

The Trademark Reporter[®]

KEYWORD-BASED ADVERTISING: FILLING IN FACTUAL VOIDS (*GEICO v. Google*)

By Jacob Jacoby and Mark Sableman***

I. INTRODUCTION

During the early days of the public's use of the Internet, search engines served essentially as free public utilities: they performed their services without charge and with no visible signs of support. However, the monetary needs of the private enterprise system, and the attractiveness of search engine pages to advertisers, soon brought advertising to search engine pages. As the Internet has evolved, so has Internet advertising. In recent years, Internet search services have offered and sold more and more targeted advertising, often through paid advertisements or through search listings that are keyed to users' search terms. These advertising programs have raised the legal issue of whether Internet search service sales of keyword-based advertisements and search listings that use trademarks are violating trademark law. This legal issue depends, or should depend, upon factual determinations, including a determination of the facts relating to how search services and their advertising programs work, and how consumers understand the advertisements.

The legality of keyword sales of trademarks is unsettled. Although a few cases have been litigated, the overall results have been inconclusive, in no small part because of a lack of evidence on the key factual issues. This article reviews Internet search service keyword sales practices, explains how these practices have been viewed in early cases, reviews a survey that probed the key issue of how consumers understood keyword-based advertisements containing trademarks, and suggests there is a need for further factual exploration and analysis.

* Merchants Council Professor of Consumer Behavior and Retail Management, Leonard N., Stern School of Business, New York University; President, Jacob Jacoby Research, Inc.; and Associate Member of the International Trademark Association.

** Partner, Thompson Coburn LLP, St. Louis, Missouri; Associate Member of the International Trademark Association; and Adjunct Professor, Washington University School of Law.

Two circumstances provide the necessary predicate for consideration of the sale of keywords issue: how Internet search services work, and how Internet users understand the keywords and the advertisements that are keyed to their use. Unfortunately, search engine technology is constantly changing, and the legal literature concerning consumer understandings of the keywords contains far more speculation than evidence.¹ The ultimate resolution of the sale of keywords issue, however, is likely to be based on actual search service practices at the time of the challenged conduct, and actual consumer understandings of the keywords at that time, as shown by reliable evidence. In short, the facts about search engine operations and consumer understandings of keyword-based advertising are central to the issue. This article will also therefore suggest how these important factual issues can be explored in future cases, and in particular, will describe a consumer understanding survey that was planned and conducted by one of the authors on the crucial issue of how consumers understand keyword-prompted advertisements.

II. BACKGROUND OF SEARCH SERVICES AND KEYWORD ADVERTISING

A. Search Engine Technology and Judicial Understanding

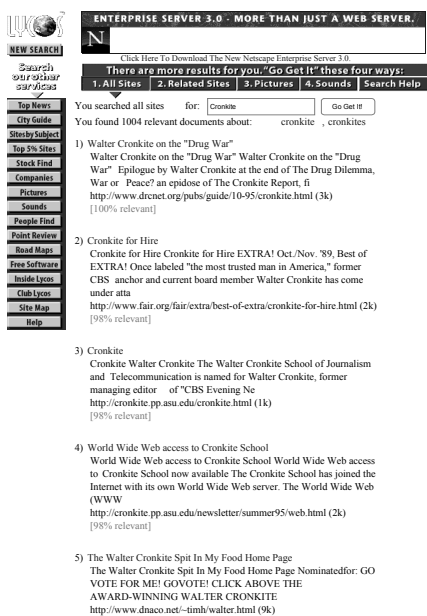
Search engines are one of the primary tools used by the public for navigating the Internet, and in particular, the World Wide Web. Other means of finding relevant websites include the direct entry of website addresses, the use of general or specialized Internet website directories, and the use of hyperlinks. Search engines work by indexing Internet content through a variety of methods. Some search engines index sites based upon submissions by the website owners. Most of the larger search engines use automated means (web “[ro]bots” and “spiders”) that read the content of sites and index them based upon content. That indexing may be based upon visible content (what a user sees or is capable of seeing on the website), on metatags (descriptive terms written into the computer code for the site by the site creator but not visibly displayed on the website), or on other indicators. Google, the leading search engine, indexes and ranks sites in large part

1. An FTC Staff communication on keyword-based advertising noted that “there are very few studies on this subject” and then cited opinion-poll-style studies, not controlled consumer understanding studies, as representing the best available information at that time. FTC Staff, Complaint Regarding Investigation of Various Internet Search Engine Companies Paid Placement and Paid Inclusion Programs, June 27, 2002, at n.3 (*available at* <http://www.ftc.gov/os/closings/staff/commercialalertattach.htm>).

upon the number and quality of links on a site from other sources. Indexing techniques may change from time to time, particularly as search engines attempt to avoid being manipulated by website publishers. For example, after website owners began publishing repetitive keywords on their sites, often in small or invisible text, many search engines reportedly changed their indexing algorithms so that such repetitive words were either disregarded or given little weight. Search engine searching, indexing and ranking techniques are usually trade secrets.

For the first few years after the creation of the World Wide Web, the Internet search service display pages consisted primarily of search result listings generated by the search engine, which are sometimes known as "organic listings."² Examples of organic listings are shown below:

Lycos search result page from around 1997



Google search result page from 2002



2. Search services are typically referred to as "search engines," but this terminology may be somewhat inexact because some of the popular services (such as the Alta Vista and Netscape) have utilized the searching, analysis and ranking services (the actual "search engine") of others. In these situations the branded service that the consumer sees will be referred to as the consumer-side search service, and the underlying analytical engine will be referred to as the search engine.

How do search engines generate organic search listings? Lawyers and judges have seemed to assume a lot on this question, despite a paucity of evidence. The legal literature on search engine technology is somewhat sparse and conclusory. Even the best-known fact about how search engines work—Google’s revolutionary use of links to websites as evidence of their content and popularity, as opposed to the solely content-based algorithms used by first-wave search engines such as Altavista and Excite—is barely mentioned in court decisions relating to search services.³ It is not clear why courts (and litigants) have not explored these issues. Perhaps it is because lawyers and judges, as trained users of content-based proprietary search services such as Lexis and Westlaw, feel they already understand searching technologies. If so, this is a mistake, as even the early search engines involved more than word-indexing, and Google’s well publicized different approach demonstrated that the Lexis/Westlaw model did not fit. Perhaps technology-shy lawyers do not recognize the need to understand how search engines really work, or perhaps the early-disposition procedural contexts of many of the early Internet trademark cases (motions to dismiss or for preliminary injunctions) prevented development of a full factual record.

Whatever the reason, the absence of full court records on how search engines work has been detrimental to the full and reliable development of the law. To take just one example, multiple court decisions have been reached concerning the trademark significance of metatags. Descriptive and keyword metatags, which are optional codes often embedded in a website’s HTML code by the website creator that are designed to be available for indexing and describing the site, have been found in a number of cases to be potentially infringing.⁴ In most such cases, the courts presumed

3. Google uses an algorithm called PageRank to rank web pages that are responsive to the search terms. The PageRank algorithm calculates the relevancy of web pages to the search terms based on the weighted sum of the PageRanks of the pages linking to them. This concept, basing search results on human-generated links, rather than how often the search terms occurred in the page, or how strongly associated the search terms are with each page, gave Google an edge over other first-generation search engines. See Google, “Webmaster Help Center,” at <http://www.google.com/support/webmasters/bin/answer.py?answer=40349&ctx=related>. (“Links help our crawlers find your site and can give your site greater visibility in our search results. When returning results for a search, Google combines PageRank (our measure of a page’s importance) with sophisticated text-matching techniques to display pages that are both important and relevant to each search. Google counts the number of votes a page receives to determine its PageRank, interpreting a link from page A to page B as a vote by page A for page B. Votes cast by pages that are themselves ‘important’ weigh more heavily and help to make other pages ‘important.’”).

4. *Playboy Enters., Inc. v. Asia Focus Int’l, Inc.*, 1999 WL 724000, 1998 U.S. Dist. Lexis 10359 (E.D. Va. 1998); *Horphag Research, Ltd. v. Pellegrini*, 337 F.2d 1036 (9th Cir. 2003); *Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036 (9th Cir. 1999).

that Internet users saw, at some point, several or all of the words contained within the offending metatags when they conducted Internet searches.⁵ However, the courts in these cases did not make explicit their reasoning, which must have followed along the following three-step line: (1) Search engine robots look at metatags, and use them for indexing websites. (2) Search engine algorithms use the metatags in their database to identify relevant websites in response to a search, and more specifically, if a user searches for “playboy,” “Niton,” or “moviebuff,” the search engine will rank high in its results all of those sites that contain the searched words in metatags. (3) The search service will display the highest-ranking sites based at least in part on the metatags, and, in addition, the search service will quote the metatags (probably meaning the descriptive metatag, which usually consists of a sentence or a phrase describing the website) in its thumbnail description of the site in the organic search listings. This assumed line of reasoning is never explicitly stated, but is almost certainly what has been assumed in all or most of the leading decisions that have been based on metatag use of trademarks.⁶

Is this three-step assumed line of reasoning correct? We do not know, but some literature suggests it is not.⁷ It has been reported, for example, that even in pre-Google days, search engine technology constantly evolved as search engine operators modified their algorithms in order to avoid manipulation by website creators.⁸ If this is so, and if at least some search engines modified

5. *E.g.*, *Niton Corp. v. Radiation Monitoring Devices, Inc.*, 27 F. Supp. 2d 102, 104 (D. Mass. 1998) (search service listings reported to repeat language from metatags).

6. *E.g.*, *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036 (9th Cir. 1999) (involving “moviebuff” as metatag); *Niton Corp. v. Radiation Monitoring Devices, Inc.*, 27 F. Supp. 2d 102 (D. Mass. 1998) (“Niton”); *Playboy Enters., Inc. v. AsiaFocus Int'l Inc.*, 1998 WL 724000, 1998 U.S. Dist. Lexis 10359 (E.D. Va. 1998) (“playboy” and “playmate”).

7. Linda Barlow, *How To Use Web Search Engines: Tips on Using Internet Search Sites Like Google, alltheweb, and Yahoo*, The Spider's Apprentice, May 11, 2004 (“The general opinion seems to be that meta tags are less useful than they were a few years ago, largely because of the high rate of spamdexing (web authors using false and misleading keywords in the meta tags).”), available at <http://www.monash.com/spidap4.html#meta> (last visited Apr. 22, 2007); Danny Sullivan, *How to Use HTML Meta Tags*, Search Engine Watch, Dec. 5, 2002 (“Far too many people new to search engine optimization obsess with the meta keywords tag. FEW crawlers support it. For those that do, it MIGHT! MAYBE! PERHAPS! POSSIBLY! BUT WITH NO GUARANTEE! help improve the ranking of your page. It also may very well do nothing for your page at all. In fact, repeat a particular word too often in a meta keywords tag and you could actually harm your page's chances of ranking well.”), available at <http://searchenginewatch.com/showPage.html?page=2167931> (last visited Apr. 22, 2007).

8. *Id.*

their algorithms to ignore, discount or downplay metatags, then these facts ought to be highly relevant to the trademark analysis. A metatag, hidden within the HTML code invisible on normal viewing of Internet websites, can hardly cause likelihood-of-confusion-based trademark infringement unless the metatag is picked up, indexed, and/or displayed by search services. If search services quit doing these things, the case for trademark infringement through metatag use disappears. Yet without a factual record, we do not know if this was the situation.

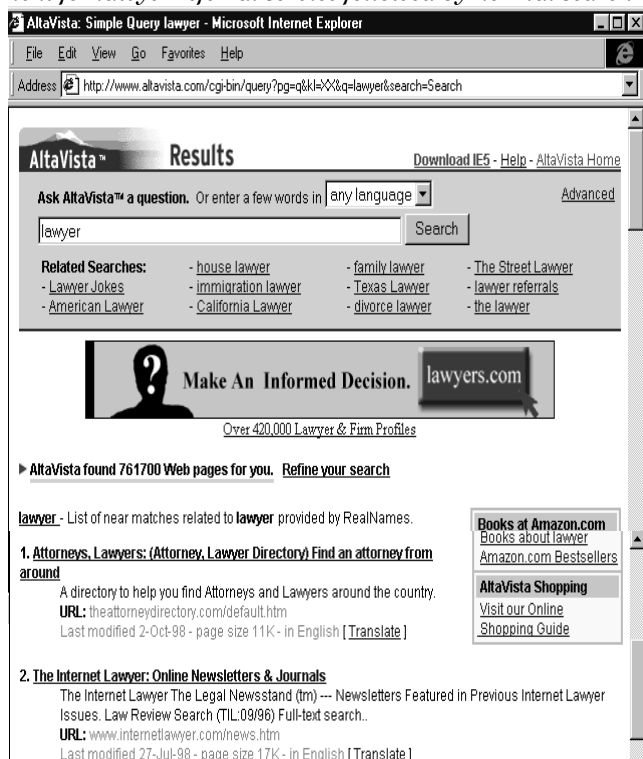
Litigants in future trademark cases can, and should, explore and discover how search engines actually function, including how they have changed and are likely to change in the future in response to new technologies and to website developer and consumer behavior. Such a fuller factual development can only help courts as they consider the application of the trademark law to Internet practices that relate to search engines and services. One such practice is keyword-based advertising.

B. Keyword-Based Advertising

When search services began selling and displaying advertisements on search results pages, display advertisements of various kinds became commonplace on search service results pages. Internet users who search for descriptive words are likely to find results pages that display banner or other display advertisements related to those descriptive terms. A search for “lawyer” is likely to produce banner advertisements for lawyer referral services, while a search for “hotel” is likely to produce advertisements for travel-related services. Although these advertisements are sold to produce revenue for the search service, they arguably serve the Internet user by offering advertisements of potential interest, not unlike the placement of food-related advertisements in *Women’s Day* and *Good Housekeeping* and the placement of auto-related advertisements in *Motor Trend*.

Typically, advertisements were stretched across the top of the results page (and hence were termed “banner” advertisements). An illustration of a banner advertisement generated in response to a descriptive search term (“lawyer”) is illustrated below:

Alta Vista search results around 2000 for “lawyer” showing banner advertisement for lawyer referral service followed by normal search result listings



Display advertisements do not always appear at the top of the search results page. Google, for example, places its display advertisements at the far right-hand side of the page and restricts its advertising content in several ways.⁹

1. Featured Listings

In addition to selling results-page display *advertisements*, some search engines also sell *featured listings*. Around the year 2000, various search services that had utilized a search engine and centralized advertising service offered by Overture, Inc., began listing, in addition to their normal search results, special listings for advertisers' websites. These listings usually appear just above the normal organic search result listings, usually under a heading such as “Sponsored Links” or “Featured Listings.” An example of a page with both a banner advertisement and a featured listing is shown below:

9. See Google AdWords Editorial Guidelines, <http://adwords.google.com/select/guidelines.html> (last visited Apr. 24, 2007).

*Alta Vista search showing Orbitz banner and
Orbitz featured listing*

*Banner
ad →*

*Featured
listing →*

The screenshot shows a Microsoft Internet Explorer browser window displaying search results for 'bbc travel news' on the Alta Vista search engine. The address bar shows the search URL. The search bar contains the text 'bbc travel news' and a search button. Below the search bar is a banner for Travelocity.com with the text 'Book your flight now with Travelocity.com.' and a 'Depart From:' dropdown menu. The search results are listed below the banner, including 'Products and Services', 'BBC Online - Londonlive - Travel and Weather - Travelnews', 'BBC London Live travel and weather news with jam cam traffic views', 'Independent News', 'BBC News | UK | Travel delays in blast aftermath', and 'BBC News | AFRICA | Travel ban on Liberians'.

Overture, Inc. offered the first featured listing service, and its website promoted this service to potential advertisers and described these listings as a kind of advertising.¹⁰ The featured listings obviously were designed to attract the attention of the Internet user who used a search term that suggested a potential interest in the advertiser's goods or services. Various kinds of special listings and features, including listings at the top of the normal search listing, some of them in the midst of the normal search listing, and additional "mouse over" prompted displays, were designed to connect the user with the advertiser's website.

Featured listings may even dominate the initial search results listings, at least on some search services. For example, a search in 2004 for "lawyer" on Alta Vista produced much different results on the initial screen views than the results page generated a few years earlier, as shown in the upper portion of the image that follows:

10. See "Local Featured Listings," at <http://searchmarketing.yahoo.com/local/lfl.php> (description of featured listings service, originated at Overture, and now offered by Yahoo! Search Marketing, which purchased Overture) (last visited Apr. 22, 2007).

