

AMERICAN AND FRENCH PERSPECTIVES ON TRADEMARK KEYING: THE COURTS LEAVE BUSINESSES SEARCHING FOR ANSWERS

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Abstract

Trademark owners in America and Europe are attacking the lucrative practice of selling search results and advertising linked to searches based on product names and trademarks, which is known as *trademark keying*. From makers of luxury products to travel companies, and insurance companies to home décor vendors, companies have sued Internet search providers to stop this practice that they believe amounts to trademark infringement. Recent cases against search engine companies in American and French courts reflect divergent views on the legality of the practice at this early stage of the debate. This Article evaluates recent rulings in both jurisdictions which illustrate the challenges that search engines and trademark owners face as they try to protect their interests.

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INTRODUCTION

<1> *Trademark keying* is the sale of search results and advertising linked to searches based on product names and trademarks. The legality of trademark keying has caused widespread debate between trademark owners and search engine companies. For search engines, trademark keying generates much of the advertising revenue that drives their significant growth. Moreover, they claim that this practice enables them to provide searchers with the most relevant and informative search results. Trademark owners claim that their significant investments to build goodwill and brand awareness among consumers are at risk when competitors are allowed to use their trademarks to trigger competitive advertising online. They assert that such advertising creates confusion among potential customers and that it is tantamount to trademark infringement.

<2> Recent judicial decisions in the United States and France seem to indicate that the jurisdictions are headed in opposite directions. French courts appear to be taking a strong pro-trademark-owner stance, while American courts are showing more deference to search engines. This divergence reflects a fundamental difference in how trademarks are perceived under French law and American law: Trademark rights are more akin to property rights in France than in the United States. French trademark law focuses on a trademark owner's investment of intellectual and financial resources in her trademark. As a result, French law emphasizes protection of the trademark owner's reputation and goodwill that become the "protectible features of the trademark" over time.² American law and public policy, on the other hand, tend to favor consumer welfare and freedom of competition. Each is accorded great weight when courts consider the rights of trademark owners.³ This difference is reflected, for example, in the stark contrast between France's restrictive attitude toward comparative advertising and America's far more permissive stance. Although it may be premature to discern a true divide on matters relating to trademark use in search engines, the recent decisions illustrate some of the issues that businesses face in this developing area.

TRADEMARK KEYING: CRITICAL TO THE BUSINESS OF SEARCH ENGINES

<3> A shopper searching for a luxury handbag needs to go no further than her personal computer to find a wealth of information about the product she is seeking. Accompanying this product information will undoubtedly be the locations and prices of retailers, many of which allow purchases through their Web sites. For many such shoppers, the process of finding the perfect product begins with using a search engine to obtain a listing of relevant Web sites. For example, a shopper seeking luxury handbags might use generic terms such as "handbag," "purse," or "pocketbook." A search, however, might be more

effective if it also includes, among its terms, the name of a luxury designer such as "Kate Spade," "Coach," or "Louis Vuitton." In fact, searches including trademarked terms reportedly account for 20% of all online searches.⁴

<4> Search engines permit online advertisers to target searchers by paying to select keywords that will trigger their online advertisements. These advertisements appear primarily in the form of search results. These paid search results are displayed separately on the results screen from the unpaid, "organic" results. In order to distinguish paid results from organic results, the former are labeled with headings such as "Sponsored Links" (Google), "Sponsored Sites" (MSN Search), or "Sponsor Results" (Yahoo!).

<5> Trademark keying is a critical component of the business models of search engines and shopping sites,⁵ which make the vast majority of their money by selling advertising. This keyed advertising is very effective for advertisers because they reach Internet users while the users are actively searching for specific products and services.⁶

<6> Google, which is accessed by 39% of American Internet users⁷ and 47% of European users,⁸ is currently the world's most-used search engine. In 2004, Google demonstrated the importance of advertising keyed to trademarks when it relaxed its policy preventing trademark keying and began permitting advertisers in the United States and Canada to bid on others' trademarked names without restriction.⁹ Google's current trademark policy bars advertisers from using a term trademarked by another party in the heading or body of ads that are displayed as sponsored links. The company attempts to insulate itself from disputes between trademark owners and advertisers by stating that "advertisers themselves are responsible for the keywords and ad content that they choose to use,"¹⁰ and by having a well-developed policing program currently in place to find and deal with violations.¹¹

