before beginning a new search for Promatek and Copitrak."[141] Thus, according to the Seventh Circuit, increasing consumer knowledge about a product is damaging to a trademark owner when the information is about its competitor. The court should not have framed the damage to the plaintiff in this way because it proposes that giving owners complete control over their marks is the goal of trademark protection.

Courts also misunderstand the expectations consumers have when they enter terms into a search engine. They *may* be searching for the specific trademarked product correlating to the words entered, or they may be looking for a list of other products similar to the trademarked product.[142] Consumers today are more computer savvy than courts give them credit for—they are likely aware that a list of search results does not necessarily detail all products affiliated with the trademarked product entered into the search engine.[143] Either way, it is unlikely a consumer would be offended by a list of websites with related products.

On the other hand, allowing unauthorized trademark usage to run rampant on the internet may result in information overload and inaccurate results, which could lead to confused consumers.[144] Consumers who are only searching for the specific trademarked product entered into the search engine may be confused and overwhelmed if bombarded with a slew of

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139. Lemley, *supra* note 118, at 1688-89.

140. Rothman, *supra* note 43, at 129 ("One of the greatest dangers of initial interest confusion is that it is often used to deny consumers access to information about the goods and services offered by competing sellers."); Dogan & Lemley, *supra* note 132, at 782.

141. Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 813 (7th Cir. 2002).

142. King, *supra* note 43, at 326.

143. Maynard, *supra* note 134, at 1335.

144. Harvard Law Review Association, *supra* note 133, at 2404 n.90 ("But not all users will forgo their initial searches in favor of these new options, and with respect to these users, the additional communications simply increase the transaction costs associated with reaching and benefiting from the sites initial sought.").

additional products. This proposition is paternalistic, however, because it suggests that courts, rather than the market, need to draw the line between ample choice and excessive information.[145] Furthermore, it does not take into account the fact that the website of the trademarked product entered into the search engine is usually the first website listed on the results page. Thus, consumers who are looking for a specific product should still be able to find it quickly and easily, even if a whole plethora of related products also result. Further, because consumer searching costs are, for the most part, inapplicable in the context of internet cases due to the ease of navigating the web, courts are not applying the doctrine to benefit consumers.[146] Accordingly, the doctrine is a poor fit for the purpose underlying trademark protection.

IV. FROM DIVERSION BACK TO CONFUSION

For a number of doctrinal and policy reasons, the initial interest confusion doctrine is inappropriate as currently applied to metatag cases. Accordingly, this Note urges courts to put the focus of the likelihood of confusion test back on confusion, and apply the traditional analysis in questions of initial interest confusion.

The fact that metatags have become less and less applicable to search engine results exemplifies the market's ability to address the potential problem of inaccurate searches and confused consumers. Following Google's lead, many search engines, including Ask Jeeves, Earthlink, AOL, Netscape, and Compuserve, are now using algorithms that determine how relevant a site is to a keyword search.[147] These search engine companies realized it would make poor business sense to offer a system where irrelevant websites could appear on a results page if they were simply stuffed with the "right" metatags by the website owners. Therefore, these companies switched to a more accurate valuation system. This is a good example of the market taking care of the potential problem without interference by the courts. Others have already made the case for allowing

145. Julie A. Rajzer, Comment, *Misunderstanding the Internet: How Courts are Overprotecting Trademarks Used in Metatags*, 2001 L. REV. M.S.U.-D.C.L. 427, 463 (2001) ("As Internet users become more experienced at 'surfing' the web, they become accustomed to sifting and sorting through the material found on the Internet to determine its value and truthfulness.").

146. Sharrock, *supra* note 9, at 64 (characterizing the infringement analysis based on initial interest confusion as "divorced entirely from its ultimate effect on purchasers").

147. Zweihorn, *supra* note 4, at 1362-63 n.142. Google, in fact, has never used metatags in its service of providing search engine results. *Id.*

the market to regulate trademark use on the internet.[148] It makes even less sense now for courts to continue regulating competition on the internet when the problem has already been solved by the industry. Situations like this clearly indicate it is the business owners, and not the courts, who best understand the technology to implement the right strategies to benefit competition.

Accordingly, courts need to focus on what they are best at: applying the traditional initial interest confusion analysis to these cases, without being swayed by bad actors or an outcry over the misappropriation of goodwill. The cases that clearly should have resulted in a finding of trademark infringement, like *Australian Gold* and *Playboy Enterprises*, would have most likely come out the same way if the initial interest confusion doctrine had not been used. Even if courts decide to characterize the type of confusion in a case as initial interest confusion, they should not be relying on its presence to find for plaintiff. Initial interest confusion should be used to inform the analysis, not engulf it. Courts should base trademark infringement findings on consumer confusion, and not on momentary diversion.

V. CONCLUSION

The initial interest confusion doctrine has been applied inappropriately in metatag cases. The combination of a poor understanding of the internet and an overemphasis of the misappropriation of an owner's goodwill without consideration of fair competition and consumer interests has lead to the misapplication and broadening of this doctrine. By finding trademark infringement based on initial interest confusion before reaching a solid conclusion of likelihood of confusion, courts have chipped away at the requirements for finding trademark infringement in internet cases. This is harmful to competition and to consumers, which runs contrary to the purpose of trademark law. Accordingly, courts should carefully reconsider their reliance on initial interest confusion in cases of momentary diversion and instead rely on the traditional likelihood of confusion analysis.

148. King, *supra* note 43, at 326-27.