Alta Vista 2004 search results for “lawyer”

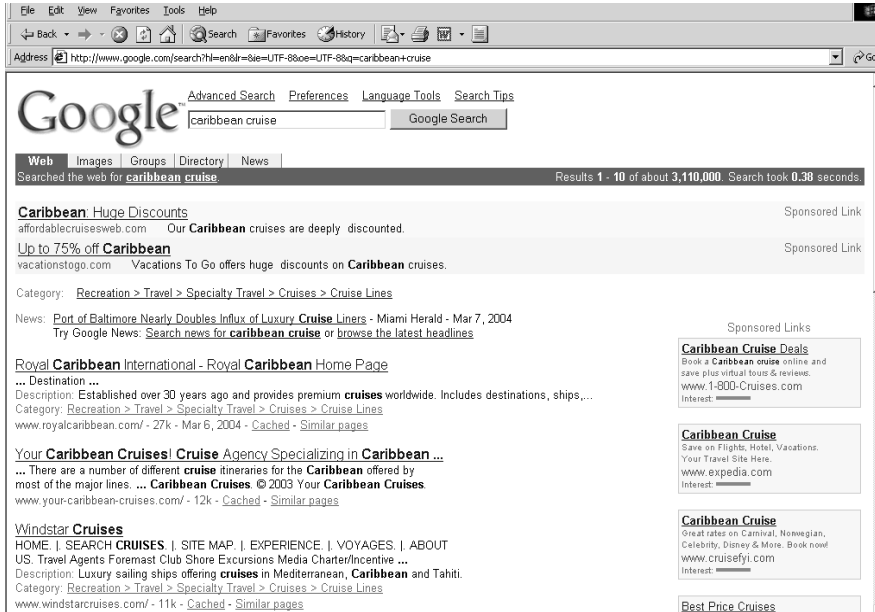
The screenshot shows a web browser window with the address bar displaying a search URL. The search results page features a navigation bar with 'Web', 'Images', 'MP3/Audio', 'Video', 'Directory', and 'News'. A search bar contains the word 'lawyer' and a 'FIND' button. Below the search bar, there are several sponsored listings. The first listing is for 'AV Criminal Trial Lawyer' with a description: 'Major felony trial specialist. Experienced in all California state and federal courts. Free consultation. Immediate response.' Other listings include 'Lawyer Casepost', 'Where Can I Find a Lawyer?', 'Legal Help for the Seriously Injured', 'AltaVista found 3,245,724 results', 'FindLaw - Law, Lawyer, Lawyers, Attorney, Attorneys and Legal Resources', 'FindLaw - Find a Lawyer, Attorney, or Law Firm - Free Lawyers Search', 'Find A Lawyer or Law Firm. Get Legal Assistance. Research Legal Topics. Lawyers.com', and 'The Lawyer'. On the right side of the page, there is a 'Refine Your Search' section with a list of links including 'American Lawyer Media', 'Find A Lawyer', 'Law Firms', 'Law Schools', 'Law Students', 'Legal Advice', 'Legal Information', 'Legal News', 'Personal Injury', 'Attorneys', 'Bankruptcy', and 'Solicitors'.

In some cases, like the one shown above, the normal organic search results may not even appear on the user's initial computer screen. As featured listings increasingly dominate the initial displays of some search services, the potential of the featured listings to divert traffic from the normal search listings increases. Some search services even operate on a pay-for-priority basis, selling their highest search listings to the highest bidders and displaying organic listings only after the paid listings.¹¹

Other search services, including Google, also offer featured site listings. Google has long distinguished featured listings, which appear above the organic listing, by using color-shaded backgrounds and the legend “Sponsored Link.” Google also uses the terms “Sponsored Links” for its version of banner ads, which are boxed pastel-shaded textual advertisements that it also displays along the right-hand side of the results page.

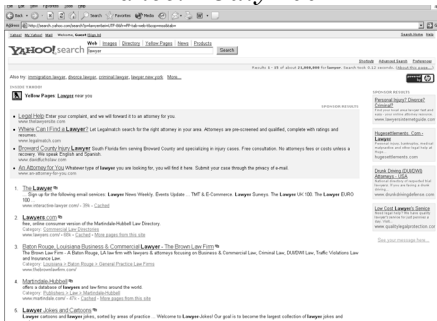
11. See, e.g., 800-JR Cigar, Inc. v. Goto.com, Inc., 437 F. Supp. 2d 273 (D.N.J. 2006) (explaining Goto.com's pay-for-priority search service).

Sample Google search results page with ads (at right) and “sponsored links”

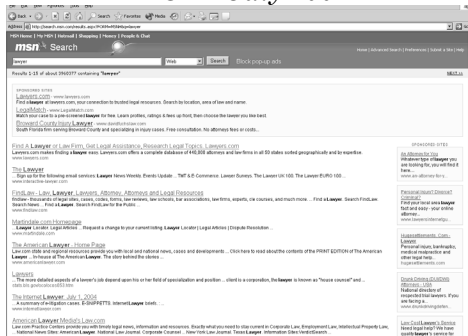


In mid-2004, both Yahoo! and MSN adopted graphic displays similar to the display pioneered by Google, with both advertisements and featured listings in shaded backgrounds:

Yahoo!—July 2004



MSN—July 2004



These shadings appeared to represent the industry’s response to the Federal Trade Commission’s suggestion “that search engines should clearly and conspicuously disclose that certain web sites or

URLs have paid for higher placement in the display of search results.”¹² Courts have begun noticing the graphic distinctions that search services have attempted to make between paid advertisements and listings and the organic search results. As one court noted:

Defendant’s advertisements are visually separated from the natural search results. On Google and Yahoo, the advertisements are shaded blue, and appear under the caption “Sponsored Link” or “Sponsored Result.” Yahoo further separates its advertisements by using bullet points, while its natural search results are numbered.¹³

Featured listing services have different rules and guidelines for these services. Google, for some time period prior to early 2004, sold featured listings based on trademarks only to the owner of the trademark. In April 2004, Google announced that it was abandoning that restriction on its featured listing sales.¹⁴ Google later adopted the policy that it would not permit the buyer of a trademark to display that term in the heading or text of the resulting featured listing or banner advertisement.¹⁵ Yahoo! sold advertisements keyed to trademarks for several years, but in early 2006, announced that it would limit such sales to special circumstances.¹⁶ It has been reported that another search service has checked in advance to determine if the search term is properly connected to the advertiser’s site before it has sold keyword-based ads.¹⁷ Most search services also require their advertisers to warrant that their keyword purchases will not violate anyone’s

12. FTC Staff, Complaint Regarding Investigation of Various Internet Search Engine Companies Paid Placement and Paid Inclusion Programs, June 27, 2002, p.3 (*available at* <http://www.ftc.gov/os/closings/staff/commercialalertattach.htm>).

13. Edina Realty Inc. v. TheMLSonline.com, 2006 WL 737064 (D. Minn. 2006).

14. *Google Plans Trademark Gambit*, CNet News, Apr. 13, 2004, http://news.com/2102-1038_3-5190324.html.

15. Google’s current policy for the United States and Canada states, “When we receive a complaint from a trademark owner, we only investigate the use of the trademark in ad text. If the advertiser is using the trademark in ad text, we will require the advertiser to remove the trademark and prevent them from using it in ad text in the future. *Please note that we will not disable keywords in response to a trademark complaint.* In addition, please note that any such investigation will only affect ads served on or by Google.” Google AdWords Trademark Complaint Procedure, http://www.google.com/tm_complaint_adwords.html (policies as of Apr. 22, 2007; emphasis in original).

16. K. Newcomb, *Yahoo! Modifies Trademark Keyword Policy*, ClickZ, Feb 24, 2006 <http://clickZ.com/news/article/php/3587316>.

17. 800-JR Cigar, Inc. v. Goto.com, Inc., 437 F. Supp. 2d 273, 278, 283 n.6 (D.N.J. 2006) (describing Goto.com’s 1990-2000 policies and its acceptance process for the keyword ads in issue).

trademark rights, although such warranties in many cases have little practical value.¹⁸

2. Search Service Trademark Policies

In different ways, various search services may avoid, or attempt to avoid, trademark misuse in connection with the banner and featured listing advertising techniques. Some search services may sell trademarks as keywords, but block their use in the situation in which they would offer up the purchaser's advertisement in response to a search for a competitor's trademark. For example, only the keyword SOAP might be sold to the maker of SAFEGUARD soap, and SAFEGUARD advertisements and/or sponsored links would be posted in response to searches for SOAP alone or in various combinations. However, if the word SOAP were searched as part of a trademark, e.g., DIAL SOAP, then the SAFEGUARD advertisement would be blocked. As noted, Google initially refused to sell advertisements or listings based on a trademark, although it did sell what it believed to be descriptive terms. It abandoned this policy in early 2004,¹⁹ and later elaborated with the condition that the trademark search term could not appear in the advertisement text or heading. Netscape at some point sold search terms in packages, including the package that commingled a variety of descriptive terms with the two famous trademarks "playboy" and "playmate," as explained in the *Playboy v. Netscape* case described below.²⁰

C. Consumer Understanding of Search Engine Displays

1. Organic Search Listings

For trademark law purposes, it is more important to know how Internet users use search engines and how they understand search engine results than it is to know how search engines work. Here, too, the legal literature today is not fully illuminating. In the last decade, which is the first decade of widespread Internet use by the public, court decisions have been rendered concerning a variety of Internet-related trademark issues, including trademarks as

18. *E.g.*, Google, "AdWords Terms and Conditions" ("Customer represents and warrants that (y) all Customer information is complete, correct and current; and (z) any Use hereunder and Customer's Creative, Targets, and Customer's Services will not violate or encourage violation of any applicable laws, regulations, code of conduct, or third party rights (including without limitation intellectual property rights)."), <https://adwords.google.com/select/tsandcsfinder> (last visited Apr. 22, 2007).

19. *See supra* note 15.

20. *See infra* text at notes 34 through 66.

domain names, website text, metatags, and as used for keyword-prompted advertising. Few of these decisions have even discussed empirical data about Internet use. Many have included yet-to-be-tested assumptions about how consumers use the Internet.

As examples, the two leading and often-cited decisions, *Brookfield Communications Inc. v. West Coast Entertainment Corp.*²¹ and *Niton Corp. v. Radiation Monitoring Devices, Inc.*,²² were based on very limited factual records. In *Brookfield*, the Ninth Circuit explicitly made findings about search engine practices and consumer confusion on a sparse preliminary injunction record that was, at best, based on a few affidavits from the parties. In *Niton*, and similar cases involving alleged metatag trademark infringement, judicial conclusions about search engine searching and displaying practices, and consumer reaction to assumed search service display pages, were similarly based on threadbare early-motion records.

Yet such limited records did not prevent the court in *Brookfield* from expressing conclusions about how Internet users conduct their searches. The court stated that users often assume “that the domain name of a particular company will be the company name [or trademark] followed by ‘.com.’”²³ Similar limited records did not preclude other courts from expressing seemingly contradictory opinions about consumer care on the Internet, such as the opinion of one court that “web surfers are more likely to be confused as to ownership of a web site than traditional patrons of a brick-and-mortar store would be of a store’s ownership”²⁴ contrasted with the opinion of another court that “[i]n the Internet context, consumers are aware that domain names for different web sites are quite often similar, because of the need for language economy, and that very small differences matter.”²⁵

Courts should always be wary of making assumptions about consumer perceptions and conduct. Indeed, many trademark decisions express this wariness in the course of addressing litigants’ arguments that are based on mere assumptions.²⁶ For

21. 173 F.3d 1036 (9th Cir. 1999).

22. 27 F. Supp. 2d 102 (D. Mass. 1998).

23. *Brookfield*, 173 F.3d at 1055, n.18.

24. Northern Light Tech. Inc. v. Northern Lights Club, 97 F. Supp. 2d 96, 115 (D. Mass. 2000), *aff’d*, 236 F.3d 57 (1st Cir. 2001) (quoting *Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.*, 147 F.3d 1036, 1057 (9th Cir. 1999)).

25. *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1147 (9th Cir. 2002).

26. *E.g.*, *Anheuser-Busch Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 638-39 (8th Cir. 1984) (disapproving of assumptions by trial court regarding consumer understanding of trademarks, and favoring reliance on consumer surveys); *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 718 F.2d 327, 330 (9th Cir. 1983) (issue of consumer understanding of trademark must be decided on evidence, not court’s own set of assumptions).

example, even where an assumption with respect to the understanding of the majority of consumers may be correct, courts still need to consider empirical evidence of different consumer understandings. Cognizable trademark confusion may be based on the perceptions of a minority of the total population if the minority represents the perceptions an appreciable percentage of consumers—say 20 to 30 percent.²⁷ Not only the prevailing consumer understandings, but also any consumer understanding that is held by an “appreciable” or “significant” number of consumers, should be studied. For all of these reasons, courts and litigants should always be wary of mere speculation and assumptions about consumer behavior.

The following propositions describe likely widely held assumptions about the typical understandings of organic search result pages of users who became accustomed to search engines during the early days of the World Wide Web:

- **Relevant results.** When they search for a particular word or phrase, users expect that the search engine results listings, and in particular, the first few results pages, will contain many websites and Internet locations that are relevant to the search terms.²⁸
- **Some irrelevant results.** They probably also understand that search engines are not perfect—that even the first few results pages will contain a number of listings that are not particularly relevant to the search term.²⁹

27. *Virgin Enters. Ltd. v. Nawab*, 335 F.3d 141 (2d Cir. 2003) (“showing that a significant number of consumers are likely to be confused”); *Prime Media, Inc. v. Primedia, Inc.*, 33 F. Supp. 2d 932 (D. Kan. 1998) (“significant likelihood of confusion among an appreciable number of consumers”). *But see Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 n.4 (8th Cir. 1987) (rejecting argument that any non-*de minimus* level of confusion is significant; “In applying principles of trademark law, courts commonly refer to ‘the consumer,’ much like the references made to ‘the reasonable person’ in resolving questions of tort law.”).

28. The FTC staff explained its expectations as follows:

Because search engines historically displayed search results based on relevancy to the search query, as determined by algorithms or other objective criteria, the staff believes that consumers may reasonably expect that the search results displayed by individual search engines are ranked in accordance with this standard industry practice—that is, based on a set of impartial factors. Thus, a departure from the standard practice, such as a search engine’s insertion of paid-for placements in the search list, may need to be disclosed clearly and conspicuously to avoid the potential for deception.

FTC Staff, Complaint Regarding Investigation of Various Internet Search Engine Companies Paid Placement and Paid Inclusion Programs, June 27, 2002 (*available at* <http://www.ftc.gov/os/closings/staff/commercialalertattach.htm>).

29. *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996) (“a broad search will almost always include some irrelevant results”).

- **Ranking by approximate relevance to search terms.** They most likely expect that the highest rankings are given to the most relevant sites, or, at least, the sites that are richest with respect to mentions of the search terms, or other objective indicators of relevance.³⁰
- **Unbiased results.** They expect, at least with respect to the organic search result listing, that the search engine is a neutral tool—that is, that the organic results listing has not been slanted in favor of any particular entity or listings.³¹
- **Interest-related advertisements.** They expect that search engines may post advertisements on the results page, and that the advertisements may be geared to the user's interests, based on the user's search terms (which, after all, are the only real information the search engine has about the user).³²

The correctness (or incorrectness) of these assumed propositions can be important in trademark law. For example, if Internet users understand and expect irrelevant results in response to their searches, the typical user may tend to ignore one or two irrelevant results, and thus a few such results procured by alleged trademark misuse may not lead to any appreciable consumer confusion. If, on the other hand, Internet users generally give weight to high-ranked organic search result listings, then any such listings procured by trademark misuse could lead a significant percentage of consumers astray. Our assumptions and the evidence on these

30. See, e.g., *iProspect Search Engine User Behavior Study*, April 2006 (“a fairly high level of confidence exists on the part of users across search engines in general, as the vast majority seems to trust their search engine of choice to return the correct information more than they trust themselves to enter the appropriate keywords”), http://www.iprospect.com/premiumPDFs/WhitePaper_2006_SearchEngineUserBehavior.pdf (last visited April 22, 2007); Leslie Marable, *FALSE ORACLES: Consumer Reaction to Learning the Truth About How Search Engines Work Results of an Ethnographic Study*, June 30, 2003 (2002 survey reporting that more than 60 percent of its respondents said they were unaware that search engines accept fees to list some sites more prominently than others in search results, a practice commonly known as paid placement), <http://www.consumerwebwatch.org/dynamic/search-report-false-oracles-abstract.cfm> (last visited Apr. 22, 2007).

31. *Id.*

32. B. J. Jansen and M. Resnick, M. *An Examination of Searcher's Perceptions of Non-Sponsored and Sponsored Links During Ecommerce Web Searching*, 57 *Journal of the American Society for Information Science and Technology* 1949, 1959 (Dec. 2006) (study of consumer views of sponsored links, finding “explicit suspicion about sponsored links” and “low expectation level of sponsored results”), available at http://list.psu.edu/faculty_pages/jjansen/academic/pubs/sponsored_links_jansen.pdf (last visited April 26, 2007). Presumably, the suspicion of sponsored listings derives from an awareness that they are indeed advertisements keyed to the consumer's presumed interests.

issues can make all the difference in the results of trademark and unfair competition cases.

2. Legal Approaches to Keyword-Prompted Featured Listings and Advertisements

Lawsuits concerning keyword-based advertising have arisen in two contexts: suits by the trademark owner alleging direct infringement by competitors who purchased keyword ads, and suits by the trademark owner based on contributory infringement or some other derivative liability theory against the search service that implemented the keyword ads.³³ Many of the reported cases involve search-service defendants, perhaps because their keyword-ad-based revenue model motivates them to defend claims vigorously. It is likely that many cases involving advertiser defendants just settle, since keyword-based advertising is usually a small part of an advertiser's overall marketing plan.

a. *Playboy v. Netscape*

Assumptions about consumer perceptions of organic search result listings are difficult enough. Assumptions about keyword-prompted paid listings and advertisements can be especially difficult. There is no better example than the first reported keyword-advertising case in the United States, *Playboy Enterprises, Inc. v. Netscape Communications*.³⁴ Playboy Enterprises (sometimes referred to as "PEI") had complained about the sale of advertisements by the Netscape and Excite search engines that were linked to user searches for "playboy" and "playmate." The district court granted summary judgment to the search engines, concluding that because "playboy" and "playmate" were words in common use in the English language, Playboy Enterprises could not claim trademark infringement based upon their use.³⁵ Necessarily implicit in the district court's analysis was the premise that Internet users frequently searched for a man devoted to the pursuit of pleasure (the dictionary definition of "playboy") and for a child's play companion (the definition of "playmate"). That premise was insupportable in fact, as is apparent to anyone familiar with mens' attraction to Playboy magazine's photographs, including its photos of its monthly

33. A discussion of the secondary liability of search services can be found in *800-JR Cigar, Inc., v. Goto.com, Inc.*, 437 F. Supp. 2d 273, 280-81 (D.N.J. 2006).

34. 354 F.3d 1020 (9th Cir. 2004).

35. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 2000 WL 308815 (C.D. Cal. 2000). The district court had previously denied Playboy a preliminary injunction. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 55 F. Supp. 2d 1070 (C.D. Cal. 1999).

featured “playmate.” On appeal, the Ninth Circuit characterized the district court’s theory as “absurd.”³⁶

The Ninth Circuit, however, did not itself steer totally clear of assumptions in its analysis of the keyword advertising in *Playboy Enterprises Inc. v. Netscape Communications*. On an admittedly sparse summary judgment record, the court assumed that consumers might well assume that banner ads were connected with the owner of the trademark that was used as the search term.³⁷

The *Playboy* case arose not long after *Overture*, the search engine (later acquired by Yahoo!) that then powered the Netscape and Excite search services, began offering advertisements keyed to particular search words. In the *Playboy* case, *Overture*-affiliated search services had sold the keywords “playboy” and “playmate” to adult-oriented website owners as part of a package of more than 400 keywords. When Internet users searched for any of those words, the advertiser’s site would be displayed in a banner advertisement. As is typical, a user who clicked on the banner ad would be taken immediately to the advertiser’s website—in this case, an adult-oriented website.

Playboy argued that the practice meant that its PLAYBOY and PLAYMATE trademarks were being used to take Internet users to competitors’ websites. It also argued that some users would inevitably be confused, and thus the key likelihood of confusion element of trademark law would be satisfied, on the theory that a legally significant percentage of consumers would think that the banners were associated with *Playboy*.

The Ninth Circuit decision repeatedly referenced several facts that the panel found important. First, Netscape mandated that adult advertisers buy the package of more than 400 keywords, which included “playboy” and “playmate,” and that these terms could not be deleted from the package, even though almost all of the other words in the package were descriptive non-trademark words. This likely signaled to the court that Netscape was attempting to profit from *Playboy*’s valuable marks. Second, many of the resulting banner advertisements were either “confusingly labeled” or unlabeled—thus promoting, or at least doing nothing to avoid, consumer confusion.³⁸

36. *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1027 at n.32 (9th Cir. 2004) (“Indeed, to argue that they use the marks for their primary meaning, as defendants did below, is absurd. Defendants obviously do not use the term ‘playmate,’ for example, for its dictionary definition: ‘a companion, especially of a child, in games and play.’”).

37. *Id.* at 1025 (assuming that initial interest confusion may occur due to unlabeled banner advertisements).

38. *Id.*

In conducting its trademark analysis, the Ninth Circuit initially noted that Playboy's strongest argument was for "initial interest confusion," the doctrine first applied to the Internet in the Ninth Circuit's ruling in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*³⁹ It summarized the *Brookfield* rule as follows: "Although dispelled before an actual sale occurs, initial interest confusion impermissibly capitalized on the goodwill associated with a mark and is therefore actionable trademark infringement."⁴⁰ Playboy argued that keyword-based advertisements initially confuse Internet users, who, after conducting a search for Playboy's trademarks, are confronted with unlabeled advertisements pertaining to adult material that invite the user to "click here." As the court described Playboy's theory, "[u]sers may follow the instruction, believing that they will be connected to a PEI site."⁴¹ When they are connected to the advertiser's site, they will realize it is not Playboy's site, but under the "initial interest confusion" theory, the harm is done at that point, because the advertiser has been introduced to a new potential customer.⁴² The court agreed with this theory, finding the keyword advertisement factually indistinguishable from the metatags involved in *Brookfield*.⁴³

The *Brookfield* "initial interest confusion" doctrine is controversial. It has been used by trademark owners to challenge the use of their marks in domain names, metatags, invisible text, and other Internet contexts, and often where no traditional trademark confusion exists, but where the courts have viewed the challenged trademark use as improper. In a concurring opinion in *Playboy v. Netscape*, Judge Marsha S. Berzon criticized the doctrine and recommended that it be reconsidered.⁴⁴

Brookfield involved two similarly named websites, with some overlapping functionality. The court found that the junior trademark user's use of the trademark MOVIE BUFF in metatags could lead users to the senior user's website, where they might linger, even though they would realize it wasn't their intended destination.⁴⁵ The court in *Brookfield* analogized the situation to one where an ambiguous sign leads a driver off the highway,

39. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 55 F. Supp. 2d 1070 (C.D. Cal. 1999).

40. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d at 1025.

41. *Id.*

42. *Id.*

43. *Id.* at 1025-26.

44. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d at 1034-36 (Berzon, J., concurring).

45. *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1061-62 (9th Cir. 1999).

where he finds, instead of his desired commercial destination, a competitive establishment, which he then patronizes because of its convenience.⁴⁶ The driver is not misled when he enters the establishment, but was diverted to its vicinity by trademark confusion. Judge Berzon acknowledged, as the full panel had held, that the keyword advertising situation was “analytically similar” to the situation found to present initial interest confusion in *Brookfield*, but using real world analogies, Judge Berzon suggested that the doctrine penalizes the sound retail practice of offering consumers useful choices.⁴⁷

Judge Berzon asked the reader to consider a hypothetical shopping trip to Macy’s department store, where a consumer looked for Calvin Klein goods, and, on her way to that section, was confronted with Macy’s less expensive house brand, deliberately designed to appeal to Calvin Klein buyers.⁴⁸ Has Macy’s infringed Calvin Klein’s mark? More pointedly, Judge Berzon described Internet merchants like Amazon.com that deliberately present consumers with choices of other products based on consumers’ searches.⁴⁹ Her decision questioned whether the law should penalize such presentations of choices, particularly given, in the keyword advertisement context, “the minimal inconvenience in directing one’s web browser back to the original list of search results.”⁵⁰ While recognizing *Brookfield* as controlling law, Judge Berzon called it “unsupportable” and illogical, and openly invited *en banc* reconsideration of the decision.⁵¹

46. *Id.* at 1063-64.

47. *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d at 1034-36 (Berzon, J., concurring).

48. *Id.* at 1035.

49. *Id.*

50. Both the initial interest confusion doctrine and the issue of keyword sales inevitably lead to battles over the most applicable analogies. The *Brookfield* court’s highway analogy portrays an initial diversion as an almost-conclusive move, because of the trouble it takes to reenter the highway. Judge Berzon’s analogy of competing department store displays suggests, by contrast, that the consumer can readily proceed as she originally desired even if presented with possible diversions to competing products. One commentator has noted, “As with many Internet situations, the result depends on what analogy you draw. A keyword buy, for instance, is less like [an analogy to a waiter suggesting that a customer who orders Coke accept Pepsi instead] than like a waiter *actually serving* Pepsi in response to orders for Coke, a practice that has been found to violate trademark rights.” Bruce P. Keller and Peter Johnson, *Are the “New” Cyberspace Legal Developments Really So New?*, 3 Libel Defense Resource Center Bulletin 167, 183 (1999) (emphasis in original). Analogies can be helpful, but ultimately in trademark law the right approach depends on how one answers the key question: What does the consumer expect? Does the consumer expect Macy’s to offer her house-brand alternatives to the designer brand? Does the Internet user expect the search engine to serve up advertisements only for the company whose trademark he has just searched?

51. *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d at 1036 (Berzon, J., concurring).

Perhaps because of Judge Berzon's concerns, and the possibility of reconsideration of *Brookfield*, the Ninth Circuit panel did not rest its decision in *Playboy v. Netscape* solely on initial interest confusion. Rather, it determined that "to be certain" of the result, it needed to "test PEI's theory using this circuit's well-established eight-factor test for the likelihood of confusion."⁵² This referred to the *Sleekcraft* factors, the Ninth Circuit's version of the basic trademark infringement factors.⁵³ The court first focused on the most important factor, evidence of actual confusion. Playboy had submitted an expert consumer study that it asserted found 22 to 29 percent of consumers confused (at least initially) by the keyword-based advertisements.⁵⁴ The search services had submitted no contrary study, and though Playboy's study was subject to criticism, it created a genuine issue of material fact on this key element. Thus, on this factor alone, the appeals court found the district court's summary judgment improper.⁵⁵

The court found most of the other trademark-infringement factors to favor Playboy.⁵⁶ Its analysis on some of these factors may be challenged as being results-oriented. For example, the court assumed that Internet users searching for adult-oriented material are "easily diverted."⁵⁷ This assumption was based on no empirical evidence, and one could as easily assume that Internet users are savvy about banner advertisements and are unlikely to be unwillingly diverted. Similarly, the court in circular fashion presumed that some banner ads infringed Playboy's mark, then held that the search engine's intent to profit from such conduct was illegitimate, and then found that this bad intent supported a finding of infringement.⁵⁸

At several points, the court pointed to facts that it found troublesome. Chief among these were the facts that the search engines required that "playboy" and "playmate" be purchased as part of the adult-oriented keyword package, and that the search engines neither required the advertiser to label its advertisements, nor provided such labels themselves.⁵⁹ The court indicated that if the ads were labeled (for example, with the name of a Playboy

52. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d at 1026.

53. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).

54. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d at 1026.

55. *Id.* at 1027.

56. *Id.* at 1027-29.

57. *Id.* at 1028.

58. *Id.*

59. *Id.* at 1023, 1029-30.

competitor, such as Penthouse), such labels would dispel consumer confusion.⁶⁰

After finding at least a genuine issue of fact on consumer confusion under both the initial interest confusion test and the standard multi-factor test, the court turned to the search engines' defenses.⁶¹ The key defense was nominative use, the situation where it is essential to use a trademark to identify what one is referencing. One can hardly refer to "Disney World," for example, without using the DISNEY WORLD trademark. In this case, the court found that the search engines were not using "playboy" or "playmate" in their nominative sense, for example, to compare their advertisers' products to those of Playboy Enterprises, but rather the search engines and advertisers were using the marks "to identify consumers who are interested in adult-oriented entertainment."⁶²

The court also rejected a fair use defense on the ground that a confusing use can never be a fair one, and it found inapplicable the search engines' functional use defense; this doctrine prevents one party from monopolizing a functional design, and Playboy's trademarks contained no unprotectable functional attributes.⁶³

The court also dealt with Playboy's trademark dilution claim, and similarly found issues of fact that precluded the summary judgment that the district court had granted.⁶⁴

Because of the summary judgment status that the case presented on appeal, the Ninth Circuit's decision did not definitively resolve keyword-based advertising. Both the trademark infringement and the dilution issues were remanded to the district court, albeit with a clear sign that the Ninth Circuit disfavors the practice, at least where the trademarks are sold in packages and the resulting banner ads are unlabeled or confusingly labeled.⁶⁵ However, the decision left room for a full evidentiary record on consumer confusion at trial, and the evidence could well have developed differently from the Ninth Circuit's assumptions, particularly if it showed that Internet users understood that banner ads are not necessarily sponsored by the companies whose marks were searched. Because the case settled

60. *Id.* at 1025.

61. *Id.* at 1029.

62. *Id.* at 1029-30.

63. *Id.* at 1030-31.

64. *Id.* at 1032.

65. *See id.* at 1023, 1025, 1029-30.

shortly after the Ninth Circuit decision, that evidence would have to await another case.⁶⁶

Ultimately the Ninth Circuit's decision, while rejecting the District Court's untenable assumption and insisting on empirical evidence of consumer understanding, advanced the keyword-based advertising issue only by a few small steps. It provides little guidance on how user understandings should be measured, and the panel's emphasis on a few particulars, such as the source labeling or the lack of labeling of the banner advertisements, may even cause future litigants to give undue emphasize to those facts, whether or not they prove significant to actual users. Finally, by utilizing the "initial interest confusion" theory, a theory that invites assumptions, the court in effect countermanded its own demand for clear empirical evidence.

Playboy, in short, left almost all of the development of the law of keyword-based advertising to future cases.

b. Post-Playboy Legal Approaches

In the wake of the appellate decision in *Playboy*, leaving undecided the question of keyword use, litigants and courts have taken several different approaches in addressing claims of keyword-based trademark infringement.

(1) Non-Trademark Use

Not all uses of a trademark constitute trademark use. The keyword situation does not fit neatly into traditional infringement analysis. Therefore, defendants in some keyword cases have asserted that their keyword uses of the plaintiffs' trademarks do not qualify as trademark use.

Pop-up advertising, another unusual Internet situation, gave rise to the key precedents employed by those who assert the no-trademark-use defense. In the pop-up situation, a user's activity, which may relate to the plaintiff's trademark, triggers a pop-up advertisement. In *1-800 Contacts, Inc. v. WhenU.com, Inc.*,⁶⁷ certain Internet users had permitted the defendant WhenU.com's "Save Now" software to be installed on their computers, although in many cases the users probably were not even aware of having given their permission. That software generates pop-up advertisements that are keyed to the user's activities. When, for example, a user visits the website of the plaintiff, 1-800 Contacts, Inc., the Save Now software examines that website, including its

66. *AOL Settles Playboy Suit*, ClickZNetwork, Jan. 23, 2004, <http://www.clickz.com/news/article.php/3303251>.

67. 414 F.3d 400 (2d Cir. 2005). Co-author Jacob Jacoby served as a testifying expert for the defendant in this matter.

domain name (1800Contacts.com), compares the results to Save Now's Internet directory of website addresses, address fragments, search terms, and keyword algorithms, and generates a pop-up ad that appears to correlate with the consumer's interest.⁶⁸ Not surprisingly, when the website of 1-800 Contacts, a distributor of contact lenses and related goods, is visited, Save Now generates a pop-up ad from a competitive optical goods supplier.

The issue in *1-800 Contacts*, and in several related pop-up advertising cases, is whether WhenU.com's software that generated the pop-up ads made trademark use of the plaintiff's trademark. WhenU.com argued that it had only listed the plaintiff's public domain name, among many others, in its software's directory, and used that directory for the purpose of determining the computer user's interests.⁶⁹ WhenU.com did not disclose the contents to its directory to its clients, nor did it sell its clients pop-up ads keyed to certain trademarks or domain names.⁷⁰ For those reasons, the Second Circuit decided that WhenU.com's use of the plaintiff's domain name in its software directory did not involve trademark use, an essential prerequisite for trademark infringement:

A company's internal utilization of a trademark in a way that does not communicate it to the public is analogous to a individual's private thoughts about a trademark. Such conduct simply does not violate the Lanham Act, which is concerned with the use of trademarks in connection with the sale of goods or services in a manner likely to lead to consumer confusion as to the source of such goods or services.⁷¹

Similarly, WhenU.com's action of generating a pop-up ad in response to a user's viewing of the plaintiff's website did not involve trademark use, either, the court held.⁷² The court viewed the pop-ups as a legitimate marketing scheme in which advertisers take advantage of available knowledge about consumers' interests:

Indeed, it is routine for vendors to seek specific "product placement" in retail stores precisely to capitalize on their competitors' name recognition. For example, a drug store typically places its own store-brand generic products next to the trademarked products they emulate in order to induce a customer who has specifically sought out the trademarked product to consider the store's less-expensive alternative.

68. *Id.* at 404.

69. *Id.* at 408-09.

70. *Id.* at 409.

71. *Id.*

72. *Id.* at 410-11.

WhenU employs this same marketing strategy by informing C-users who have sought out a specific trademarked product about available coupons, discounts, or alternative products that may be of interest to them.⁷³

More specifically, the court distinguished the pop-up situation from that of keyword-based search service advertising because “WhenU does not link trademarks to any particular competitor’s ads, and a customer cannot pay to have its pop-up ad appear on any specific website or in connection with any particular trademark,” and thus WhenU.com’s pop-up placement is keyed only to categories of consumer interest, not particular trademarks.⁷⁴ For this reason, the court found that the pop-up ads did not involve trademark use and thus could not support an infringement claim. As a result, the court dismissed consumer confusion survey evidence as irrelevant.⁷⁵ Other courts have reached similar conclusions concerning trademark non-use in the pop-up situation.⁷⁶

Despite the passage in *WhenU.com* that distinguished the keyword-based advertising situation from the pop-up ad situation, the trademark non-use argument can be, and is being, asserted by defendants in keyword-based advertising cases. Specifically, in *Merck & Co. v. Mediplan Health Consulting, Inc.*,⁷⁷ the court dismissed trademark infringement claims directed against keyword-based ads on the ground that no trademark use was involved. The Canadian pharmacy defendants in that case had purchased sponsored links keyed to searches for ZOCOR, a patented drug sold by Merck. The sponsored listings were linked to the pharmacies’ websites, which advertised a generic ZOCOR substitute.

Citing the statutory definition of a service mark use as a “display[] in the sale or advertising of services,” the court found no trademark use in the keyword-based ad situation:

Here, in the search engine context, defendants do not “place” the ZOCOR marks on any goods or containers or displays or associated documents, nor do they use them in any way to indicate source or sponsorship. Rather, the ZOCOR mark is “used” only in the sense that a computer user’s search of the keyword “Zocor” will trigger the display of sponsored links to

73. *Id.* at 411.

74. *Id.*

75. *Id.* at 412.

76. *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734 (E.D. Mich. 2003) (Co-author Jacob Jacoby served as a testifying expert for the defendant in this matter.); *U-Haul Int’l. Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723 (E.D. Va. 2003).

77. 425 F. Supp. 2d 402 (S.D.N.Y. 2006).

defendants' websites. . . . This internal use of the mark "Zocor" as a key word to trigger the display of sponsored links is not use of the mark in a trademark sense. *Cf. 1-800 Contacts*, 414 F.3d at 408 (holding that defendant's inclusion of plaintiff's website address, www.1800contacts.com, in defendant's internal directory to trigger pop-up ads was not "use" in trademark sense).⁷⁸

For this reason, the court found the key-word-based ads to be non-actionable under a trademark infringement theory. The court acknowledged that *Playboy* had implicitly held to the contrary, and that two other decisions, *GEICO v. Google*⁷⁹ and *Google Inc. v. American Blind and Wallpaper Factory, Inc.*,⁸⁰ had found sufficient use.⁸¹

In *Rescuecom Corp. v. Google Inc.*,⁸² the district court carefully analyzed four different theories of keyword use as actionable "use" under the Lanham Act, and concluded that none of the theories supported true trademark use. The court summarized the plaintiff's four theories of trademark use as follows:

Plaintiff contends that defendant's actions constitute trademark use because: (1) defendant is attempting to "free-ride" on the good will associated with Rescuecom and its activities cause confusion; (2) defendant's activities lure Internet searchers away and prevent them from reaching plaintiff's website; (3) defendant's activities alter the search results an Internet user receives; and (4) defendant uses Rescuecom internally as a keyword that triggers the appearance of competitors' advertisements.⁸³

As to free riding on goodwill, the court followed the reasoning in *1-800-Contacts* to find that this theory failed because it essentially alleged the likelihood-of-confusion element, but not the predicate element of improper trademark use.⁸⁴ In the same way, the court dismissed the plaintiff's theory that keyword use lured users away from its website as a theory that was putting the cart (confusion) before the horse (improper trademark use).⁸⁵ The court noted that the plaintiff's two-step diversion theory focused on both the initial use of the trademark as a search term and the subsequent use of a

78. *Id.* at 415.