<7> Google's broad prohibition on trademark use is a conservative approach that arguably goes much further than required under current law. Yahoo! takes a more balanced approach by permitting use of another party's trademark for comparative advertising and other limited purposes. Yahoo! permits the use of another party's trademark in ads only where (1) the advertiser's Web site either sells or facilitates the sale of the product or service bearing the trademark; (2) the primary purpose of the advertiser's Web site is to provide information about the trademark holder or its products or services bearing the trademark and the site does not sell competing products or services; or (3) the advertiser's Web site offers or promotes competing products or services, the site offers detailed multi-dimensional comparative information, and the ad itself clearly identifies the source of the ad and the nature of the site's content.¹² In response to complaints by trademark holders, Yahoo! will review an advertiser's listing and, if appropriate, require revision or removal of the ad.¹³

<8> Google has become the target of a number of lawsuits in recent years, coincident with its rise to the top among search engines worldwide and the introduction of its revised trademark policy in the United States and Canada. It expects to face an increasing number of claims as it implements its relaxed trademark keying policy.¹⁴ While analysts agree that Google is defending its primary source of revenue, some commentators assert that the company's growth will be severely constrained if trademark keying is prohibited by American courts or courts abroad.¹⁵ Google asserts that trademark keying is legal so long as the search engine user is not deceived into thinking an advertisement has been placed by the advertiser's competitor. The legal issues raised in recent trademark keying litigation in the United States and Europe, however, remain substantially unresolved.¹⁶

<9> The relevant court decisions issued to date are not precedent-setting since the cases have not reached appellate courts. They nonetheless provide guidance as to how other courts may approach the issues. Indeed, the few court decisions on matters related to trademarks vis-à-vis search engines demonstrate that different legal doctrines applied in different jurisdictions may, in the end, yield different results for search engines with geographically dispersed users.

THE AMERICAN PERSPECTIVE: DIRECTION UNCLEAR

<10> In the United States, state and federal trademark law has its origins in the common law doctrine of unfair competition.¹⁷ The Commerce Clause of the United States Constitution provides the authority for a federal trademark registration system for trademarks used in interstate commerce,¹⁸ and federal trademark law is codified in the Lanham Trade-Mark Act ("Lanham Act").¹⁹ The fundamental test of both common law and federal statutory trademark infringement claims is whether the manner of the defendant's use of the mark is likely to cause confusion among consumers.²⁰

<11> Trademark holders' complaints that users are confused by results of searches keyed to trademarked terms may have some support. According to the Pew Internet & American Life Project, 2 out of 5 Internet searchers are aware of a distinction between paid and unpaid search results; however, 5 out of 6 cannot consistently distinguish between the two.²¹ Evidence of actual confusion provided at trial in various trademark keying cases has garnered mixed responses from courts.²²

<12> In 2004, the United States Court of Appeals for the Ninth Circuit addressed the use of trademarked

terms in lists of keywords.²³ In *Playboy Enterprises, Inc. v. Netscape Communications Corporation*, the defendant search engines maintained various lists of terms to which advertisers could key their ads. Defendants required all sex- and adult-oriented advertisers to key their ads to a single list which included two terms trademarked by Playboy: “playboy” and “playmate.” Playboy asserted that the search engines’ use of its trademarked terms infringed upon and diluted those marks. Playboy showed that the search engines had keyed the marks to advertisements placed by competing adult entertainment companies such that search engine users were shown Playboy’s competitors’ banner ads along with their search results.²⁴ In appealing a summary judgment for the defendants, Playboy had the burden of showing a sufficient “likelihood of confusion” to defeat summary judgment.²⁵

<13> The court recognized that likelihood of confusion is the “core element” of a trademark infringement claim. It went on to state that Playboy’s strongest argument supporting a likelihood of confusion was one for “initial interest confusion,” where the customer’s confusion results in initial interest in a competitor’s product. Such confusion constitutes actionable trademark infringement because it capitalizes impermissibly on the goodwill that the customer associates with the mark. Although the court considered many factors, it reasoned that a showing of actual confusion alone strongly supports a likelihood of confusion. It stated that an expert study introduced into evidence by Playboy would likely preclude summary judgment absent any additional considerations. The court reversed the grant of summary judgment and remanded.

<14> Despite *Playboy’s* outcome in favor of the trademark owner, Circuit Judge Marsha Berzon argues persuasively in support of the principle that keywords can be sold lawfully by search engine operators. In her concurring opinion, Judge Berzon voiced strong support for the opinion based on its consistency with Ninth Circuit precedent. She also expressed strong concern with the court’s earlier decision in *Brookfield Communications v. West Coast Entertainment Corp.*,²⁶ on which *Playboy* relied.²⁷ In *Brookfield*, the court considered the legality of using trademarked terms in metatags, which are parts of Web site code invisible to Internet users but which are nonetheless used by search engines to identify relevant Web sites or advertisements.

