Emerging Issues in the Use of Surveys in Trademark Infringement on the Web

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Abstract

The use of surveys for evidence of consumer confusion is common in trademark infringement cases. But, new applications of theories of confusion as applied to the Internet have created interesting challenges for those who use and design surveys. This discussion focuses on one aspect, initial interest confusion and uses two examples from recent cases using surveys. These examples help to articulate some the challenges in designing surveys for initial interest confusion cases on the Internet, including 1) locating the correct population; 2) determining the appropriate form of survey administration; 3) determining how to use technical language; 4) setting up the research to accurately reflect the market conditions; and 5) evaluating the appropriateness of traditional trademark survey questions. Some suggestions are made on how to approach these issues while maintaining the standards of quality, reliable survey research.
I. Introduction

Surveys are a common tool used in trademark litigation. Many aspects of the use of surveys in trademark litigation have been well tested by the courts and there are a variety of “rules of thumb” regarding how to interpret survey data in these contexts. However, the application of trademark law is facing substantial new challenges in the Internet age, and the application of survey methods to address these challenges necessitates a revisiting of past practices. This paper focuses on one key aspect of changes in surveys and trademark litigation specifically, the theory of initial interest confusion and its application to Internet searches.¹

The Internet as a platform for advertising and commerce continues to grow dramatically. In 2006, Internet advertising accounted for 6.5 percent of all advertising dollars spent in the U.S.² On the web, keyword advertising is big business; in 2006, 6.8 billion dollars were spent on the bidding and purchasing of keywords.³ As the Internet as a space for offering products and services grows, the technology to design and create websites is becoming more and more accessible. In this rapidly changing environment, owners of trademarks need to be more concerned about the possibility that their marks may be used in unauthorized ways leading to confusion and/or dilution of a mark’s meaning.

One of the more contentious areas in trademark law and the Internet is the use of keywords to sell advertising. Broadly, keyword advertising allows companies to bid on and purchase particular words that are commonly used in Internet searches. Search engines such as Google, Excite or Yahoo provide advertisers with listings of popular and suggested keywords. When a search is executed, the keywords trigger “natural” or “organic” listings with web page content directly relevant to the searched item. The search will also generate paid or advertiser listings that are sponsored by companies to appear with the natural listings in some form. The paid listings may appear as banner ads, pop-ups or as sponsored links. Each time a consumer clicks on the paid advertisement, the sponsor of that ad pays the search engine. An issue arises

¹ Surveys can also be useful in other emerging IP issues, such as dilution surveys in “cybersquatting” cases.
when the keyword or search term being used is trademarked and has been purchased by a competitor for advertising purposes.

In 2007 alone, courts in the U.S. have heard cases involving the use of keywords at least seven times, one of the most recent being the suit brought against Google, Inc. by American Airlines (filed August 16, 2007). These cases have been filed in a number of districts and the courts have offered a variety of conclusions making the need for reliable, empirical evidence all the greater. The courts in New York, Pennsylvania, Virginia, New Jersey, California, Arizona, Illinois and Texas have handled what constitutes “use” of a mark with significant variation and differ in how to handle evidence of consumer confusion and how much weight to afford this evidence. While there are many issues in these cases that are open for debate (particularly what constitutes “use” of the mark) it remains essential to provide evidence on the likelihood of confusion.

II.  

*Sleekcraft* Factors and the Concept of Initial Interest Confusion

In trademark cases, a plaintiff alleging infringement and unfair competition must provide evidence of the infringement, including the likelihood of consumer confusion. Confusion is a mixed matter of law and fact and can be established using some guiding principles. These principles or factors are commonly known as the *Sleekcraft* factors. These are:

1. Strength of the mark;
2. Proximity of the goods;
3. Similarity of the marks;
4. Evidence of actual confusion;
5. Marketing channels used;
6. Degree of care used by the consumer when purchasing;
7. Defendants intent in the selection of the mark; and
8. Likelihood of product line expansion.⁴