79. 330 F. Supp. 2d 700, 703-04 (E.D. Va. 2004).

80. 2005 WL 832396 at *6 (N.D. Ca1. 2005).

81. 425 F. Supp at 415, n.9.

82. 456 F. Supp. 2d 393 (N.D.N.Y. 2006).

83. *Id.* at 400.

84. *Id.* at 400-01.

85. *Id.* at 399-400.

link from the resulting search results page.⁸⁶ The search results page, however, does not display the plaintiff's mark (other than in the organic listings for the plaintiff's own website), so the court concluded that the defendant could not be charged with use of the plaintiff's trademark at that point.⁸⁷

With respect to the theory that the defendant had altered the search results that an Internet user receives, the court noted that "there is no allegation that plaintiff's trademark is displayed in any of the sponsored links about which plaintiff is concerned."⁸⁸ Thus, an Internet user who searches for "Rescuecom" still has every opportunity to reach the Rescuecom website, simply by clicking on the Rescuecom link in the organic search listings. The sponsored links to the defendant's site, though prompted by the trademark search term, merely give the user "other choices," just as WhenU.com's pop-up ads presented new material.⁸⁹ The court quoted a passage from *1-800-Contacts* that analogized the pop-ups to retail product placements, thus suggesting that keyword use is also analogous to the common retail practice of using customers' buying and browsing habits as the basis for bringing competitive products to their attention.⁹⁰

Finally, with respect to the "internal use" argument, the court concluded that mere internal use of a trademark within a search service to trigger sponsored links does not constitute trademark use "because there is no allegation the defendant places plaintiff's trademark on any goods, containers, displays or advertisements, or that its internal use is visible to the public."⁹¹ The *Rescuecom* decision is likely to be a key point of reference for other rulings on the trademark-use issue, because of its discussion of each of the four theories, and its research and citation to prior decisions.⁹²

A few European decisions appear to follow the no-trademark-use rationale. In the United Kingdom, the case of *Reed Executive plc v. Reed Business Information Ltd.*⁹³ pitted two companies that each had some rights to the word "Reed" to use against one another. The plaintiffs included Reed Employment, which had registered the trademark REED for use in connection with

86. *Id.* at 400-01.

87. *Id.* at 401.

88. *Id.* at 402.

89. *Id.*

90. *Id.* at 401-03.

91. *Id.* at 403-04.

92. In *Site Pro-1, Inc. v. Better Metal, LLC*, 2007 WL 1385730 (E.D.N.Y. 2007), the court followed *Rescuecom*, finding its reasoning persuasive, and applied its reasoning to trademark infringement claims both on metatag use, and keyword search use, of the defendant's trademark.

93. 2004 EWCA (Civ) 159 (March 3, 2004).

employment services; and the defendants were affiliates of publishing giant Reed Elsevier, including an Internet employment service known as totaljobs.com. The plaintiff, Reed Employment, which was better known in the British job-seeking market than the Reed Elsevier defendants, complained that the defendants' totaljobs.com website used trademarks like REED BUSINESS INFORMATION, which it contended could cause confusion with Reed Employment. The court rejected the plaintiffs' basic infringement claims, holding that there was insufficient evidence of consumer confusion, and, moreover, that Reed Elsevier companies were privileged to use their own name on their totaljobs.com website.⁹⁴ Hence, the court sided with the defendants on the basic trademark claims based on the visible use of the REED trademark.

The court then turned to plaintiffs' claims that defendants committed infringement by using the word REED in website metatags and as a keyword for search service banner advertising. On the banner advertising issue, the appeals court applied its own view of how consumers understand and treat banner advertisements. Brushing aside the trial court's holding that infringement would occur when a user clicked through on the banner, Lord Justice Jacob stated:

I am unable to agree with this. The banner itself referred only to totaljobs—there was no visible appearance of the word Reed at all. . . . I cannot see that causing the unarguably inoffensive-in-itself banner to appear on a search under the name “Reed” or “Reed jobs” can amount to . . . infringement. The web-using member of the public knows that all sorts of banners appear when he or she does a search and they are triggered by something in the search. He or she also knows that searches produce fuzzy results—results with much rubbish thrown in. The idea that a search under the name Reed would make anyone think there was a trade connection between a totaljobs banner making no reference to the word “Reed” and Reed Employment is fanciful. No likelihood of confusion was established.⁹⁵

The court noted that infringement might exist if the website brought up by the banner click-through was itself infringing, or if, unlike this case, the trademarks and goods at issue were identical.⁹⁶ However, the court also expressed doubt that the

94. *Id.* at ¶¶ 116-30.

95. *Id.* at ¶ 140.

96. *Id.* at ¶¶ 141-42.

“invisible” use of trademarks as search terms even constituted actionable “use in the course of trade.”⁹⁷

Even apart from whether keyword use constitutes trademark use under the Lanham Act, some cases of alleged keyword use may fail for even more basic non-use issues. In the case of multiple-word trademarks comprised of common words, for example, the plaintiff may not be able to establish that the search term that was used was its trademark, as opposed to the individual non-protectable words that comprise it. That was the situation in *Picture It Sold, Inc. v. I Sold It, LLC*,⁹⁸ where the court noted that unless the plaintiff’s multi-word mark was searched within quotation marks, “the search engine would pull up results containing those words and in any order.”⁹⁹ Especially in that case, where the defendant’s name contained two of the same words, the plaintiff could not readily show use by the defendant of its mark.

(2) Nominative Fair Use

In one keyword case, *Edina Realty Inc. v. TheMLSonline.com*,¹⁰⁰ the court rejected the defendant’s argument that its keyword use of the plaintiff’s trademarks was privileged as nominative fair use. The case involved two large real estate brokerage firms. The defendant purchased “Sponsored Link” or “Sponsor Result” advertisements on the Google and Yahoo search services, keyed to various iterations of the plaintiff’s trade name and domain name. Using the Third Circuit’s test for nominative use set forth in *Century 21 Real Estate Corp. v. Lendingtree, Inc.*,¹⁰¹ the court found no fair use because (1) the defendant could have described its website contents without purchasing the plaintiff’s marks as keywords, and (2) the defendant’s use of the plaintiff’s marks in its paid listing headlines suggested that the defendant was connected to the plaintiff.¹⁰²

(3) Misleading and Non-Misleading Use

Courts sometimes attempt to judge whether or not keyword use is misleading without the benefit of research. Some courts have attempted to distinguish between misleading and non-

97. The court took a similar approach to its metatag analysis, concluding apparently based on the court’s own experience that Internet users do not attribute any special significance to any connection between the words searched and search results that may have been prompted by metatags. *Id.*, ¶¶ 144-50.

98. 199 Fed. Appx. 631 (9th Cir. 2006).

99. *Id.* at 633.

100. 2006 WL 737064 (D. Minn. 2006).

101. 425 F.3d 211 (3rd Cir. 2005).

102. 2006 WL 737064 at *5.

misleading keyword use by focusing on the content of the featured listings, and whether the ad copy and graphics fosters or dispels confusion. In *GEICO v. Google*, for example, the court concluded that ads using GEICO in their titles, in violation of Google's policy at the time of the *GEICO v. Google* trial, were most likely to mislead.¹⁰³ Similarly, in *Edina Realty Inc. v. TheMLSOnline.com*,¹⁰⁴ the court pointed to the defendant's use of the plaintiff's trademark "in the headline, which is underlined and in bold font" as weighing against nominative fair use. These findings bring to mind the Ninth Circuit's concern in *Playboy* with banner ads that failed to identify their proponent.¹⁰⁵ These three cases suggest that prominent use of the plaintiff's name, and/or failure to label the ad as coming from the defendant, are likely to weigh against the defendant in a keyword case.

Other indicators of a defendant's intent also influence courts in keyword cases. In one case where the defendant not only purchased keyword ads, but also used the plaintiff's mark on its web page in invisible text, the court could not help but be skeptical of the defendant's keyword use.¹⁰⁶ In other cases, allegations that the defendants had engaged in various different kinds of infringing activities, including use of trademarks as search engine keywords, have permitted courts to focus their analysis on the other, more established, kinds of trademark misuse.¹⁰⁷

Ultimately, courts must be wary of acting on their own judgment about whether a keyword use is misleading or proper, because only actual consumer understandings matter under trademark law. Clearly, different interpretations of keyword-based advertisements are possible. One unreported case involving a lawyer's purchase of featured search listings that were keyed to a competitor's name illustrates the different interpretations one can put on such activities. Ben Cowgill, a Kentucky lawyer, had purchased featured listings keyed to searches for "Peter

103. *Gov't Employees Ins. Co. v. Google, Inc.*, 2005 WL 1903128 (E.D. Va. 2005) (finding Lanham Act violation where GEICO trademarks were used in the heading or text of Google ads).

104. 2006 WL 737064 (D. Minn. 2006).

105. See text *supra* at note 66.

106. *Edina Realty Inc. v. TheMLSOnline.com*, 2006 WL 737064 (D. Minn. 2006). Invisible text (called "hidden text" in this opinion) is text that is coded to display in the same color as the web page background. Although invisible to Internet users, it is "seen" in the web page's HTML code by search engines.

107. *E.g.*, *International Profit Assoc., Inc. v. Paisola*, 461 F. Supp. 2d 672 (N.D. Ill. 2006) (allegations of keyword use together with domain name use and use of plaintiff's marks in the content of defendant's website).

Ostermiller,” his chief competitor in Cowgill’s law specialty.¹⁰⁸ Ostermiller obviously saw the practice as deceptive, and after he complained, the ads were stopped. Cowgill defended his ads, according to a report, by asserting that it was “a matter of putting one’s name in the place where people are looking.”¹⁰⁹ A news account quoted one professor as comparing the sponsored link to “putting your name on another lawyer’s door,” while yet another commentator compared it to “standing in front of another lawyer’s office with a sandwich board saying, ‘Would you consider coming down to my office instead?’”¹¹⁰ With such competing interpretations possible, courts should generally be cautious about putting their own “misleading” or “non-misleading” labels on the challenged practices, and should generally take due care to learn how the ads are understood by typical consumers.

(4) Triable Confusion Issues

Counterposed against the decisions that hold keyword use to be non-trademark use are several decisions, including *GEICO v. Google*, that treat keyword use as trademark use, at least potentially, and thus leave the ultimate issue of confusion or non-confusion to the trier of facts. In an early decision, *Google Inc. v. American Blind & Wallpaper Factory, Inc.*,¹¹¹ the court, citing *Playboy*, found that the Ninth Circuit’s analysis must have included an “implicit, preliminary determination” of actionable trademark use.¹¹² The court accordingly rejected Google’s non-trademark use argument.¹¹³ The court noted that metatags, like keywords, involve somewhat hidden use of trademarks, but suggested that such use may be actionable at least on an initial interest confusion theory:

The purchase of trademarks as keywords for a Web site and the insertion of trademarks as metatags in the code of a Web site, both of which are employed as means of having links to that Web site appear on a search-results page, are sufficiently analogous that it cannot be said that American Blind has

108. *Web Ad For Lawyer Linked To Competitor Spurs Dispute*, Louisville Courier-Journal, July 6, 2004. Similarly, one of Jacoby’s competitors as a litigation survey expert has at times purchased featured listings keyed to searches for Jacob Jacoby.

109. *Id.*

110. *Id.*

111. 2005 WL 832398 (N.D. Cal. 2005). (The decision was marked as “not citable as precedent”).

112. *Id.* at *6.

113. *Id.* at *7.

failed to allege actionable trademark “use” by Defendants’ advertisers.¹¹⁴

The 2005 case, *Google Inc. v. American Blind & Wallpaper, Inc.*, was decided at the motion to dismiss stage, and a year later, Google took a second shot at the issue in a summary judgment motion. In its second decision,¹¹⁵ the court adhered to its prior view that keyword-based advertisements tied to trademarks used as search terms satisfied the Lanham Act’s “use in commerce” requirement. While acknowledging the intervening decisions that went the other way, and a developing split between district courts in the Second Circuit (finding no trademark use) and several in the Third Circuit (finding trademark use), the court concluded that its decision had to be based on the sole relevant Ninth Circuit precedent, *Playboy v. Netscape*.¹¹⁶

Specifically, the court noted that while the Ninth Circuit in *Playboy v. Netscape* never addressed the “use in commerce” element, it must have *assumed* that producing banner advertisements in response to searches using trademarks as keywords satisfied that element.¹¹⁷ Both the majority and concurring opinions, the court held, made an “implicit finding of trademark use in commerce.”¹¹⁸ Thus, the district court essentially made that implicit finding of *Playboy v. Netscape* explicit in the case at hand, and reaffirmed its earlier conclusion that trademark “use” is involved in keyword use.

A district court in New Jersey strongly rejected the no-trademark-use analogy to pop-up advertising cases and found actionable trademark use under several different theories. In *800-JR Cigar, Inc. v. Goto.com, Inc.*,¹¹⁹ the court distinguished the pop-up cases on the ground that the trademarks that prompt the pop-up ads are contained only “in internal computer coding that is neither communicated to the public nor for sale to the highest bidder.”¹²⁰ The court suggested that by marketing the rights to use the trademarks as search terms, the search service in *800-JR Cigar* (GoTo.com) was itself selling and profiting from the plaintiff’s trademarks.¹²¹ The court described three ways in which the search service made improper use of the plaintiff’s marks:

114. *Id.* at *7.

115. *Google Inc. v. American Blind & Wallpaper Factory, Inc.*, 2007 WL 1159950 (N.D. Cal. 2007) (The decision is marked “Not for citation.”).

116. *Id.* at *6.

117. *Id.* at *5.

118. *Id.*

119. 437 F. Supp. 2d 273 (D.N.J. 2006).

120. *Id.*

121. *Id.* at 28.

Here, GoTo makes trademark use of the JR marks in three ways. First, by accepting bids from those competitors of JR desiring to pay for prominence in search results, GoTo trades on the value of the marks. Second, by ranking its paid advertisers before any “natural” listings in a search results list, GoTo has injected itself into the marketplace, acting as a conduit to steer potential customers away from JR to JR’s competitors. Finally, through the Search Term Suggestion Tool, GoTo identifies those of JR’s marks which are effective search terms and markets them to JR’s competitors. Presumably, the more money advertisers bid and the more frequently advertisers include JR’s trademarks among their selected search terms, the more advertising income GoTo is likely to gain.¹²²

In *Buying for the Home, LLC v. Humble Abode, LLC*,¹²³ the court found trademark “use” in the keyword buys at issue, through which, interestingly, each side accused the other of infringing its trademark rights by engaging in keyword buys of each others’ marks. The court initially expressed its awareness of “the challenges that sometimes arise in applying existing legal principles in the context of newer technologies,” and acknowledged that a keyword buy was “certainly not a traditional ‘use in commerce.’”¹²⁴ Nonetheless, the court found that the activity met the Lanham Act’s use requirement.¹²⁵ First, the alleged keyword purchase “was a commercial transaction that occurred ‘in commerce,’ trading on the value of Plaintiff’s mark.”¹²⁶ Additionally, the alleged use “was both ‘in commerce’ and ‘in connection with any goods or services’ in that Plaintiff’s mark was allegedly used to trigger commercial advertising which included a link to Defendants’ furniture retailing website.”¹²⁷ As a result of this link, the court found that the trademark use was “tied to the promotion of Defendants’ goods and retail services,” and the mark was employed in creating “direct access (*i.e.*, a link)” to Defendant’s retail website.¹²⁸ Based on this literal coverage of the keyword-use activity, and apparently weighing the link provided by the search service as a critical connection between the trademark use and resulting purchases, the court concluded that allegations of keyword trademark use “clearly satisfy the Lanham Act’s ‘use’

122. *Id.* at 285 (footnote omitted).

123. 459 F. Supp. 2d 310 (D.N.J. 2006).

124. *Id.* at 323.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

requirement.”¹²⁹ The court noted, of course, that overcoming the trademark “use” requirement was only a first step; the plaintiff still needed to prove likelihood of confusion or deception of consumers.¹³⁰

This reasoning was approved and followed in *J.G. Wentworth, S.S.C. Limited Partnership v. Settlement Funding LLC*:¹³¹

But like the Court in *Buying for the Home*, I recognize that defendant’s use of plaintiff’s marks to trigger internet advertisements for itself is the type of use consistent with the language in the Lanham Act which makes it a violation to use “in commerce” protected marks “in connection with the sale, offering for sale, distribution or advertising of any goods or services,” or “in connection with any goods or services.” 15 U.S.C. §§ 1114(1) and 1125(a)(1). Such use is not analogous to “an individual’s private thoughts” as defendant suggest [sic]. By establishing an opportunity to reach consumers via alleged purchase and/or use of a protected trademark, defendant has crossed the line from internal use to use in commerce under the Lanham Act.¹³²

Similarly, in *Government Employees Insurance Co. v. Google, Inc.*,¹³³ the court found that keyword use of a trademark could constitute infringement, and, in *Bayer Healthcare LLC v. Nagrom, Inc.*,¹³⁴ the court held actionable use of the plaintiff’s trademark when the defendant “paid at least one search engine to secure highly prominent placement for [the defendant’s] web site in search results.”¹³⁵ Although the decision does not make clear whether the particular practice at issue involved paid featured listings, or as the opinion’s wording suggests, paid “higher-than-normal listings” within the search source’s organic results listings, and although the court did not spell out its keyword analysis, it seemed to view keyword use as akin to metatag use, generating at least initial interest confusion.¹³⁶ Similarly, in *Edina Realty Inc. v. TheMLSonline.com*,¹³⁷ the court concluded that keyword-based ads

129. *Id.*

130. *Id.*

131. 2007 WL 30115 (E.D. Pa. 2007).