<15> The *Brookfield* court held that such use of trademarked terms might cause initial interest confusion because the advertiser “impermissibly capitalizes on the goodwill associated with a mark.” Confusion might occur when, for example, a user searches on a trademarked term, is “confused” by the various search results returned, and is “diverted” to click on a link to a competitor’s Web site instead of the trademark owner’s site. Judge Berzon stated that the *Brookfield* holding could “expand the reach of initial interest confusion from situations in which a party is initially confused to situations in which a party is never confused.” She noted that initial interest confusion can result from unlabeled ads that do not identify the source of the ad. In contrast, she stated that confusion does not result when a user is informed by the search engine or the ad itself that the ad’s source is one other than the trademark owner. Judge Berzon’s reasoning is similar to that adopted by a British court in *Reed Executive Plc v. Reed Business Info. Ltd*, discussed later in this article.

<16> The Ninth Circuit’s ruling in favor of *Playboy*, although considered by some analysts to be a significant blow to the search engine industry, was based on a narrow set of facts. The analysis of the court was limited to a situation in which search engine users typed in one of *Playboy’s* trademarks and, as a result, the search engine returned banner ads that neither (1) identified the source of the ad with its sponsor’s name nor (2) overtly compared *Playboy’s* products to those of the competitor. The court asserted in a footnote that identification of the ad’s source within the ad itself might have eliminated the likelihood of confusion (which was *Playboy’s* main claim). The parties settled the case. It is unclear whether survey evidence of actual confusion would have been sufficient for *Playboy* to make its case at trial.

<17> The settlement in *Playboy* left open the possibility that trademark infringement may result from trademark keying. In contrast, a federal district court in Virginia recently found that the use of trademarks as keywords to trigger advertisements was not trademark infringement. In *Government Employees Insurance Company v. Google, Inc.* (hereinafter *GEICO*), the plaintiff insurance provider claimed that Google violated the Lanham Act and state law when it keyed competitors’ advertisements to *GEICO’s* trademarks to sell advertising.²⁸ *GEICO*, a low-cost provider of insurance that relies on the Internet for a significant portion of its business, brought suit against Google when it permitted competing insurance companies to bid on the term *GEICO*. As a result of this practice, Google users searching on the term would see advertisements of *GEICO’s* competitors displayed as “Sponsored Links” to the right of organic search results. *GEICO’s* federal claims under the Lanham Act included direct, contributory and vicarious trademark infringement, false representation, and dilution.

<18> In its December 2004 bench decision²⁹ and its recently published memorandum opinion, the court partially granted Google’s motion for judgment as a matter of law when it held that no likelihood of confusion resulted from trademark keying in this case and there was, therefore, no violation of the Lanham Act. The court found that *GEICO* had provided insufficient evidence of confusion where, in response to a search on a trademarked term, the ads displayed as “Sponsored Links” did not display plaintiff’s trademark “*GEICO*” in either its heading or its text. The court nevertheless found sufficient

evidence to defeat Google's motion on the narrow issue of whether ads containing GEICO's trademarks in their headings or text are likely to confuse consumers and, therefore, violate the Lanham Act.

<19> This remaining narrow issue was never resolved because GEICO and Google settled prior to resumption of the trial. As a result, it remains unclear whether the use of trademarks in the headings or text of ads is likely to cause confusion under the Lanham Act. The settlement also avoided further argument on the significant issue of whether Google may be held liable for infringement for such uses of trademarks before it began blocking placement of ads containing trademarked terms. Also unresolved was whether Google can be held liable for ads that have been displayed in violation of its policy once the policy was put into effect. Relying on its trademark policies and policing program, Google may convince courts in future challenges that its inability to prevent such use in 100% of cases does not rise to the level of contributory liability.³⁰