Initial interest confusion can be considered one aspect of the evidence on confusion. Generally, the theory of initial interest confusion suggests that infringers capitalize on the good will and name or mark recognition of the mark’s owner by using the mark to divert consumer attention.⁵ The theory of initial interest confusion was first articulated by the Second Circuit in 1975 and gained further visibility with the decision in Mobil Oil Corp. v. Pegasus Petroleum, 818 F.2d 254 (2nd Cir. 1987). However, this theory has gained more prominence in its application to trademark issues on the Internet. Perhaps the most widely cited case for Plaintiffs has been the Ninth Circuit’s decision in Brookfield Communications, Inc. v. West Coast Ent. Corp., 174 F. 3d 1036 (9th Cir. 1999). While many courts embrace the theory (notably the Second, Seventh and Ninth circuits) others have taken a more reluctant approach, notably, the First Circuit, which while not expressly rejecting the theory has not endorsed it either.

Initial interest confusion has shifted the timing of the confusion from the point of sale or after the point of sale to earlier in consumers’ evaluations of products and services. What makes the theory of initial interest confusion a particularly interesting issue in current trademark law is that there have been some uses that suggest this type of confusion can “stand alone” and that it can lessen the burden on the Plaintiff to demonstrate infringement using the multi-factor test. Another interesting aspect is the disparity of rulings on initial interest confusion and the Internet; some decisions suggest that this type of confusion is more likely to occur given the nature of the

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⁴ AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979). Different courts use different versions of the multifactor test, for example the 2nd Circuit uses the factors set out in Polaroid Corp. v. Polarad Electronics Corp. 287 F. 2d. 492, 495 (2d Cir. 1961). These are: (1) strength of the mark (2) degree of similarity between the conflicting marks (3) proximity of the goods or services (4) likelihood that the senior user will bridge any gap between the goods or services of the parties (5) actual confusion (6) the junior user’s good faith in choosing its marks (7) the quality of the junior user’s product and (8) the sophistication of the buyers.

⁵ The most common analogy is of a billboard advertisement on the side of a highway. Assume that a consumer is driving down the highway and sees a sign saying, “Acme Burgers, Next Exit”. The consumer wants Acme burgers and gets off the highway fully expecting to find an Acme restaurant. Instead, she finds there is only a “Joe’s” restaurant because the billboard had purposively and deceptively been placed there by Joe’s. But the confusion has already occurred and rather than getting back on the highway, the consumer decides to eat at Joe’s. While this is a useful illustration, many of the recent cases do not emphasize the diversion of a purchase, in fact some Plaintiffs argue that whether or not the consumer actually purchases from the competitor is not at issue or at least is not the primary issue.
Internet, while others courts argue that consumers expect inaccuracies in their web searches.\textsuperscript{6} Given the ambiguity around the theory of initial interest confusion, it would seem imperative to offer empirical evidence determining the degree to which it may or may not have occurred.\textsuperscript{7}

### III. Overview of the Use of Surveys in Trademark Litigation

Consumer surveys that provide evidence of confusion are common in trademark litigation, yet the frequency of their application does not mean the method is accepted without challenge. First, it should be noted that every survey actually consists of a sampling plan, a set of questions (the survey instrument), and a method of administering the questions. Each aspect, the sample, the instrument, and the implementation, must be designed according to scientific and accepted research practice. The sample is a selection of units for observation. For a consumer survey those units are purchasers and/or potential purchasers of the product. Deciding upon the correct population is essential to the design of a relevant and reliable survey. The selected respondents must reasonably represent the consumers at issue in the case and must therefore be carefully screened to ensure they are indeed the right persons for the interview. Typically, surveys being used to generalize to a larger population are conducted using a random sample of potential respondents, known as a probability sample. Probability samples employ selection methods such that each unit (i.e. respondent) has a known probability, that is greater than zero, of being included. This allows the survey results to be projected back to the total population with a precise margin of error.