132. *Id.* at *6.

133. 330 F. Supp. 2d 700 (E.D. Va. 2004). The court reasoned that when a search service sells the rights to link advertising to plaintiff’s trademarks, such activity constitutes a use of the trademarks “in a way that may imply that defendants have permission from the trademark owner to do so.” *Id.* at 704.

134. 72 U.S.P.Q.2d 1751, 2004 WL 2216491 (D. Kan. 2004).

135. *Id.*, 2004 WL 2216491 at *2.

136. *Id.* at *5.

137. 2006 WL 737064 (D. Minn. 2006).

involve trademark use, just as metatag use does. A few other cases appear to conclude or assume without significant analysis that use of a trademark as a keyword for search-service generated advertisements satisfies the Lanham Act's "use" requirement.¹³⁸

(5) Foreign Keyword Use Decisions

According to published reports, in October 2003, in *Luteciel v. Google France*, the Nanterre Court of First Instance found Google France guilty of counterfeiting trademarks in connection with its "AdWords" sponsored links program.¹³⁹ Google France apparently sold sponsored links connected to the words *vols* (flights) and *voyages* (travel). The plaintiff owned the trademarks BOURSE DES VOLS and BOURSE DES VOYAGES. The keyword matching system used by Google France displayed all results matching at least one of the words in a search query. Hence, when one searched for the trademark BOURSE DES VOYAGES, the matching system would recognize the word *voyages* and would run the sponsored link associated with that word. The plaintiffs asserted that the association of the sponsored link with the search for the trademark BOURSE DES VOYAGES constituted trademark infringement.

Google France unsuccessfully claimed in defense that the marks in question were not distinctive because the words *bourse* (market) and *vols* (flight) were commonly used French terms. The court also discounted Google France's argument that its system could not distinguish between searches for ordinary descriptive terms, such as *vols*, and trademark phrases, such as BOURSE DES VOLS. In response, the court noted that Google France profited from a system that displayed the maximum number of advertisements, and it also stated that Google France had not proven the technical limitation it asserted. Google France unsuccessfully appealed the decision.¹⁴⁰

138. *International Profit Assoc., Inc. v. Paisola*, 461 F. Supp. 2d 677, 2006 WL 3302850 (N.D. Ill. 2006) (citing *Buying for the Home*); *Kinetic Concepts, Inc. v. Bluesky Medical Group Inc.*, 2005 WL 3068223 at *8 (W.D. Tex. 2005) (fact that defendant purchased plaintiff's trademarks as keywords held relevant to unfair competition and trademark infringement analysis where other acts of infringement were also alleged); *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 204 F.R.D. 460, 466 (C.D. Cal. 2001) ("There appears to be no good cause for not extending these protections and limitations [prohibitions against misleading uses of trademarks as metatags] to cases where one infringes or dilutes another's mark by purchasing a search term—as opposed to using another's mark in one's metatags—for the purpose of manipulating a search engine's results list.").

139. *Google's AdWord Links Found to Infringe Competitor's French Trademarks on Terms*, 8 ECLR (BNA) 980 (Oct. 22, 2003).

140. *French Trademark Ruling Against Google Keyword Advertising Upheld on Appeal*, 10 ECLR (BNA) 296 (Mar. 23, 2005).

Similar results were reportedly reached in other French courts in cases involving keyword use of trademarks owned by Louis Vuitton¹⁴¹ and Meridien hotels.¹⁴²

In late 2003 in Germany, in *Metaspinner GmbH v. Google Deutschland*, the Regional Court of Hamburg granted an interim injunction prohibiting Google Deutschland from displaying a sponsored link for the domain name *preisserver.de* in the results page for a search with the keyword *preispiraten* (price pirates). The plaintiff operated a website at *preispiraten.de*. It objected on trademark grounds to Google Deutschland's sale to its competitor, the operator of *preisserver.de*, of sponsored links based on searches for the word *preispiraten*. The court agreed with the plaintiff and entered interim injunctive relief.¹⁴³

(6) Proof of Keyword Use Confusion

With decisions to date finding triable issues of trademark infringement arising from use of keywords for advertising, practitioners must be prepared to submit credible evidence of confusion or non-confusion.¹⁴⁴ The first United States case on keyword advertising to reach trial, *GEICO v. Google*,¹⁴⁵ may provide helpful guidelines in this regard, both through the evidence entered into evidence by the plaintiff and through the evidence assembled on behalf of the defendant (by co-author Jacoby), but never ultimately entered into evidence because the case settled at the conclusion of the plaintiff's case-in-chief.

The *GEICO v. Google* case ultimately became the first keyword-use case to go to trial. Given the centrality of the issue of how consumers understood the advertisements generated through

141. Louis Vuitton S.A. v. Google. See S. Olsen, *Google Loses Trademark Case In France*, News.com, February 4, 2005; E. Mills, *Google Loses French Trademark Lawsuit*, News.com, June 29, 2006 (reporting appellate affirmance of judgment against Google); *French Appeals Court Upholds Finding That Sale of Mark as Keyword Is Infringing*, 11 ECLR (BNA) 755 (July 12, 2006).

142. Société des Hôtels Meridien v. S.A.R.C. Google France (Paris District Court, December 2004); *French Trademark Ruling Against Google Keyword Advertising Upheld on Appeal*, 10 ECLR (BNA) 296 (Mar. 23, 2005).

143. *Google's German Subsidiary Enjoined From Selling Trademark Term as AdWord*, 8 ECLR (BNA) 1144 (Dec. 17, 2003). See also Michael Warnecke, *Search Engine Operators in Europe Find Law Uncertain on Linking, Keyword Liability*, 9 ECLR (BNA) 970 (Nov. 24, 2004).

144. One keyword case suggests that expert evidence other than survey evidence may be admissible to prove confusion in a keyword case. *Edina Realty Inc. v. TheMLSONline.com*, 2006 WL 737064 (D. Minn. 2006). However, to the extent this decision suggests that soft evidence of consumer confusion such as consumer focus groups may be legally insufficient, it appears out of line with controlling authorities. See, e.g., *Scotts Company v. United Indus. Corp.*, 315 F.3d 264 (4th Cir. 2002) (focus group evidence fails to meet scientific reliability standards).

145. *Government Employees Ins. Co. v. Google, Inc.*, 2005 WL 1903128 (E.D. Va. 2005).

Google's AdWords program, both the plaintiff and the defendant retained experts to assess consumer understanding of Google's keyword-based advertisements. The key question was whether Internet users who used the search term GEICO were confused or misled by the advertisements that Google generated for its paid advertisers. GEICO's survey expert, Gary Ford, presented a survey in which survey respondents typed GEICO into the Google search service and were then presented with a Google search results page. Test group members were then asked about sponsored ads that were generated as a result of the GEICO search. Control group survey respondents were asked about the different sponsored ads that appeared on their search results page, all relating to NIKE athletic apparel. All survey respondents were asked questions about the ads designed to measure confusion. The study concluded that survey respondents found that the GEICO-keyword based ads created "substantial" confusion, on the order of around 68%.¹⁴⁶

GEICO v. Google went to trial in December 2004 before U.S. District Judge Leonie Brinkema, without a jury. At the conclusion of GEICO's case-in-chief, Google moved for judgment as a matter of law. After evaluating GEICO's survey evidence, Judge Brinkema granted the GEICO motion in part, finding a lack of evidence of consumer confusion as to the situations in which Google followed its stated policy and did not permit advertisements keyed to GEICO trademarks to display GEICO's marks in the advertising heading or text.¹⁴⁷ With respect to the remaining situation, those instances where Google's stated policy was not followed, and keywords-prompted advertisements (*i.e.*, sponsored listings) displayed GEICO marks in the headings or text, Google acknowledged that it could not disprove confusion, and Judge Brinkema concluded that the only issues left were "whether Google is liable for such violations, and if so, the measure of damages."¹⁴⁸ Judge Brinkema adjourned the trial after making these determinations, thus encouraging the parties to settle, which they then did.

Both the plaintiff's survey and the defendant's survey in *GEICO v. Google* were designed to measure "initial interest confusion," the kind of confusion most often involved in Internet trademark cases, but problems that Judge Brinkema identified in GEICO's survey that were raised during the trial cross-examination of the GEICO survey, were problems that were then cured in Google's survey (which had been designed and proffered by co-author Jacoby). Because of the continuing interest in initial

146. *Id.* at *5.

147. *Id.* at *7.

148. *Id.* at *1.

interest confusion in Internet advertising cases and the relevance of surveys to measure initial interest confusion, both surveys prepared for *GEICO v. Google*, along with the Judge Brinkema's principal criticisms of GEICO's survey that was entered into evidence, are described below.

III. SURVEYS OF CONSUMER PERCEPTIONS OF KEYWORD-BASED ADVERTISING

A. GEICO v. Google

The *GEICO v. Google* case arose when the Government Employees Insurance Company (GEICO), a seller of motor vehicle insurance, sued Google over its keyword-based advertising. GEICO alleged that "consumers using the GEICO Marks as search terms or keywords on [Google's] search engine are likely to be confused as to whether the 'sponsored listings' . . . paid for by the advertisers have some connection or affiliation with GEICO, or are otherwise associated with GEICO."¹⁴⁹ Even if the alleged confusion ultimately was dispelled prior to consumers making their purchase, GEICO argued that consumers interested in learning more about or reaching GEICO would have been hijacked by the sponsored listings, thereby diverting them from reaching GEICO. As summarized by the court, "In the Internet context, this term [initial interest confusion] describes the distraction or diversion of a potential customer from the Web site he was initially seeking to another site, based on the user's belief that the second site is associated with the one he originally sought."¹⁵⁰ Both GEICO and Google commissioned and proffered surveys.

B. GEICO's Survey

GEICO's survey involved two groups, a Test Group and a Control Group. Respondents in the Test Group were asked to type GEICO into the Google search engine, after which they were given a results page showing five sponsored links alongside the organic listings. Though the screen shot was of an authentic Google results page from April 2004, the page was atypical in that it contained more sponsored links (five) than the average Google page would contain. Moreover, four of these sponsored links contained the name GEICO even though, after April 2004, Google's policy barred advertisers from using another party's registered trademarks in

149. First Amended Complaint, ¶6, *Government Employees Ins. Co. v. Google, Inc. and Overture Services, Inc.*, No. 1:04CV507 (E.D. Va., May 14, 2004).

150. *Government Employees Ins. Co. v. Google, Inc. and Overture Services, Inc.*, 2005 WL 1903128 (E.D. Va. 2005), at *4.

the heading or text of their sponsored link advertisements. Respondents were then asked a series of questions regarding each of the sponsored links that were designed to assess likely confusion.

Respondents in the Control Group also were asked to type “GEICO” into the Google search engine. However, instead of being shown sponsored and organic links for auto insurance, the respondents in the Control Group were given a results page showing organic and, most importantly, sponsored links for NIKE athletic apparel.¹⁵¹ Control Group respondents were then asked the same series of questions regarding each of the athletic apparel sponsored links as were being asked of respondents in the Test Group. After subtracting the near-zero-level findings obtained with the Control Group from those obtained with the Test Group, GEICO’s survey expert concluded that a substantial percentage of potential GEICO customers were confused into thinking that the sponsored links were associated with GEICO.

In evaluating the GEICO survey’s probative value, after hearing the Google counsel’s cross-examination of the GEICO survey expert, which was informed by Google counsel’s knowledge of the methodology of Jacoby’s Google survey, the court found numerous flaws in the GEICO survey.

The court’s first criticism focused upon the GEICO survey control. Although the court had much to say on this issue, the following passage captures the essence of the court’s criticisms.

As a threshold matter, the control retained use of “GEICO” as a keyword, which itself was alleged to be a source of confusion. Further, instead of removing only the references to GEICO in the Sponsored Links, . . . the survey removed all references to car insurance and replaced them with clearly unrelated NIKE ads. Thus, the control did not reveal which aspects of the insurance-related Sponsored Links caused respondents’ confusion—the use of GEICO’s mark in the ads or the ads’ mere reference to insurance.¹⁵²

As a second set of GEICO survey criticisms, the court noted that “the survey design introduced ‘demand effects’ and ‘order effects’”¹⁵³ that easily could have biased respondents’ answers in a manner indicating confusion. Specifically, instead of rotating the

151. As discussed at considerable length elsewhere (see J. Jacoby, *Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys*, 92 TMR 890, 929-37 (2002)), such a control amounts to a bogus control—something that has the patina of a control, but actually controls for nothing. From its critique, the *GEICO v. Google* court obviously grasped this distinction.

152. *Government Employees Ins. Co. v. Google, Inc and Overture Services, Inc.*, 2005 WL 1903128 at *5 (E.D. Va. 2005).

153. *Id.* at 17.

order of the sponsored links across the respondents, all respondents were asked about each of the five links in the same order. By the time the respondent was being asked about the third sponsored link, it would be obvious to the respondent that the focus of the questions was on GEICO and obtaining quotes from GEICO. As a result, since only the fifth sponsored link did not mention GEICO in its heading or text, by the time the respondents were asked about this fifth sponsored link, their minds had already been contaminated.

For its third set of GEICO survey criticisms, the court focused on the fact that “the overall appearance of the outdated screen shot shown to survey respondents differed markedly from the Google results page that a user would encounter in running a real search.”¹⁵⁴

When the GEICO survey’s flaws were considered collectively, the court concluded as follows:

[T]he Court finds that plaintiff has failed to establish a likelihood of confusion stemming from Google’s use of GEICO’s trademark as a key word and has not produced sufficient evidence to proceed on the question of whether the Sponsored Links that do not reference GEICO’s marks in their heading headings or text creates a sufficient likelihood of confusion to violate either the Lanham Act or Virginia common law.¹⁵⁵

C. The Jacoby Google Survey

Months before trial, counsel for Google contacted co-author Jacoby and requested that he design and conduct a survey to determine whether, and if so, to what extent, prospective GEICO consumers would be confused or hijacked, as the GEICO complaint alleged (hereinafter the “Jacoby Google survey”). The Jacoby Google survey sought to determine user understandings in this situation by a survey of Internet users that replicated actual Internet searching conditions, and used controls to test for plausible alternative explanations for the findings and filter out possible survey-related influences. Although the Jacoby Google survey was never tested by the court because it adjourned the *GEICO v. Google* trial and made a case-determinative pro-Google ruling before Google presented its evidence, the Jacoby Google survey did not contain the problems that the court found within the GEICO survey. The Jacoby Google survey illustrates how consumer understandings of keyword-based listings and advertisements can be tested. The Jacoby Google survey’s

154. *Id.* at *6.

155. *Id.* at *6.

methodology is of particular interest because it measured “initial interest confusion,” which is the kind of confusion that is most often asserted in Internet trademark cases.

1. An Overview

The Jacoby Google survey was designed as a mall-intercept survey of individuals aged 16 or older who said they had searched for information or had bought a product or service on-line in the past six months, had used Google in the past six months, and had either used or would consider using the Internet to get information about or to buy motor vehicle insurance. The individuals who met the qualification criteria and consented to participate were then taken to and questioned in a shielded testing facility within the mall. Next, the respondents were seated before a computer and asked to type in “GEICO” (or in the case of respondents in Control Group 3, “NIKE”), after which they saw a Google search results page displayed as they normally would see it on a computer monitor. With the search results page and its contents visible directly in front of them, as would be the case while they consulted and interacted with a search results page under real-world circumstances, the respondents were asked questions to determine the extent, if any, to which they were misled or confused about selected web links on the page. Specifically, the survey sought to determine the extent to which consumers who, having typed the term “GEICO” on a Google web search page and called for the results, would exhibit confusion in regard to a relationship between GEICO and sites appearing on the results page under the title “Sponsored Links.”

A Test Group of 160 respondents underwent an experience that simulated the real world that Google users now experience under Google’s current policies for Sponsored Links. Specifically, respondents in the Test Group first typed in “GEICO” and used the Google engine to generate a search results page that was displayed on screen. At this point, the respondents were asked a series of questions (described below) to determine the extent, if any, to which they were confused regarding possible relationships between GEICO and the three sites listed under Sponsored Links.

Confusion found in a survey might be caused by a number of factors, not all of which necessarily reflect confusion for the reason(s) being investigated. As examples, some or all of the confusion may be caused by the questions asked, or may be a consequence of mere guessing by respondents. One way survey scientists adjust for and rule out such potential alternative explanations for empirical findings is to use both Test and Control

Conditions.¹⁵⁶ A Control Condition is used to examine and if possible rule out alternative explanations for the findings. As a general rule, Net Confusion, which is the percent confusion that survey experts rely on when contending that the marketplace will exhibit a certain level of confusion, is determined by taking the level of confusion obtained under the Test Condition and subtracting from it the level of confusion obtained under the Control Condition: $\text{Net Confusion} = \text{Test Confusion} - \text{Control Confusion}$.

In the *GEICO v. Google* matter, respondents were randomly assigned either to the Test Group, or to one of three different Control Groups, where each of the latter sought to control for (*i.e.*, rule out) a different plausible alternative explanation. As was true of the Test Group, respondents assigned to Control Group 1 were instructed to type in “GEICO.” After the Google search results were displayed on a screen, respondents were asked questions to determine the extent, if any, to which they were confused regarding possible relationships between ALLSTATE (another motor vehicle insurance company) and the three sites listed under Sponsored Links. The purpose of Control Group 1 was to determine the extent to which the respondents thought the sites listed under Sponsored Links offered automotive insurance from ALLSTATE, even though the respondents had not typed in “ALLSTATE” at the outset, nor had they seen that company’s name anywhere on the search results page. In this way, one can gauge the general level of confusion that exists that cannot be attributed to the name “GEICO.”