<20> The outcomes of *Playboy* and *GEICO* are interesting but are of little predictive value. First, both cases were decided on fairly narrow facts. Second, the *Playboy* holding is of precedential value only on similar facts and only in the Ninth Circuit, while the *GEICO* holding is not binding on any other court. The *GEICO* decision, however, has broadened the scope of trademark keying litigation to include advertisers who use others' trademarks to key their ads and display those trademarked terms in their ad headers. It may not be long before more cases are pursued based on this type of theory. Finally, the role of survey evidence in *Playboy* and *GEICO* is notable because of how it dramatically affected the outcomes. Central to the infringement claims in both cases was survey evidence commissioned by the parties. Sufficient survey evidence made *Playboy's* case, while inadequate survey evidence foiled both parties in *GEICO*. Since many of the concepts central to trademark law refer to psychological states of consumers, cases may hinge on survey evidence; however, it may be difficult to predict the adequacy of survey evidence in advance of a trial.³¹

<21> Finally, the upcoming federal court dispute in *Google Inc. v. American Blind & Wallpaper Factory, Inc.*³² might shed some light on unresolved legal issues arising from *Playboy* and *GEICO*. In this case, trademark owner American Blind and Wallpaper Factory believes that it can present a stronger case against Google on a different set of facts and overcome the evidentiary problems faced by *GEICO*.³³ American Blind and Wallpaper, an Internet seller of window treatments and wall coverings, alleged that Google's AdWords program capitalizes illegally on its trademarks by allowing and encouraging competitors to purchase keywords identical or substantially similar to its marks. Further, American Blind alleged that the intended result of the AdWords program is confusion and diversion of Internet users who are led to search-results pages displaying lists of its paying competitors. In March 2005, the district court rejected Google's summary judgment motion to dismiss American Blind's Lanham Act claims of trademark infringement, false representation, and dilution, as well as its alternative claims of contributory trademark infringement and contributory dilution.

THE FRENCH PERSPECTIVE: PRO-TRADEMARK OWNER

<22> The national courts of European countries have been busy in recent years hearing trademark keying cases similar to those being argued before American courts. There have been a sufficient number of cases in the national courts of France applying intellectual property principles to the Internet to discern a trend in favor of trademark owners against search engine operators. If these principles are adopted by the French high court in civil matters (the Cour de Cassation) and accorded substantial weight (though not considered binding precedent in the French system) by all French courts, they will pose a significant challenge to search engines' business models.

<23> Formally, French trademark law is found only in the French civil code. While intellectual property rights are generally available in the Intellectual Property Code, text dealing specifically with trademark rights is found in Articles L. 711-1 through L. 716-16 and Articles R. 712-1 through R. 718-4.³⁴ In addition to the national laws of France, rules of the European Union and treaties to which France is signatory are binding.³⁵ The co-existing system combining Community-wide trademark rights and territorially-based national trademark rights are similar, but only in a general sense, to the trademark system in the United States.³⁶ The United States system provides for nationwide registration under the Lanham Act, yet recognizes state-granted registrations.

<24> Trademark infringement in France bears many similarities to infringement in the United States. Article L.313-3 provides that a trademark is infringed where there is a likelihood of confusion³⁷ and: (1) defendant reproduces a mark for products or services similar to those listed in the trademark registration,³⁸ or (2) defendant imitates a trademark or uses an imitated trademark for goods and services that are identical or similar to those listed in the trademark registration.³⁹

<25> Despite the similarities between American and French law, there is a crucial distinction. The French Intellectual Property Code, Article L. 713-2, also provides that a trademark is infringed, even where there is no likelihood of confusion,⁴⁰ when: (1) defendant reproduces the characteristic elements of the mark,⁴¹ or (2) defendant uses the mark in any act of commercial competition conducted with a counterfeit mark.⁴² This infringement provision reflects France's view that trademark rights are akin to

property rights. French trademark law is concerned with “protectible” features of trademarks such as their owners’ goodwill and reputations, which require investment of financial and intellectual resources.⁴³ These rights are established over time and may be subject to infringement even in the absence of likelihood of confusion.

<26> In February 2005, a French lower court ruled in favor of trademark owner Louis Vuitton Malletier where it complained that Google users who entered Vuitton’s trademarked terms were shown advertisements paid for by companies selling counterfeit copies of its luxury apparel and accessory products.⁴⁴ The Tribunal de Grande Instance in Paris ordered Google to pay €200,000 (\$260,000) plus costs for breach of trademark, including trademark counterfeiting, unfair competition, and misleading advertising.⁴⁵ The court also enjoined Google from displaying advertisements for competitors of Louis Vuitton when the entered search terms include the company’s name or any other of its registered trademarks, such as “Vuitton” or “LV.”⁴⁶