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\textsuperscript{6} In Brookfield Communications, Inc. v. West Coast Entertainment Corp., the Court stated: "[I]n the Internet context, . . . entering a web site takes little effort--usually one click from a linked site or a search engine’s list; thus, Web surfers are more likely to be confused as to the ownership of a web site than traditional patrons of a brick-and-mortar store would be of a store’s ownership." This is contrasted by, “Internet surfers are inured to the false starts and excursions awaiting them.” See Chatam International., Inc. v. Bodum, Inc, 157 F. Supp. 2d 549, 558 (E.D. Pa 2001); accord, Strick Corporation v. James B. Stickland, Jr., 162 F. Supp. 2d 372, 377 (E.D. Pa. 2001); Hasbro, Inc. v. Clue Computing, 232 F.3d 1, 2 (1st Cir. 2000); Checkpoint Systems, Inc. v. Checkpoint Software Technologies, Inc., 269 F.3d 270 (3rd Cir. 2001).

\textsuperscript{7} A number of courts have argued that claims of confusion or the lack thereof need to be supported by empirical evidence: “PEI has not presented a consumer survey of likelihood of confusion, despite having (a) significant financial resources to pay for such a survey (in fiscal 1997, PEI had approximately $300 million in net sales and spent almost $50 million in advertising), see Lindeman Decl., ¶ 3, and (b) plenty of time to conduct such a survey, See Marhull Decl., ¶ 1 (PEI hired expert witness in November 1998, but did not move for preliminary injunction until April 1999).” Playboy Enterprises, Inc. v. Netscape Communications Corp. F.Supp.2d 1999.
However, trademark surveys have not traditionally relied upon probability samples to locate and recruit respondents and instead employ a non-probability sample design. In large part, the reliance on non-probability sampling has emerged from necessity. Typical trademark cases require individuals to view or handle a product. Therefore, most trademark surveys are conducted as intercept studies which recruit respondents at shopping malls or other similar venues. In intercept studies, participating individuals do not have known probabilities of selection nor does every member of the target population have a non-zero chance of selection. Instead, demographic information is often collected to ensure that the distribution of the characteristics of respondents does not differ significantly from the distribution of characteristics found in the target population. Trademark studies assume that the rates of confusion found in the survey are a reasonable representation of the rates of confusion found in the total population as long as the characteristics of the respondents reasonably approximate the characteristics of all consumers of interest.\(^8\)

Regardless of how the sample is selected in a survey, the appropriate population must be identified and the sample must reasonably approximate this population. Ensuring that the sampled respondents look like the total population is essential for addressing concerns about selection bias. Selection bias occurs when individuals who are included in the survey are significantly different from either those who are not included or from those who decline to participate in the survey. The research on the impact of selection is varied, but it is essential for the survey researcher to be sensitive to the possibility of selection bias and to test the data and show results which indicate that no or minimal bias exists.

The careful construction of survey questions is always important, but it is particularly significant in trademark litigation. Generally, the survey should be designed such that all potential sources of bias are minimized and the questions address the specific issue required for the litigation. This means that all questions must be framed in a precise and clear manner with clear definitions for technical or otherwise unknown terms. Question formats should be designed

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\(^8\) Characteristics can include a multitude of things from geography, to age, gender, purchase preferences, etc. The design of an appropriate sample in a trademark intercept study is not necessarily easier than the sample design in a study using probability methods and careful consideration must be given to how best to achieve a representative group of respondents.
to avoid context bias or order effects so previous questions do not influence respondent answers
to later questions. The use of open ended and closed ended questions should be justified
appropriately and analyzed properly. In a confusion study, the research must be able to address
the different types of confusion including confusion over the source or origin of the goods and
confusion over the sponsorship, approval or affiliation of the producer of the goods or services.
Responses to open-ended questions in confusion surveys can serve as an internal control and
when reviewed and coded with care should indicate whether the source of confusion has come
from the mark or has been caused by something else.9

Most confusion surveys use an additional control stimulus to accurately measure
confusion. The aim in the use of a control stimulus is to generate control results which allow the
researcher to “net” out the effects of guessing or other types of random error in the responses.
There are a variety of ways to use a control. In some studies, the same respondent is asked a set
of questions about the mark or senior product and then is asked the same questions about a
control or infringing mark or product. In other studies, different respondents are asked to view
either the control or the actual product, not both, and are then asked questions about confusion. If
the survey requires a control, the researcher must ensure that the control stimulus is properly
chosen to be similar in nature to the relevant trademark, but without any of the infringing
elements at issue in the case.