Respondents assigned to Control Group 2 repeated what respondents in the Test Group did, with one slight modification. After typing in “GEICO” and having the Google search results page displayed on a screen, not only were respondents in Control Group 2 asked questions to determine the extent to which consumers thought the sites listed under Sponsored Links offered automotive insurance from GEICO, but they were also asked the same questions to determine the extent, if any, to which similar confusion would be associated with an organic, *non-sponsored* link that mentioned GEICO, but did not offer GEICO insurance. This is another way to gauge the level of confusion that is not attributable to the Sponsored Links, in general.

Respondents assigned to Control Group 3 also repeated what respondents in the Test Group did, except with a more substantial modification. Instead of being instructed to type in “GEICO,” respondents in Control Group 3 were instructed to type in

156. An overview of the approach is provided in Jacob Jacoby, *Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys*, 92 TMR 890-956 (2002).

“NIKE.”¹⁵⁷ Along with the organic links that are associated with NIKE, but not seeing Sponsored Links normally associated with NIKE, the Google search results page had been programmed to display the same three Sponsored Links as were shown to the other three Groups. These respondents also were asked questions to determine the extent to which consumers thought the sites listed under Sponsored Links offered automotive insurance from GEICO. The purpose of this control was to parse out the influence, if any, of the respondent having typed in “GEICO” as the search term and the concomitant expectations this might entail.

Collectively, the three controls enabled parsing out whether the confusion evidenced with Test Group respondents was due to the factors argued by GEICO, or were more readily explained by other factors, such as the mere mention of automobile insurance.

The Jacoby Google survey was designed and conducted in strict accordance with the seven-factor framework cited in the Federal Judicial Center’s 1995 *Manual for Complex Litigation, Third*,¹⁵⁸ and with the greater amplification of this framework provided in the “Reference Guide on Survey Research” appearing in the FJC’s 1994 *Reference Manual on Scientific Research*.¹⁵⁹ Also considered in the design of the Jacoby Google Survey were the implications of the Supreme Court’s opinion in *Daubert v. Merrell Dow* and successor rulings.¹⁶⁰ A more detailed description of the survey methodology follows.

2. The Universe (or Population)

To be useful, research needs to ensure that it focuses on the “proper respondents.” For the Jacoby Google survey, the relevant population was defined as individuals, aged 16 or older, who had searched for information regarding or had bought a product or service on-line during the past six months, had used Google during the past six months, had used (or would consider using) the Internet to get information about or buy motor vehicle insurance,

157. NIKE was selected as a control only because it was used as the control in the survey conducted for GEICO by its expert. In point of fact, using NIKE as a control is highly conservative, as it favors the plaintiff’s interests. Specifically, one would not expect much, if any, confusion with GEICO to arise as a consequence of typing in NIKE. Thus, finding a low level of confusion with this control, which would then be subtracted from the level of confusion found with the test, would yield an inflated estimate of Net Confusion.

158. Section 21.493, page 102; 1995.

159. At the request of the Federal Judicial Center, Jacob Jacoby served as a peer reviewer for the *Reference Guide on Survey Research* that appears in both the first (1994) and second (2000) editions of the *Reference Manual on Scientific Research*.

160. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 118 S. Ct. 512 (1997); *Kumho Tire Co., Ltd. et al. v. Carmichael et al.*, 526 U.S. 137 (1999).

and who came to the interview knowing of GEICO and its line of business.

3. Sampling Plan

Theoretically, it would appear to be best if one could take a census; that is, test all members of the relevant population. However, generally speaking, this is neither possible nor practical. Accordingly, researchers test only a subset, or “sample,” of that population. Then, utilizing well-established, generally accepted methods, the findings from the sample are extrapolated to the relevant population as a whole.

The set of rules that one uses for selecting a sample is termed the sampling plan, and there are two broad categories of approaches: probability and non-probability plans. A probability sample is one in which every respondent has a known probability of being included in the sample. For example, this would be equivalent to knowing that each specific card in a standard deck had a 1 in 52 chance of being selected on the first draw. In a non-probability sample, one does not know the probability, or odds, of selecting any particular respondent.

In marketing and consumer research, non-probability sampling designs overwhelmingly are the designs of choice when physical objects or similar materials, such as products, product packaging, brochures or advertisements, need to be shown to respondents. Well-conducted non-probability samples are widely relied upon by both academic and commercial (*e.g.*, marketing and advertising) researchers, and many business decisions of considerable consequence are predicated on results derived from studies that employ such plans.¹⁶¹ The overwhelming majority of consumer reaction studies submitted for litigated matters are based on non-probability samples.

When applying non-probability sampling, and to avoid including in the population members who might be atypically sensitized to the issue and therefore not representative of the population as a whole, it is generally considered good research practice to exclude people who, though otherwise qualified, live in households where someone works in:

- marketing research or advertising, or
- a store in the mall where the interview was being conducted.

161. See Jacob Jacoby and Amy Handlin, *Non-Probability Designs for Litigation Surveys*, 81 TMR 169-79 (1991).

Given the subject matter being tested, also excluded are people who, though otherwise qualified, lived in households where someone works in:

- an Internet company, or
- a company that sells auto insurance.

4. Market Selection

The Jacoby Google survey was conducted in eight geographically dispersed markets, two in each of the four U.S. Census Divisions. The regions and specific markets are noted below.

<i>Census Region</i>	<i>Markets</i>
Northeast	Turnbull, CT; Erie, PA;
Midwest	Fairlawn, OH; Chicago Ridge, IL;
South	Louisville, KY; Montgomery, AL;
West	Northridge, CA; Colorado Springs, CO.

5. Selection of Interviewing Services Within Markets

The local interviewing service used in each market was selected based on: (a) Princeton Research and Consulting Center's (PRCC's)¹⁶² experience with or knowledge of them;¹⁶³ (b) their having the ability to recruit and interview qualified individuals for the study; (c) their having experienced professional interviewers available during the time period required for conducting the interviews; and (d) their being able to conduct the study within the necessary time frame.

6. Selection of Respondents

The interviewers intercepted potential respondents in the shopping malls according to the standard procedure followed in their mall and then initiated conversations with these individuals in the manner specified at the beginning of the Screener Questionnaire.

162. The Princeton Research and Consulting Center, Inc. (Princeton, New Jersey) served as the principal subcontractor for this project.

163. Testing facilities that, in prior studies, failed to meet timetables, have high rates of rejected interviews, and/or were found to have conducted interviews that resulted in high invalidation rates were eliminated from consideration.

7. Screener and Main Questionnaires

This section describes the questions and protocol used. A subsequent section discusses the findings obtained using these questions and protocols.

As is customary practice, the Jacoby Google survey utilized two questionnaires, a “Screener” for identifying individuals who qualified as being members of the previously defined universe, and a “Main Questionnaire” designed to assess the substantive questions at issue. In constructing the questionnaires, close attention was paid to the wording and ordering of questions to ensure that the questions asked, and the order in which they were asked, were clear and not leading or otherwise biasing.

a. Screener Questionnaire (Respondent Qualification)

The objective of a Screener is to ensure that the interviews (as implemented through the Main Questionnaire) are conducted only with respondents who satisfy the universe definition. It does so, first, by making certain that the prospective respondent satisfies the universe definition, and, second, by excluding from participation those considered likely to be highly atypical members of the universe.

The Jacoby Google survey used two Screening Questionnaires. Although respondents in all Groups had to qualify on precisely the same criteria, one version of the Screener Questionnaire was used for respondents in the Test Group and Control Groups 1 and 2, with the other version of the Screener Questionnaire being used for respondents in Control Group 3. The only difference between the two Screener Questionnaires was that the latter version had additional questions and instructions designed to make the instruction “please type in ‘NIKE’; now we ask questions about” appear reasonable. The following description is of the Screener Questionnaire used with respondents assigned to either the Test Group or Control Groups 1 or 2.

Question A of the Screening Questionnaire made sure the respondent was at least 16 years of age.

Next, the Question B series determined whether the respondent had searched for information or for products or services, or had bought a product or service on-line in the past six months, and if they had used Google in the past six months. To qualify for the survey, a respondent had to answer “Yes” to all questions in the Question B series.

The Question C series established that the respondent was involved in selecting insurance for motor vehicles in their household, and, if the need arose, would consider using the Internet to get information about or buy insurance for a motor vehicle.

Individuals screened for Control Group 3 were also asked if they owned any sneakers or tennis shoes, if they ever used the Internet to buy or get information about sneakers or tennis shoes, and, if they had not, if they would consider using the Internet to buy or get information about sneakers or tennis shoes. Individuals who did not use and would not consider using the Internet to buy or get information about sneakers or tennis shoes were excluded from Control Group 3.

Additional questions focused on screening out people who were or might be more sensitized to the issue at hand, or who were likely to possess special familiarity that might yield atypical responses that were not representative of the population as a whole. These were people who worked for, or lived with someone who worked for, a market research company, an advertising agency, an Internet company, a store in the mall where the interview was conducted, or a company that sold auto insurance. Also eliminated were those who, during the past three months, had participated in a market research study involving the Internet. Because respondents were going to look at a computer monitor, people who wore eyeglasses when using a computer, but did not have them available, or who wore contact lenses when using a computer, but were not wearing them, were also excluded.

Individuals who satisfied all the screening criteria and who agreed to participate were asked to accompany the interviewer to the shielded interviewing facility.

b. Main Questionnaire

After the respondents were seated, and, if appropriate, asked to put on their eyeglasses, the interviewer said:

This is a nationwide survey on what people think about some of what they see when doing on-line searches. Different survey participants are being taken through different searches using different search engines. The people being interviewed today have been assigned to do a search using Google.

To discourage guessing, the interviewer cautioned the respondents by saying:

But before we begin, it is important for me to tell you to not guess at answers. For each of my questions, if you don't know or don't have an answer, that's O.K. Just tell me you "don't know" or "don't have an answer" and we'll go on to the next question.

As described in greater detail below, depending upon the Group to which the respondent had been assigned, the respondents then were given one or two cards with a name printed on the card(s).

In large part, the questions asked of respondents in each of the Groups were the same. What differed across the Groups were the names and websites that were the focus of the questions. To simplify discussion, the Main Questionnaire was described in two sections. Section 1 discussed the wording and procedures associated with Questions 1 and 2, separately for each of the four Groups: the Test Group and Control Groups 1, 2 and 3. Section 2 discussed the wording and procedures associated with Questions 3 through 8, separately for each of the four groups.

(1) Section 1: Questions 1 and 2

Test Group. Respondents in the Test Group were given one card with the name GEICO appearing on it. The interviewer asked if each respondent had ever heard of the company whose name was on the card (Question 1a). If the respondent said “Yes,” the interviewer asked Question 1b, “What products or services do they sell or provide?” For reasons discussed in the section entitled “Survey Findings,” below, the few who replied “No” to Question 1a were not asked any further questions.

The interviewer then turned on a computer monitor, and with Question 2a confirmed that the respondent was looking at the appropriate Google “web search page”—the opening page onto which the user types his or her query. After the respondent typed in the target name (in this case GEICO), the monitor would display a different version of the “search results page,” as described below. Next, the interviewer told the respondent:

Okay, suppose you wanted to look up information about the company whose name appears on this card. Please type in the search term exactly as it appears on the card. When the screen comes up with the search results, take as much time looking at the screen as you normally would if you were doing a search like this. Feel free to scroll up or down if that’s what you normally would do. Just tell me when you are done.

After typing in “GEICO,” the monitor displayed a search results page. The search results page was an authentic search results page generated at the time the study was designed, with one exception. One of the organic sites generated was a site that referred to the lawsuit. For obvious reasons, this site was removed from the search results page. The remaining 13 links were listed one under the other down the left hand side of the page.

Under Sponsored Links, the upper right quadrant of the search results page consisted of paid advertisements, lightly shaded in color, which displayed links to the following three sites:

www.insureCom.com
www.insurancefinder.com
www.AutoandHome.com

Hereinafter the phrase “three sponsored links” refers to these three specific sites, and to no others. The results page used in the Jacoby Google survey did not contain any paid featured listings, *i.e.*, paid advertisements that are formatted similarly to organic search result listings, and are displayed above (rather than to the side of the organic results listings). The reason these sponsored links were selected for study is because they were the three advertisers mentioned in GEICO’S complaint, and they are the sort of sponsored links that Google’s current trademark policy permits.

There were six versions of the search results page, each containing the same information. The only difference was that to avoid order effects, which is a form of measurement error or “noise,” the sites under Sponsored Links were provided in different orders. A representative copy of one version of the search results page that was used is set forth below.

The screenshot shows a Google search results page for the query "geico". The search bar at the top contains "geico" and the search button is labeled "Search". The page displays several organic search results, including links to GEICO Car Insurance, GEICO Career Paths, GEICO Returns to NJ Auto Market, GEICO Insurance, Rip Off Report GEICO, and PRESS RELEASE GEICO INSURANCE DRIVES NORTH. On the right side of the page, there is a "Sponsored Links" section with three advertisements: "Free Insurance Quotes", "Insurance Finder", and "Shop for Auto Insurance". At the bottom of the page, the Google logo is displayed in a large, stylized font, and the "Result Page:" navigation shows links for pages 1 through 10, with "Next" as an option. The search bar at the bottom of the page also contains "geico" and a "Search" button.

When the respondent indicated that he or she was done reviewing the search results page displayed on his or her monitor, and with the screen remaining visible then and throughout the remainder of the interview, the interviewer asked the following Question 2c.

As you probably know, using your mouse to click on underlined words will take you to another website. Suppose you wanted to go directly to GEICO's website. Without clicking anything, which link on the page would you try first?

The possible answers to this question included each of the 13 sites under the Web generated by the organic search, the three Sponsored Links, "I don't know" and "None of these."

Control Group 1. Respondents in Control Group 1 were given two cards, one with the name "GEICO," and the other with the name "ALLSTATE." For each name, the interviewer asked, "Have you ever heard of this company before today?" and for those who answered "Yes," the following question, "What products or services do they sell or provide?" For reasons discussed in the section entitled "Survey Findings" below, the few who replied "No" were not asked any further questions.

The interviewer then turned on a computer monitor, and with the GEICO card in front of the respondent, the interviewer said:

Okay, suppose you wanted to look up information about the company whose name appears on this card. Please type in the search term exactly as it appears on the card. When the screen comes up with the search results, take as much time looking at the screen as you normally would if you were doing a search like this. Feel free to scroll up or down if that's what you normally would do. Just tell me when you are done.

After typing in GEICO, the monitor displayed a search results page. When the respondent indicated that he or she was done reviewing the search results page displayed on the monitor, and with the screen remaining visible then and throughout the remainder of the interview, the interviewer asked Question 2c:

As you probably know, using your mouse to click on underlined words will take you to another website. Now I'm going to ask you some questions about ALLSTATE. Suppose you wanted to go directly to ALLSTATE's website. Without clicking anything, which link on the page would you try first?

The possible answers to this question included each of the ten sites under the "Web" generated by the organic search, the three Sponsored Links, "I don't know" and "None of these."

Control Group 2. As was the case for respondents in the Test Group, respondents in Control Group 2 were given one card with the name GEICO appearing on it. From this point through Question 5, the procedure, questions and screens were the same as

for the Test Group. In this regard, Control Group 2 essentially replicates the Test Group. As discussed in Section 2, below, the only difference between Control Group 2 and the Test Group was that in addition to being asked questions 5 through 8 about each of the Sponsored Links, respondents in Control Group 2 were asked the same questions regarding an organic (*i.e.*, non-sponsored) link.

Control Group 3. Respondents in Control Group 3 were given two cards. The first card contained six names: ALLSTATE, BURNWOOD (a fictitious company name), GEICO, INTEL, NIKE and REEBOK. For each name, the interviewer asked, “Have you ever heard of this company before today?” and, for those who answered “Yes,” “What products or services do they sell or provide?”¹⁶⁴ For reasons discussed in the section entitled Survey Findings, below, the few who replied “No” were not asked any further questions.

The interviewer then turned on a computer monitor, and with Question 2a confirmed that the respondent was looking at the appropriate Google web search page. Next, the respondent was given a card with NIKE¹⁶⁵ on it, and with that card in front of him or her, was told by the interviewer:

Okay, please type in the company whose name appears on Card 53. Type in the search term exactly as it appears on the card. When the screen comes up with the search results, take as much time looking at the screen as you normally would. Feel free to scroll up or down if that’s what you normally would do. Just tell me when you are done.

Since respondents in Groups 3 typed in “NIKE” on the web search page, instead of the sites that would come up when typing in and searching for GEICO, the search results page showed a set of organic sites that surface when NIKE was searched. However, appearing under Sponsored Links were the same three insurance sites that appeared on the pages used for the Test Group and Control Groups 1 and 2. The purpose of Control Group 3 was to identify the degree of confusion that could be attributed to the respondent having typed in “GEICO” as the search term.

When the respondent indicated that he or she was done, and with the screen remaining visible then and throughout the remainder of the interview, the interviewer asked Question 2c:

As you probably know, using your mouse to click on underlined words will take you to another website. *Now I’m*

164. For Control Group 3, the wording was as follows: “Have you ever heard of this company before today?” and, for those who answered “Yes,” “. . . what products or services is ___(best) known for?”

165. As mentioned earlier, NIKE was selected as the control name because it was the control name used in the study being proffered by GEICO’s expert.

going to ask you some questions about GEICO. [This italicized sentence was in addition to what was told to the respondents in the three other Groups.] Suppose you wanted to go directly to GEICO's website. Without clicking anything, which link, if any, on the page would you try first?

The possible answers to this question included each of the 10 sites under the Web generated by the organic search, the three Sponsored Links, "I don't know" and "None of these."

(2) Section 2: Questions 3 through 8

At this point in the interview, the respondents in all four groups were asked Question 3, "As best you recall, when you first looked at this page, did you pay attention to any of the listings in the section where it says 'Sponsored Links'?" This was followed by Question 4, "If you think you know, what are 'Sponsored Links'?"

Next, the interviewer drew attention to the sponsored links in the upper right quadrant of the search results page by saying:

As you can see, there are three "Sponsored Links" listed in the Sponsored Links section on the right side of this page.

Additionally, the respondents in Control Group 2 were told:

I'm going to be asking you questions about these links as well as about one or two of the other links on this page.

The respondents in all four groups then were asked a series of questions, Questions 5, 6, 7, and 8, along with their sub-components. The purpose of these Questions was to assess the extent to which the respondents exhibited confusion with regard to four issues: where clicking on a link would take them (Question 5), whether or not the source of the link offered insurance from the entity named in Question 6, whether or not the source of that link had a business relationship with the entity named in Question 7, and whether or not the source of that link had been authorized by the named entity to offer that entity's insurance (Question 8). Although the questions asked of the respondents in the Test and three Control Groups used the same phrasing, to assess potential alternative explanations for the findings obtained with the Test Group, the entity named in the question, as well as the links about which the respondents were asked, varied across the four Groups. The chart below summarizes these differences.

SUMMARIZING THE VARIATIONS ACROSS GROUPS

Group	Respondents typed in:	Entity named in question:	Questions focused on the:
Test	GEICO	GEICO	3 Sponsored links
Control 1	GEICO	ALLSTATE	3 Sponsored links
Control 2	GEICO	GEICO	3 Sponsored links + 1 organic link
Control 3	NIKE	GEICO	3 Sponsored links

For respondents in the Test Group and Control Groups 2 and 3, Question 5a asked the following about each of the three sponsored links:

Do you think clicking on this link does take you to the GEICO website, does not take you to the GEICO website, or are you not sure about this? [The order of the first two response options was rotated across the respondents]

If the respondent answered, “It does,” because there can be many reasons why a person thinks it does, not all of which are relevant or probative, *e.g.*, “Something in the question led me to say so,” or “Just a guess,” the interviewer asked the follow-up Question 5b:

What, in particular, makes you think that clicking the first sponsored link does take you to the GEICO website? (Probe:) Anything else?

As indicated in the summary chart, above, for respondents in Control Group 1, the name provided in the question was Allstate, not GEICO. Thus, respondents in Control Group 1 were asked the following questions about each of the three sponsored links:

5a. Do you think clicking on this link does take you to the ALLSTATE website, does not take you to the Allstate website, or are you not sure about this?

If the respondent answered, “It does,” for the same reason described above, the interviewer asked the follow-up question:

5b. What, in particular, makes you think that clicking the first sponsored link does take you to the ALLSTATE website? (Probe:) Anything else?

As indicated in the summary chart, above, in addition to being asked Questions 5a and 5b about each of the three sponsored links, respondents in Control Group 2 also were asked these questions about a fourth link, the “Yahoo! GEICO Company Profile” link, which came up as part of the organic search results.

For respondents in the Test Group and Control Groups 2 and 3, the Question 6 series asked if the Sponsored Links offered GEICO insurance:

6a1. Do you think this link offers only GEICO insurance, offers GEICO insurance along with insurance from other companies, does not offer any GEICO insurance, or are you not sure about this? Before you answer, let me read these choices again. Do you think this link offers only GEICO insurance, offers GEICO insurance along with insurance from other companies, does not offer any GEICO insurance, or are you not sure about this? [The order of the “does” and “does not” response options was rotated across respondents.]

If the respondent said the link did offer GEICO insurance, either alone or along with other insurance, the interviewer asked Question 6a2:

What, in particular, makes you say that? (Probe:) Anything else?

As indicated in the summary chart, above, for respondents in Control Group 1, the named entity in Question 6 was ALLSTATE, not GEICO. Also, as indicated in the summary chart, in addition to being asked Questions 6a1 and 6a2 about each of the three Sponsored Links, respondents in Control Group 2 also were asked these questions about a fourth link, the “Yahoo! GEICO Company Profile” link that came up as part of the organic search results.

The Question 7 series was designed to test for confusion as to business connections or affiliations. For respondents in the Test Group and Control Groups 2 and 3, Question 7 asked if the sponsored links had a business relationship with GEICO:

7a1. Do you think this link does have a business relationship with GEICO, does not have a business relationship with GEICO, or are you not sure about this? [The order of the “does” and “does not” response options was rotated across the respondents.]

If the respondent said it did have a relationship, to determine whether the confusion was caused by a probative, trademark relevant reason, the interviewer then asked Question 7a2:

7a2. What, in particular, makes you think the first sponsored link does have a business relationship with GEICO? (Probe:) Anything else?

As indicated in the summary chart, above, for respondents in Control Group 1, the entity named in Question 7 was ALLSTATE, not GEICO. Also, as indicated in the summary chart, in addition to being asked Questions 7a1 and 7a2 about each of the three Sponsored Links, respondents in Control Group 2 also were asked

these questions about a fourth link, the “Yahoo! GEICO Company Profile” link that came up as part of the organic search results.

The Question 8 series was designed to test confusion as to authorizations or sponsorship. For the respondents in the Test Group and Control Groups 2 and 3, Question 8 asked if the Sponsored Links had been authorized by GEICO to offer GEICO insurance:

8a1. Do you think this link has not been authorized by GEICO to offer GEICO insurance, has been authorized by GEICO to offer GEICO insurance, or are you not sure about this? [The order of the “has” and “has not” response options was rotated across the respondents.]

If the respondent said it had been authorized, to determine if the confusion was probative, the interviewer asked Question 8a2:

8a2. What, in particular, makes you think the first sponsored link has been authorized by GEICO to offer GEICO insurance? (Probe:) Anything else?

As indicated in the summary chart, above, for the respondents in Control Group 1, the entity named in Question 8 was ALLSTATE, not GEICO. Also, as indicated in the summary chart, in addition to being asked Questions 8a1 and 8a2 about each of the three sponsored links, respondents in Control Group 2 also were asked these questions about a fourth link, the “Yahoo! GEICO Company Profile” link that came up as part of the organic search results.

At this point, the interviewer took back the card(s), closed the computer file and turned off the monitor.

Finally, the interviewer had the respondent sign a statement certifying that he or she had been shown a web page and had been asked questions about it and had been asked to provide information necessary for the post survey validation effort. The interviewer then signed a statement certifying that the interview had been conducted according to the instructions.

8. Interviewing Procedures and Supervision

Throughout the Jacoby Google survey, tight control and supervision were maintained over all aspects of the interviewing.

Interviewers and Interviewer Training. Customized, detailed Supervisor and Interviewer Instructions were prepared for the Jacoby Google survey. Conference call briefings with the local field supervisors were held before the supervisors, in turn, briefed their interviewers. Before beginning work, each interviewer was required to:

- read the interviewer instructions;

- attend a personal briefing conducted by a member of the interviewing organization. (At this briefing, the interviewing procedures were reviewed in detail, question by question); and
- complete two practice interviews, one as a respondent and another as an interviewer.

Double-Blind Interviewing. In accordance with standard custom and practice for surveys conducted to be proffered as evidence in court, the study was administered under “double-blind” conditions. That is, not only were the respondents kept uninformed about the purpose and sponsorship of the survey, but both the interviewers and field supervisors were similarly “blind” with respect to the purpose and sponsorship. Without such knowledge, the possibility that either some interviewer(s) or some respondent(s) might correctly guess the purpose and/or the sponsor of the investigation is minimized. At no time were either the supervisors or interviewers told that the survey might be used for purposes of litigation.

Implementation Period. Interviewing began on September 17, 2004 and ended on October 8, 2004.

9. Ensuring Accurate Data

Field Check-In. When the 329 completed interviews were returned, they were reviewed to ensure that each respondent was qualified to participate in the study, and that the questionnaires had been completed properly. No interviews were removed during field check-in.

Respondent Validation. The names and phone numbers of the 329 respondents remaining after check-in were sent to an independent telephone interviewing service that was given the responsibility for attempting a 100% validation: that is, for re-contacting, by telephone, each respondent to confirm that he or she had been interviewed for this survey. At least three validation calls were made at different times of the day and on different days of the week in an attempt to reach each respondent.

A total of 232 respondents, representing 70.5% of the usable sample, were successfully reached and “positively validated.” This percentage is well in excess of common industry practice.¹⁶⁶ Of these, 179 respondents, representing 54.4% of the usable sample, gave no inconsistent answers when the same questions were asked by the Screener and later during the validation interviews.

166. When validation is done, higher-quality marketing research generally validates at a rate of 10% to 25%. When conducted for the purpose of being proffered as evidence in a court of law, one feature of higher quality surveys is that they attempt 100% validation, typically retaining a completely independent firm for this purpose.

Another 53 respondents gave answers to one or more of the validation survey questions that were inconsistent with answers they had earlier given to questions asked as part of the original screening interview. Examination reveals that half (29, or 8.8%) of these respondents said, “No” or “I don’t know,” or refused to answer validation Question 6, “Are you one of the people in your household who is involved in selecting insurance for any motor vehicle in your household?” Most, or all, of these respondents may have thought the validation callback was an effort to sell them auto insurance. Another five of the 329 respondents (accounting for 1.5 percent) claimed not to have participated in the survey. As an exercise in caution, the data for these (53 + 5 =) 58 individuals were considered to be “unreliable” and excluded from the analyses reported below.

Ninety-two respondents, representing 28.0% of the sample, could not be reached in the time available for validation. In keeping with generally accepted procedure in the field, as there was no reason for excluding these respondents, their data were included in the analyses. Thus, the results of the validation effort were as follows:

Base = 329 respondents	%
Reached (237):	72.0
and positively validated (179)	54.4
and positively validated, but provided inconsistent answers (53)	16.1
and judged to be <i>invalid</i> (5)	1.5
Not reached and presumed valid (92)	28.0

The findings reported below are based on the 271 (329-58) completed interviews that remained after check-in and validation. In accordance with industry standards,¹⁶⁷ to safeguard respondent anonymity, all respondent-identifying information, *i.e.*, names, addresses, phone numbers, was destroyed after validation.

10. Data Analysis

As none of the respondents in the Jacoby Google survey were able to click through to the sites allegedly causing confusion, where, had they been able to do so, any pre-purchase confusion likely would have been addressed and eliminated, this survey focused on assessing “initial interest confusion.”

167. Council of American Survey Research Organizations (often referred to as CASRO), *Code of Standards for Survey Research*, section I.A.3.f. See also Shari S. Diamond, *Reference Guide on Survey Research*, Reference Manual on Scientific Evidence (2d ed., 2000), Federal Judicial Center, at 271.

To be classified as being misled or confused, as a necessary (but not sufficient) precondition, a respondent would have to say either:

(a) he/she would click on a sponsored link to get to the GEICO website, or

(b) he/she thought clicking on a Sponsored Link would take him/her to the GEICO website, or

(c) a Sponsored Link offered only GEICO insurance or offered GEICO insurance along with insurance from other companies, or

(d) a Sponsored Link had a business relationship with GEICO, or

(e) a Sponsored Link had been authorized by GEICO to offer GEICO insurance.

Respondents giving any of the answers (a) through (e), above, were then asked to indicate the reason(s) why they thought as they did. The verbatim answers provided to these questions were examined and only those respondents who gave answers indicating they were confused for the reasons being alleged, namely, because the respondent had typed in “GEICO” because the respondent thought that he or she was on a GEICO website/home page, or because the respondent thought that the site was affiliated or connected with GEICO, were tabulated as being misled or confused. In combination with one of the answers (a) through (e), cited above, such responses were considered necessary and sufficient.

An error rate is associated with all forms of measurement. To obtain an estimate of the error rate operating in the present circumstances, the level of reported confusion associated with each of the three Control Groups was determined. As described in greater detail in the Survey Findings section, below, these error rates were then used to adjust the corresponding confusion level obtained with the Test Group.

D. Jacoby Google Survey Findings

1. Prior Knowledge of Target Companies

There is no probative value in asking questions of respondents who had never heard of GEICO questions about GEICO. For this reason, with the name card in front of them, Question 1a asked respondents in all four Groups if they had “ever heard of this company before today?” Those replying “Yes” were asked Question 1b, “What products or services do they sell or provide?” Test and Control Group 2 respondents were asked these questions only about GEICO. Control Group 1 respondents were asked the same questions about ALLSTATE, while the respondents in Control

Group 3 were asked these questions about NIKE. Table 1, below, summarizes the percent in each group who replied “Yes” to Question 1a and then gave an answer to Question 1b considered correct.

**TABLE 1:
PRIOR KNOWLEDGE OF TARGET COMPANIES (Q1A/B)**

	TEST	Control 1	Control 2	Control 3
Name typed in to initiate search	GEICO	GEICO	GEICO	NIKE
Base =	(110)	(53)	(51)	(57)
	%	%	%	%
1a/b. Knew of GEICO before today?	91.8	96.2	92.2	96.5
1a/b. Knew of ALLSTATE before today?	NA*	98.1	NA	NA
1a/b. Knew of NIKE before today?	NA	NA	NA	100

*NA = Not Asked

As can be seen from the percentages in Table 1, the overwhelming majority of respondents claimed prior awareness of and knowledge regarding GEICO, and, where relevant, the other company about which they were asked. A total of 18 respondents claimed to be unaware of GEICO, or did not know it sold insurance; or, for those in Control Group 1, claimed to be unaware of ALLSTATE, or did not know it sold insurance; or, for those in Control Group 3, claimed to be unaware of NIKE, or did not know it sold shoes or athletic wear. These 18 respondents, representing 6.6% of the 271 validated respondents, were excluded from the remainder of the analyses, which are thus based on 253 respondents. The findings reported below are based only on the respondents who indicated having prior awareness of and knowledge regarding of the company (or companies) about which they were asked questions.

2. Pooling Data from the Test Group and Control Group 2

As noted, with the exception of the fact that respondents in Control Group 2 were asked about a non-sponsored site while respondents in the Test Group were not, in all other respects, the respondents in these two Groups received identical experiences in terms of all other aspects of the survey, namely, the test protocol and questions asked. Not surprisingly, comparing the findings for

these two Groups reveals them to be highly consistent. Accordingly, for most analyses, the data from the 101 respondents in the Test Group and 47 respondents in Control Group 2 may be “pooled” via a weighted average based on a combined 148 respondents to achieve greater levels of precision and stability in the obtained percentages. To achieve a more stable idea of the overall rate of confusion due to factors *not* being alleged by GEICO, for purposes of comparison, some of the tables below compare the Test + Control Group 2 percentages to the weighted average of Control Group 1 + Control Group 3, this latter average being based on (50 + 55 =) 105 respondents.

3. The Hijacking Allegation: Errors in Click-Through to GEICO

a. “Primary Site Selected” Errors

The respondents were given a name to type in, then asked to hit the “Enter” key to generate a search results page for that name. After reviewing that search results page, the respondents were asked Question 2c, “Suppose you wanted to go directly to . . . website. Without clicking anything, which link, if any, on the page would you try first?” Table 2 summarizes these results. When examining Table 2, the reader needs to understand the following:

(a) Although they were listed in different orders on the actual search results pages seen by the respondents, Table 2 lists the names of all the links appearing on the search results page, both those resulting from the organic search and the three Sponsored Links, in alphabetical order. For ease of identification, the three Sponsored Links of interest are listed at the end. These links are: www.AutoandHome.com, www.insureCom.com, and www.insurancefinder.com

(b) Because typing in “GEICO” yields a different organic search results page than does typing in “NIKE,” the data for Control Group 3 are provided below the data for the other three Groups. Since all groups share the “I don’t know” and “None of these” response options, the data for these options are provided in between the data for the first three groups and Control Group 3.

(c) To simplify the visual presentation, cells without an entry signify “zero” percent.

**TABLE 2:
CLICK-THROUGH ERRORS: SITE RESPONDENT
WOULD TRY FIRST**

	TEST	Control 1	Control 2	Control 3
Name typed in to initiate search	GEICO	GEICO	GEICO	NIKE
Base =	(101)	(50)	(47)	(55)
	%	%	%	%
Question 2c: Suppose you wanted to go directly to [NAME] website . . . which link, if any, on the page would you try first?				
Name asked about in Question 2c:	GEICO	ALLSTATE	GEICO	GEICO
1. Free Insurance Quotes (www.AutoandHome.com)	5.0	14.0	2.1	NA
2. GEICO Car Insurance (www.GEICO.com/)	82.2	4.0	78.7	NA
3. GEICO Career Paths (www.geico.com/careers/)			2.1	NA
4. GEICO Direct (company.monster.com/geico)	2.0	2.0	4.3	NA
5. GEICO Direct Online Service Center (https://mypolicy.geico.com/phsapp/)	3.0		2.1	NA
6. GEICO Returns . . . (www.insurancejournal.com/news/east/)				NA
7. GEICO Insurance (jobs.state.va.us/jobfair/geico.html)	6.9	2.0	2.1	NA
8. PRESS RELEASE: GEICO Insurance Drives North (www.emediawire.com/)				NA
9. Rip-Off Report: Geico Ins.(www.ripoffreport.com/reports/ripoff1297.htm)	1.0		2.1	NA

	TEST	Control 1	Control 2	Control 3
10. Rip-Off Report: GEICO Government Employees Ignorant . . . (www.ripoffreport.com/reports/)			2.1	NA
11. Shop For Auto Insurance (www.insureCom.com)		14.0	4.3	NA
12. Insurance Finder—Save (www.insurancefinder.com)		26.0		NA
13. YAHOO!—GEICO Company Profile (biz.yahoo.com/ic/10/10616.html)				NA
14. DON'T KNOW		6.0		9.1
15. NONE OF THESE		32.0		23.6
16. Free Insurance Quotes (www.InsureCom.com)				20.0
17. Insurance Finder—Save (www.insurancefinder.com)				21.8
18. Shop for Auto Insurance (www.AutoandHome.com)				14.5

b. Findings

A number of findings emerge from an examination of Table 2. These are the following:

(a) When respondents type in the name GEICO and bring forth a search results page containing the organic search results for GEICO, as well as the three Sponsored Links, approximately 80% in both the Test Group and Control Group 2 select the correct GEICO link. Most of the remaining respondents (approximately 15%) select one of the other organic sites associated with GEICO.