As a final note on general procedures, the survey must be properly and carefully
administered with sufficient quality control checks. Survey administrators or field staff
interviewers should not be aware of the purpose of the study. This is typically called a “double
blind” research method in which neither the interviewers nor the respondents know the ultimate
purpose of the survey. The survey instrument should be thoroughly pretested and a portion of
interviews should be monitored for evidence of respondent misinterpretation or unclear
questions. The administration of the questionnaire, if by interviewer, should be conducted by
trained staff and questions should be asked uniformly to all respondents. Finally, some portion of
the data should be independently validated to ensure that interviews were conducted and that
respondents did understand the questions.

9 Not all respondents can readily articulate the reasons for their confusion and it is best to consider only those that
clearly indicate some source other than the mark as “guessing” or “noise”.

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The steps necessary to design a relevant study with reliable results are detailed and require precise understandings of sample and questionnaire design, respondent cognition and the proper reporting of statistical results. If done well, a survey can provide definitive evidence on whether or not trademark confusion exists. If done poorly, a survey can over- or under-estimate the rates of confusion and can be dismissed as flawed and unreliable.

While these general guidelines apply to any survey used in a trademark case, the emerging issues associated with determining initial interest confusion create particular challenges. Key challenges include 1) locating the correct population; 2) determining the appropriate form of survey administration; 3) determining how to use technical language; 4) setting up the research to accurately reflect the market conditions; and 5) evaluating the appropriateness of traditional trademark survey questions. Two cases illustrate these challenges.

IV. 1-800 Contacts versus WhenU.com and Vision Direct

In 1-800 Contacts, Inc. v. WhenU.com, 414 F. 3d. 400 (2d Cir. 2005), the Plaintiffs, sellers of replacement contact lenses, own the trademark to “1-800 Contacts” and the website “1-800contacts.com”. WhenU.com is a distributor of downloadable software (called SaveNow) which once voluntarily added to a user’s machine, offers relevant coupons and discounts for use on Internet purchases. The offers are generated by the software which matches items in the user’s search with relevant advertising. Advertisers pay WhenU.com to have their offers or discounts appear when particular items, including trademarked names, are searched. The coupons are displayed in “pop-up” boxes or separate windows which appear off to the side of the main search web page.10 The pop-up boxes are framed by a green “$” mark and the text “SaveNow!” Plaintiffs alleged that Defendants’ pop-up boxes generated confusion between a competitor who purchased advertising (Vision Direct) and Plaintiffs “1-800 Contacts”. Plaintiffs conducted a survey to determine the likelihood of confusion. The survey was designed and conducted by a Mr. Neal of Decision Analysts, Inc. Survey respondents were selected from an Internet panel of over 3 million consumers. From this panel Mr. Neal selected 100,000 potential respondents and of these 46,000 agreed to take the survey. Of those who agreed to take the survey, approximately

10 Some ads also appeared as “pop-unders” or ads beneath the main search page only visible once the main page was closed or as advertisements stretching across the bottom of the user’s computer screen.
9.6 percent had the SaveNow software on their computers. The final survey yielded 994 responses and was conducted online. Mr. Neal asked two key questions in his survey.\textsuperscript{11} First, he asked respondents to agree or disagree to the following statement:

\begin{quote}
A) I believe that ‘Pop-Up’ advertisements are placed on the website on which they appear by the owners of the website.
\end{quote}

and later in the survey he asked,

\begin{quote}
B) Were you aware that, when viewing websites on the Internet, SaveNow software causes ‘Pop-Up’ advertisements to be displayed on your computer which are not authorized by the website on which they appear?
\end{quote}

From these questions, Mr. Neal concluded that 60 percent of respondents believed that pop-ups were placed on the website by the owners of that site and 52 percent said they thought that pop-ups were pre-screened and approved by the owners of the website.\textsuperscript{12}

The Defendants’ expert and the court found many problems with the survey although it was not excluded from evidence. Indeed, while the court emphasized the numerous flaws in the Neal study, it also noted that, “Defendants, who requested and were granted an opportunity to conduct their own survey, did not conduct one,” (p.63). While Neal’s study was afforded little weight, the court also pointed out that the results were at least “suggestive of the likelihood of initial interest confusion” and that the significant numbers of confused consumers should be taken into account.