(b) In terms of GEICO's complaint allegations, tellingly, the amount of click-through error to one of the Sponsored Links was negligible. When asked, "Which link, if any, on the page would you try first"—if you wanted to go directly to GEICO, only 5.0% in the Test Group and 2.1% in Control Group 2 selected the www.AutoandHome.com link; another 4.3% in Control group 2 selected the www.insureCom.com

link. In other words, less than 3% (5% - 2.1%) would select the AutoandHome site, while another 4.3% would select insureCom. When added together, this represents a hijacking rate of less than 7.5%. As the results from Control Group 3 (discussed immediately below) reveal, plausible alternative explanations exist for even these negligible errors.

(c) Control Group 3 respondents who typed in the name “NIKE,” then saw a search results page that, in addition to providing the organic search results for NIKE, also displayed the three Sponsored Links at issue. When asked Question 2c, “Suppose you wanted to go directly to GEICO’S website. Without clicking anything, which link, if any, on the page would you try first?”—20.0% of these respondents selected the www.insureCom.com link, 21.8% selected the www.insurancefinder.com link, and 14.5% selected the www.AutoandHome.com link. As none of these Sponsored Links mention any trademark or company name, for at least half the respondents (a combined 56.3%), the generic term “(auto) insurance” apparently is sufficient to lead them to think that sites bearing such names likely provide information about specific companies. The data from Control Group 3 clearly reveal that the act of typing “GEICO” to generate a search results page is *not* responsible for respondents saying they would click on one of the Sponsored Links to go directly to GEICO.

These findings may be summarized as follows: When respondents type in the name GEICO and bring forth a search results page containing the organic search results for GEICO as well as the three Sponsored Links that mention (auto)insurance, and they are asked to find the most direct link to GEICO, nearly all are able to identify either the correct organic link or one of the other organic sites associated with GEICO. As indicated by Control Group findings, those who select one of the three Sponsored Links do so *not* because they have typed in the name GEICO, but because of the generic term “(auto) insurance” used by the Sponsored Links.

c. Secondary Selection Errors

Although Question 2c determined which link the respondent would “try first,” it is possible that some respondents might think clicking on the Sponsored Links would take them to GEICO’s site, as well, thereby reflecting confusion. For this reason, respondents in the Test Group as well as Control Groups 2 and 3 were asked a direct, closed-ended question regarding each of the three Sponsored Links. Specifically, Question 5(1) asked, “Do you think clicking on [insert name of Sponsored Link] does take you to the

GEICO website . . .?” Instead of asking about being taken to the GEICO website, Control Group 1 respondents were asked, “Do you think clicking on [name of Sponsored Link] does take you to the ALLSTATE website . . .?” Control Group 2 respondents also were asked the same question regarding a fourth (non-sponsored) link, “YAHOO!—GEICO Company Profile”—one of the links generated by the organic search.

There might be many reasons for respondents thinking that clicking on a Sponsored Link might take them to GEICO’s website and not all of those reasons would necessarily have anything to do with GEICO’s complaint allegations. For this reason, respondents who answered “Yes” to Question 5(1) were then asked Question 5(2), “What, in particular, makes you think that clicking on[name of sponsored link] sponsored link does take you to the ___ website?” The verbatim answers provided by respondents to this question were examined, and only those who gave answers indicating they were confused for the reasons being alleged by GEICO, namely, because they had typed in “GEICO,” because they thought they were on a GEICO website/home page, or because they thought the site was affiliated or connected with GEICO, were tallied and tabulated.

Table 3 summarizes the results when one who is tallying the response to Question 5(2) [“What, in particular, makes you think that clicking on ___ sponsored link does take you to the ___ website?”], tallies only those who gave answers indicating they were confused for the reasons being alleged by GEICO, namely, because they had typed in “GEICO,” because they thought they were on a GEICO website/home page, or because they thought the link was affiliated or connected with GEICO.

**TABLE 3:
CLICK-THROUGH ERRORS:
SITES RESPONDENTS MIGHT TRY
(CONSIDERING RESPONDENTS’ “REASONS WHY”)**

	TEST	Control 1	Control 2	Control 3
Name typed in to initiate search	GEICO	GEICO	GEICO	NIKE
Base =	(101)	(50)	(47)	(55)
	%	%	%	%
Question 5: Do you think clicking on [link identified below] does take you to the . . . website . . .?	GEICO	ALLSTATE	GEICO	GEICO

	TEST	Control 1	Control 2	Control 3
Free Insurance Quotes (www.AutoandHome.com)	5.0	0	4.3	0
Shop for Auto Insurance (www.insureCom.com)	5.0	0	2.1	0
Insurance Finder— Save (www.insurance finder.com)	5.0	0	2.1	0
YAHOO!—GEICO Company Profile (biz.yahoo.com/ic/10/ 10616.html)	NA	NA	25.5	NA

As can be seen from Table 3, when consumers who think of clicking a particular Sponsored Link are asked to indicate the reasons why they thought clicking on that link would take them to GEICO's website, a *de minimus* level (4.2% when averaged across the Test Group and Control Group 2) answer they were confused either because they had typed in "GEICO," or because they thought they were on a GEICO website/home page, or because they thought the link was affiliated or connected with GEICO.¹⁶⁸ Based upon these findings, the GEICO hijacking allegation failed for lack of support. Attention is now directed to the data bearing on more traditional forms of confusion.

4. Thinking Sponsored Links Offer GEICO Insurance

Respondents in all four Groups were then asked the Question 6 series regarding each of the three Sponsored Links, "Do you think this link offers ___ insurance along with insurance from other companies, offers only ___ insurance, does not offer any ___ insurance, or are you not sure about this?" For respondents in the Test Group and Control Groups 2 and 3, the name used for the blanks in the question was GEICO; for respondents in Control Group 1, the name was Allstate. Control Group 2 respondents were asked the same question regarding a fourth non-sponsored link, "YAHOO!—GEICO Company Profile"—one of the links

168. Even if one does not take into consideration the reasons respondents give for thinking that clicking on the Sponsored Links would take them to GEICO's website, but counts all the responses regardless of their relevance or probative value, the level of actionable confusion fails to rise to 5%.

generated by the organic search. Table 4, below, tallies only those who, when indicating the reason why they thought a Sponsored Link offered GEICO insurance, answered that it was either because they had typed in “GEICO,” or because they thought they were on a GEICO website/home page, or because they thought the link was affiliated or connected with GEICO. Note that because the percentages for “offers only GEICO insurance” and “offers GEICO insurance along with ...” are so small, they were combined.

**TABLE 4:
THINKING SPONSORED LINKS OFFER
GEICO INSURANCE
(CONSIDERING RESPONDENTS’ “REASONS WHY”)**

	TEST	Control 1	Control 2	Control 3
Name typed in to initiate search	GEICO	GEICO	GEICO	NIKE
Base =	(101)	(50)	(47)	(55)
	%	%	%	%
Question 6: Do you think [link] . . .	GEICO	ALLSTATE	GEICO	GEICO
Free Insurance Quotes (www.AutoandHome.com) offers only GEICO insurance/ offers GEICO insurance along with . . .	4.0	0.0	2.1	0.0
Shop for Auto Insurance (www.insureCom.com) offers only GEICO insurance, offers GEICO insurance along with . . .	5.0	0.0	0.0	0.0
Insurance Finder—Save (www.insurancefinder.com) offers only GEICO insurance, offers GEICO insurance along with . . .	5.0	0.0	0.0	0.0

	TEST	Control 1	Control 2	Control 3
YAHOO!—GEICO Company Profile (biz.yahoo.com/ic/10/ 10616.html) offers only GEICO insurance, offers GEICO insurance along with ...	NA	NA	29.8	NA

As can be seen from Table 4, when consumers who think a particular Sponsored Link offers GEICO insurance are asked to indicate the reasons why they think so, a *de minimus* level (averaged across Test and Control Group 2, under 5%) indicate that their confusion is due to the fact that either they had typed in “GEICO,” or they thought they were on a GEICO website/home page, or they thought the link was affiliated or connected with GEICO. This compares to approximately 30% who mistakenly thought that a non-sponsored organic link mentioning GEICO’s name offered GEICO insurance (Control Group 2).¹⁶⁹

5. Thinking the Sponsored Links Have a Business Relationship With GEICO

To assess confusion as to business associations or relationships, respondents in all four groups were then asked the Question 7 series regarding each of the three Sponsored Links, “Do you think this link does have a business relationship with ____, does not have a business relationship with ____, or are you not sure about this?” While the name used in the question was GEICO for respondents in the Test Group and Control Groups 2 and 3, that name was Allstate for respondents in Control Group 1. Last, Control Group 2 respondents were asked the same question regarding a fourth link, “YAHOO!—GEICO Company Profile”—one of the links generated by the organic search.

As there might be many reasons for respondents thinking that a Sponsored Link has a business relationship with GEICO, and not all of these reasons would necessarily have anything to do with GEICO’s complaint allegations. For this reason, respondents who answered “Yes” to Question 7a were then asked Question 7b,

169. Even if one does not take into consideration the reasons respondents give for thinking that a Sponsored Link offers GEICO’s insurance, the level of confusion fails to rise to a level generally considered actionable.

“What, in particular, makes you think the ___ sponsored link does have a business relationship with ___?” The verbatim answers provided by respondents to this question were examined, and only those who gave answers indicating they were confused for the reasons being alleged by GEICO, namely, because they had typed in GEICO, or because they thought they were on a GEICO website/home page, or because they thought the site was affiliated or connected with GEICO, were tallied and tabulated. Table 5 summarizes the results for Question 7b.

**TABLE 5:
THINKING A SPONSORED LINK DOES HAVE
A BUSINESS RELATIONSHIP WITH GEICO
(CONSIDERING RESPONDENTS’ “REASONS WHY”)**

	TEST	Control 1	Control 2	Control 3	AVERAGES T+C2 C1+C3	
Name typed in to initiate search	GEICO	GEICO	GEICO	NIKE		
Base =	(101)	(50)	(47)	(55)	(148)	(105)
	%	%	%	%	%	%
Q7. Do you think [link] . . . does have a business relationship with GEICO?	GEICO	ALLSTATE	GEICO	GEICO		
Free Insurance Quotes (www.AutoandHome.com)	15.8	6.0	10.6	5.5	14.2	5.7
Shop for Auto Insurance www.insureCom.com)	16.8	2.0	8.5	7.3	14.2	4.7
Insurance Finder—Save (www.insurancefinder.com)	16.8	2.0	6.4	5.5	13.6	3.7
YAHOO!—GEICO Company Profile (biz.yahoo.com/ic/10/10616.html)	NA	NA	40.4	NA	NA	
Average of the averages					14.7	4.7

As can be seen from Table 5, when consumers who think a particular Sponsored Link has a business relationship with GEICO are then asked to indicate the reasons why they think so, few ($14.7 - 4.7 = 10\%$) indicate that their confusion is due to the fact that either they had typed in GEICO, or they thought they were on a GEICO website/home page, or they thought the link was affiliated or connected with GEICO. This compares to 40% who mistakenly thought that a non-sponsored organic link mentioning GEICO's name had a business relationship with GEICO (Control Group 2).

6. Thinking Sponsored Links Have Been Authorized by GEICO

To assess confusion as to sponsorship or authorization, respondents in all four groups were then asked the Question 8 series regarding each of the three Sponsored Links, "Do you think this link has been authorized by [company] ___ to offer [company's] ___ insurance, has not been authorized by [company] ___ to offer [company's] ___ insurance, or are you not sure about this?" For respondents in the Test Group and Control Groups 2 and 3, the company name used in the question was GEICO; and that name was ALLSTATE for respondents in Control Group 1. Last, Control Group 2 respondents were asked the same question regarding a fourth link, "YAHOO!—GEICO Company Profile"—one of the links generated by the organic search.

As there might be many reasons for respondents to think that a Sponsored Link has received authorization or sponsorship from GEICO, and not all of those reasons would necessarily have anything to do with GEICO's complaint allegations, respondents who answered "Yes" to Question 8a were then asked Question 8b, "What, in particular, makes you think the ___ sponsored link has been authorized by ___ to offer [its] insurance?" The verbatim answers provided by respondents to this question were examined, and only those who gave answers indicating they were confused for the reasons being alleged by GEICO, namely, because they had typed in "GEICO," or because they thought they were on a GEICO website/home page, or because they thought the sit was affiliated or connected with GEICO, were tallied and tabulated. Table 6 summarizes the results for Question 8b.

**TABLE 6:
THINKING SPONSORED LINKS HAVE BEEN
AUTHORIZED BY GEICO
(CONSIDERING RESPONDENTS' "REASONS WHY")**

	TEST	Control 1	Control 2	Control 3	AVERAGES T+C2 C1+C3
Name typed in to initiate search	GEICO	GEICO	GEICO	NIKE	
Base =	(101)	(50)	(47)	(55)	(148) (105)
	%	%	%	%	% %
Q8. Do you think [link] . . . has been authorized by GEICO to offer GEICO insurance?	GEICO	ALLSTATE	GEICO	GEICO	
Free Insurance Quotes www.AutoandHome.com)	17.8	8.0	14.9	12.7	16.9 10.5
Shop for Auto Insurance (www.insureCom.com)	21.8	4.0	12.8	14.5	18.9 9.5
Insurance Finder—Save (www.insurancefinder.com)	20.8	8.0	17.0	9.1	19.6 8.6
YAHOO!—GEICO Company Profile (biz.yahoo.com/ic/10/10616.html)	NA	NA	34.0	NA	NA
Average of the averages					18.5 9.5

As can be seen from Table 6, when consumers who think a particular Sponsored Link has been authorized by GEICO to offer GEICO insurance are asked to indicate the reasons why they think so, few (less than 10%) indicate that their confusion is due to the fact that either they had typed in “GEICO,” or they thought they were on a GEICO website/home page, or they thought the link was affiliated or connected with GEICO. This compares to approximately 34% who mistakenly thought that a non-sponsored

organic link mentioning GEICO's name had been authorized by GEICO to offer GEICO insurance (Control Group 2).

E. Jacoby Google Survey Conclusions

Based upon the foregoing survey data and analyses, co-author Jacoby concluded as follows:

1. The sponsored links at issue in *GEICO v. Google* did not lead to hijacking. People who type "GEICO" on a Google start page and then generate a search results page that includes organic search results associated with the name GEICO and Sponsored Links to other auto insurance sites that do not use the name GEICO in their heading or text were not confused on how to get to GEICO's website or home page. Contrary to GEICO's complaint allegations, these people were not misled or hijacked by these Sponsored Links into going to other insurance sites when they intended to go to GEICO.

2. The Sponsored Links at issue in *GEICO v. Google* did not create initial interest confusion. Sponsored Links that did not use the name GEICO generate negligible (non-actionable) levels of confusion as to their affiliation with, authorization by, or offering products from GEICO.

Based upon the data gathered in this survey, it can be concluded that a negligible percent of consumers using Google in the marketplace were likely to be misled or confused in a manner being alleged by GEICO in its complaint.

IV. CONCLUSION

A sound foundation of the facts relating to search service practices, and consumer understandings of them, will ultimately point the way to the best resolution of trademark keyword-based search service advertisements and featured listings. The first few waves of cases have, unfortunately, not fully developed these necessary facts, and accordingly they left practitioners with incomplete conclusions and guidance for future cases. By highlighting the factual voids so far, and the areas that need fuller factual inquiry, and by providing an example of a viable full survey of consumer understandings of keyword advertising, it is hoped that this article will point the way for litigants, courts, and survey experts to build the much-needed factual bases for resolving keyword-based trademark disputes.

Sound factual development is especially important in litigation involving new technologies. In many areas of Internet and technology law, it takes time for the courts and the established legal doctrines to adjust to new technology. New developments are often seen as radical and violative of legal rights at first, but

attitudes often change once they become more prevalent and are better understood. Initially, for example, any use of a competitor's trademark on a website, particularly in "hidden metatags," was viewed by courts as constituting illegal trademark infringement.¹⁷⁰ As the law developed, courts became more open to allowing uses of metatags.¹⁷¹ In the same fashion, while one may take issue with the analysis of the United Kingdom's Court of Appeal in the *Reed Employment* case,¹⁷² we are likely to see more of that court's approach, by viewing Internet users as accustomed to "fuzzy results," including "much rubbish thrown in," and hence relatively unlikely to expect close connections between the use of a search term and everything that is posted on a search service in response.

The development of Internet law in the last decade has shown that as familiarity with technology increases, courts generally become less hostile to the use of new techniques and the new technologies, and more open-minded about the possibilities of their allowable uses. The time is ripe for a full exploration of how Internet advertising techniques such as keyword-based advertising work, and of how consumers use and understand them.

170. *E.g.*, *Playboy Enters., Inc. v. AsiaFocus Int'l Inc.*, 1998 WL 724000, 1998 U.S. Dist. Lexis 10359 (E.D. Va. 1998) (suggesting that use of trademarks in metatags is inherently deceptive).

171. *E.g.*, *Playboy Enters., Inc. v. Welles*, 279 F.3d 796 (9th Cir. 2002) (recognizing allowable nominative use of trademarks in metatags).

172. *Reed Executive plc v. Reed Business Info. Ltd.*, 2004 EWCA (Civ) 159 (March 3, 2004).