The Neal survey is useful for demonstrating a number of challenges in using surveys focused on initial interest confusion. First, it is essential to note that Mr. Neal’s sampling method raises serious reliability questions as Mr. Neal began with 46,000 individuals willing to participate in the survey and ended up with 994 completed questionnaires.\textsuperscript{13} The Internet panel has become increasingly common in polling and market research, but should be approached with caution by

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\textsuperscript{11} Additional survey questions were asked but these were the ones relevant to proving confusion.
\textsuperscript{12} Pages 20 and 21 of 02 Civ. 8043 (DAB) Opinion.
\textsuperscript{13} It is unclear if Mr. Neal randomly sampled from the 46,000 to get to the completed number, if some individuals were screened out or some other event reduced the final sample size.
\end{flushleft}
those using surveys for litigation. There is considerable debate in professional survey research about the representativeness of Internet panels. While Internet panels can be effective and useful in some types of research, the ability to contact large numbers of people quickly (often touted as the biggest advantage of an Internet panel) can be misleading. It is essential to remember that more respondents do not necessarily equal more representative or better quality data. It is quite possible that a survey with 300 carefully selected respondents located across a random selection of intercept locations is better than an Internet panel survey with 3,000 respondents as a result of the selection bias that can occur with internet panels. Internet panels rely on respondents who have agreed to participate in a multitude of surveys and these respondents may not be the best to represent the population of interest. It should be noted that neither the panel nor the intercept methods are probability samples. This is not to suggest that all Internet panels have difficulties with professionalized respondents or are subject to selection bias but rather is meant to emphasize that the volume of respondents cannot be equated with the coverage or accuracy of the data.

Putting aside any potential problems with the sample, the court determined that Mr. Neal’s most obvious flaw was the absence of direct questions about the trademark. Mr. Neal asked generic questions about pop-ups, but respondents were not shown pop-ups nor were they given any indication that the referenced pop-ups were related to a particular website or product. This omission meant that it was impossible to determine from Mr. Neal’s results whether initial interest confusion was actually a result of the particular SaveNow pop-ups.

There are additional instructive issues in this survey. Mr. Neal’s questions were leading and used technical language in vague and unspecified ways. More and more cases involving trademarks and the Internet rely on shared understandings of technical terminology. Assumptions about how and what respondents understand about such technologies can yield inflated results of confusion or can mask the true source of confusion, particularly if respondents are provided a

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description that is biased in any way. Mr. Neal asked respondents to agree or disagree with a statement about pop-ups. Prior to the question, Mr. Neal offered a definition of pop-ups as advertisements that a) appear in the middle of the screen b) partially block the content of the underlying web page c) may take the respondent to another web page and d) may not close when the user clicks the “x”. The court stated that Mr. Neal provided no evidence to demonstrate that respondents understood this definition and could not prove that respondents associated the description with the actual SaveNow pop-ups at issue in this case. In cases relying upon technical terminology or concepts, it is essential to offer some evidence that respondents share the researcher’s intended meaning. This evidence can be in the form of qualitative focus groups or cognitive interviews used to pretest the survey instrument or in the form of a description offered to all respondents with a follow up question ensuring the meaning has been correctly conveyed. The definition offered by Mr. Neal was not only unclear, but it was also negative in its tone and may have influenced respondents, particularly those who were unsure what was being asked. Finally, as the Defendants pointed out, Mr. Neal himself used the terminology incorrectly as the SaveNow pop-ups did not actually appear on the website, but rather appeared as a separate window or website link.

His second key question illustrates additional issues. Here, Mr. Neal asks a double-barreled question in which there is no way to determine what part of the question the respondents were answering. The first part of the question asked,

Were you aware that, when viewing websites on the Internet, SaveNow software causes ‘Pop-Up’ advertisements to be displayed on your computer…

And the second part asked,

…which are not authorized by the website on which they appear?

Defendants argued and the court agreed that there was no way to know if respondents were stating that they did not know SaveNow caused pop-ups to appear or if the pop-ups were not authorized. Additionally, there was no way to know whether respondents who agreed were agreeing to the idea that all pop-ups were unauthorized or only some. Given the variety of web
pages and types of graphics, visuals, links, video clips etc that can be found while searching on
the Internet, the vague nature of this question essentially renders it meaningless.

While some of the issues in Mr. Neal’s design were not solely related to the use of the
Internet (the lack of a control, compound questions etc) others were directly related to the web.
The Neal survey is a useful example to demonstrate the care that must be taken in several key
areas including locating and interviewing the correct population, ensuring that respondents have
an appropriate understanding of the questions, and the importance of replicating as closely as
possible actual market conditions. First, Mr. Neal’s use of an Internet panel raises questions
about the representativeness of the sample. Second, Mr. Neal’s questions about technical
concepts were likely to lead to biased results and confusion resulting from respondents’
interpretations of what a pop-up is or how pop-ups and Internet searches actually work. Third, by
not actually showing respondents pop-up ads and instead merely trying to describe them, Mr.
Neal assumed that consumers shared an equivalent understanding of a pop-up. Absent this
understanding, respondents were likely to be influenced by the leading and ambiguous nature of
the questions posed and this, amongst other flaws, should have rendered the results meaningless.

While the Neal study was not entirely relevant or reliable research, it was admitted to the
court and was relied upon to provide some evidence on the likelihood of confusion. This should
emphasize the possibility that a survey which does not meet all of the scientific criteria can
inform the proceedings and can be used to offer evidence of confusion, even if the results are not
reliable.15

A different case provides an example of a survey that was conducted with greater care
than the Neal study discussed above. While this survey is an improvement, there are still
important issues, and in this case the results were deemed by the court to be insufficient to show
evidence of confusion.

15 The same survey was submitted as evidence of confusion in a different case, Wells Fargo & Co., et. al v.
WhenU.com, Inc. 293 F.Supp.2d 734 (E.D. Mich., November 19, 2003 and was not accorded any weight. Here
the court more precisely followed the seven factors recommended by the Federal Judicial Center’s Manual for
Complex Litigation, (3rd Ed. 1995).
V. Government Employees Insurance Company (GEICO) v. Google, Inc. et. al.

In Government Employees Insurance Company (GEICO) v. Google, Inc. et. al., No. 1:04cv507 (E.D. Va. Aug. 8, 2005) Plaintiffs argued that Defendants caused initial interest confusion by allowing competitors to bid on its name as a keyword. Advertisers who bid successfully were able to have their sites listed above or to the side of the natural or organic listings. These paid-for listings appear in Google as “sponsored link” in a shaded yellow bar at the top or as a column of links to the right, offset by a vertical line. GEICO claimed that consumers searching for auto insurance and who had typed “GEICO” would be confused about the precise nature of the sponsorship of the paid-for links. The Plaintiffs argued that consumers, who typically only review one or two quotes before purchasing auto insurance, would be directed to competitors’ sites via the sponsored links. GEICO submitted a survey of consumers who were likely to consider purchasing or renewing auto insurance in the next six months and who intended to use the Internet to search for providers. Respondents were shown a screen shot of an Internet search using the term GEICO. The screen had a number of organic listings, as well as five sponsored links. Four of the sponsored links mentioned GEICO in the link and one did not. The survey also used a control group. The control respondents were also shown a screen shot of a search using GEICO, but the sponsored links were replaced with links to advertisements for NIKE athletic apparel. The respondents in this survey were asked standard trademark-type questions with slight variations to account for the Internet. These questions were:

1) If you wanted to purchase automobile insurance from GEICO, where on this page would you “click” first? Why do you say that?

2) Now if you clicked on GEICO (interviewer point to each sponsored link – the four that mention GEICO and the one that does not mention GEICO) what company’s or companies’ web site would you expect to go to? Why do you say that?

3) Do you think the company that sponsors this listing is associated or connected with any other company or companies?
a. What company or companies are they associated or connected with?

b. Why do you say that?

The survey found that 67.6 percent of respondents expected that they would be directed to GEICO’s website if they clicked on the sponsored link and 69.5 percent thought that the sponsored links were affiliated with GEICO in some way.

The Defendants argued, and the court agreed, that the survey in this case suffered a number of weaknesses. First the control was inappropriate. Control respondents should not have been shown a search with the trademarked term GEICO. Additionally, the court believed that the sponsored links for NIKE used in the control were inadequate to determine what share of confusion was a result of GEICO and what share may have simply been related to the mention of insurance or cars.

Defendants further pointed out, with agreement from the court, that the visual depiction of the screen likely added to the large numbers of respondents confused. The survey used a shot of an older search in which competitors were allowed to use the name “GEICO” in their advertising – a practice stopped by Google in April, 2004. Plaintiffs argued the use of this shot was necessary to avoid natural listings referring to the trial at hand from appearing in the search. Respondents were asked about the sponsored links with the term GEICO first and then asked about the link without GEICO. Defendants argued that respondents were primed to assume that the sponsored link that did not mention GEICO was likely to be affiliated with the company. Additionally, the Defendants demonstrated that the screen shot differed from how a typical Google search would be seen. In the survey screen shot, the sponsored links were closer to the natural listings and there were more of them, five sponsored links as compared to the typical three or four.

In this case, the court found that there was insufficient evidence to demonstrate confusion between GEICO and the sponsored links which did not use the trademarked name. It did find though that the results supported the claim that consumers were confused by sponsored links using the name GEICO, and that Google could be liable for damages for the period in which it allowed this practice.
This case is interesting because the survey used was far more scientific and reliable than the survey conducted in the WhenU.com case. In the GEICO case, respondents were actually shown the stimulus and were asked more standard trademark infringement or dilution survey questions. Yet, this survey was not entirely satisfactory and a number of its greatest weaknesses likely stemmed from an attempt to apply traditional trademark survey methods to a new and ever changing medium. In this case, respondents were shown a screen shot that did not sufficiently resemble the actual look of screen a consumer would see. Determining what respondents see and how they see it is imperative in surveys of and on the Internet. Additionally, standard trademark questions (e.g. who do you think makes this product? or are these items affiliated?) need to be carefully examined for their applicability to trademark issues on the web. The GEICO survey is also interesting because similar cases are currently being played out in the courts (American Airlines, Inc., v. Google, Inc 4:07-cv-00487 (N.D. Tex. Aug. 16, 2007).) and it will be important to understand how, if at all, the decision in this case affects those in the future.

VI. Summary and Conclusions

The two case examples here demonstrate that surveys used in initial interest confusion cases as applied to the Internet need not only to avoid typical design flaws, but also need to carefully consider new challenges. Broadly, these issues are sample design, the use of technical terminology, the replication of market conditions and the use of standard trademark survey questions.

Internet panels and large sample sizes do not guarantee a reliable study. As demonstrated by the Neal study, large numbers of survey respondents do not necessarily indicate a well conducted survey. Indeed, there are reasons to approach panel research with caution. The volume of respondents may be large in a panel study, but there is no guarantee that the respondents are representative of the population of interest. Internet panels can be useful to get a quick look at how individuals respond and may help a researcher gain access to members of the population less likely to be found at shopping malls or other traditional intercept sites (for example, young men). Internet surveys can also reduce the cost of gathering survey evidence.
However, Internet surveys and panels are not useful in situations where respondents need to follow complex directions, where individuals need to be shown particular materials or where much of the evidence relies on an analysis of the verbatim responses to open-ended questions. While it would seem obvious that a survey asking questions about visual aspects of the Internet could be asked on the Internet, there are difficulties in presenting materials to respondents via the web. Not all respondents have the same download speeds, browser configurations and screen sizes to view information in the same way.\(^{16}\) While viewing a live search on a respondent’s home computer would be an excellent way to approximate market conditions, confusion surveys typically need to show a “frozen” or set screen shot to ensure the correct stimulus is being given to the respondent. The appearance of these images can vary greatly across computers and can introduce an unintended source of variation to the results. In addition, self-administered surveys (of which an Internet survey is one type) typically generate shorter and less descriptive answers to open-ended questions. Research has shown that respondents are less willing to offer lengthy answers when typing responses as compared with providing their answer verbally to an interviewer.\(^{17}\) The difference in the quality of open-ended responses could be pivotal for initial interest trademark surveys which need to be sure that responses indicating confusion are supported by the reason articulated in the open-ended response.

**Defining the relevant target population must be carefully considered.** Researchers designing initial interest confusion surveys also need to carefully consider the actual population to be studied and upon which population the rate of confusion should be counted. The courts have made no definitive determinations on whether the confusion rate should be based on all consumers who have purchased or plan on purchasing the product and will use the Internet to locate the product or service, or if the confusion rate should be calculated only on the basis of those who would use the marked term/key word at issue to conduct a search. Yet, the actual level of confusion established in the relevant population may depend to a great extent on which

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definition is chosen. It seems that an argument could be made for both interpretations and it will be up to researchers and lawyers to more specifically argue for one determination or the other.

There may be general confusion over the Internet terminology that must be separated from the trademark confusion being measured in a study. While words such as “clicking”, “webpage”, “link” and “site” are part of most American’s everyday language, there is sufficient research demonstrating that even the most common terms have the potential to be understood in ways not meant by the researcher. It is imperative in cases relying upon evidence of confusion that the researcher can demonstrate that the confusion is a result of the infringing use of the mark and not from the ways in which terms are used, defined or understood in a survey. Here, Internet surveys can be helped by using visual screen shots that are familiar to consumers. In fact, it is likely that pictures of links and sites are more readily understood than verbal descriptions of these items. It should be pointed out though, that visual images from the web are hardly ever the still shots shown to respondents. Consumers experience browsing as an interactive process and efforts should be made to replicate this situation as much as possible.

Surveys must appropriately approximate market or decision-making conditions. As the courts pointed out with the Neal survey, it is important that the survey approximate market conditions as much as possible. Respondents need to be shown stimuli that mimic the actual layout and findings of an Internet search; this is important for both the test and the control. The GEICO study failed because both the test (in its use of sponsored links which included the mark and the incorrect placement of sponsor links) and the control (in its use of the mark and a completely unrelated product category) did not reflect actual searches. The test or infringing search included sponsored links which used the mark, a practice Google had stopped prior to the trial. In addition, the placement of the sponsored links did not reflect the actual placement on a search results page. The control incorrectly used the mark in the search and also used a completely unrelated product category which did not allow for any conclusions about guessing or “noise”. The survey designer needs to take particular care to ensure that the screens selected and shown are realistic and current in their visual display.

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Traditional question wording used in trademark confusion studies may need to be revisited. A serious review of the standard trademark confusion or dilution survey questions needs to be undertaken. Questions about associations or affiliations may have very different meanings for consumers using the Internet. These terms may inflate the actual rates of confusion because consumers may assume that much of the Internet is associated in some way. Consumers may feel that all websites are associated because they share the same space, are accessed in the same way or are technically designed using the same technologies. It is also possible that using these terms obscures or depresses the real rate of confusion because consumers feel that they are being asked a technical question which they are not qualified to answer. As with the use of technical terminology, it would be wise to pretest and understand the ways in which respondents understand these ideas in the context of the Internet. Focus groups or in-depth interviews can provide a survey designer with the necessary information to properly structure a questionnaire.