<27> Although the European Union has liberalized regulation of comparative advertising in recent years, such advertising remains more heavily regulated in Europe than in the United States. Directive 97/55/EC was adopted in 1997 without the support of France. It loosens restrictions on comparative advertising and prevents Member States from enacting more stringent requirements with regard to mere product comparison (as opposed to misleading advertising which can be regulated more extensively). The Paris court’s ruling no doubt reflects France’s historical aversion to comparative advertising, which is manifested even today through restrictive legislation and business practices.⁴⁷

<28> The *Vuitton* court ruled that the practice of trademark keying is trademark infringement, an outcome that is basically the opposite of the American court decision in *GEICO*. The facts of *Vuitton*, however, are notably different from those in *GEICO*, where no physical products were involved. Louis Vuitton provided evidence that those paying Google to key their advertisements to the Louis Vuitton trademarks were, in some cases, selling counterfeit knock-offs of Vuitton’s luxury products on their Web sites. In *Vuitton*, the demonstration that there are only slight differences between the authentic and counterfeit products, which might be barely discernable even where the products could be physically examined in a retail store, would make likelihood of confusion indisputable. Although one could argue that the factual differences would justify different outcomes in *Vuitton* and *GEICO*, a case that closely followed *Vuitton* reinforces the fact that the fundamental difference of law drove the differing results.

<29> In *Viaticum et Luteciel v. Google France*,⁴⁸ a French appeals court affirmed a finding that Google had committed trademark infringement on facts more similar to those in *GEICO*. Here, the Versailles Court of Appeals in March 2005 upheld a lower court decision⁴⁹ that prohibited Google from keying search results to search terms that were merely parts of phrases trademarked by travel firms Societe Viaticum and Societe Luteciel.⁵⁰

<30> The trademarked phrases at issue, “La Bourse des Vols” (“Flights market”) and “La Bourse des Voyages” (“Travel market”), included the words “vols” and “voyages.” Through its AdWords program, Google had sold the keywords “vols” and “voyages” to competitor Web sites. The result was that searches using the actual Web site names returned sponsored links among its search results that led to competitors’ online travel Web sites. Indeed, competitor’s Web sites were displayed more prominently than the trademark owners’ own links.

<31> The French appeals court found that the trademarks were valid⁵¹ and then proceeded to specifically address the provisions of the French Intellectual Property Code described above. As to Article L. 713-2, the court found that Google in fact “reproduced” the marks within the meaning of the statute where a search term such as “bourse de voyages” triggered competitors’ paid links. The court found that the omission of the article (i.e., “La”) and the use of small letters (e.g., “bourse” instead of “Bourse”) were insignificant details that would not be noticed by the average consumer. In addition to infringement by reproduction, for which no likelihood of confusion is required, the court also found under these facts infringement by imitation and the requisite likelihood of confusion under Article L. 713-3.

<32> These French cases create a difficult situation for Google, which may indefinitely have to operate its business under two diametrically opposed legal doctrines. In fact, Google has operated this way for a short time already. Google’s trademark policy is currently bifurcated, with one policy applying to the United States and Canada, and another policy applying to all other countries. Outside the United States and Canada, Google continues to offer the possibility of removing certain marks from keyword bidding when owners of the marks raise an issue.⁵²

<33> The French cases also raise interesting questions as to the geographic scope of such decisions. In the *Louis Vuitton* case, the ruling was said to apply to all of Google, Inc.’s sites, not merely the Google.fr page that is most commonly used by search engine users in France. Google’s technology allows it to “geo-target” ads, a process by which Google targets ads specific to a user’s language and geographic region based on her IP address.⁵³ Google’s trademark complaint policy, which applies one set of rules for the United States and Canada and another set of rules for all other countries, applies to an ad based on the country to which it is geo-targeted. It is unclear whether this scheme will continue to

be adequate in the future.

THE SEARCH FOR A SOLUTION GOES ON

<34> Since cases involving the use of trademark keying have not yet made their way to high courts of either the United States or Europe, national principles have not been established. Some legal analysts predict that the successes of plaintiffs in France will almost certainly encourage a greater number of suits by trademark owners against the major search engines.⁵⁴ If the analysts' predictions are correct, the development of these principles will accelerate in the coming months.

<35> It is important to note that the rest of Europe may not follow France's lead in favoring trademark owners. Despite efforts to harmonize trademark laws across the European Union, only provisions directly addressing the functioning of the European markets have been imposed. National laws in other areas still vary.⁵⁵ The scope of the harmonizing directives is limited, and the national courts of each Member State are free to interpret the laws as they see fit.⁵⁶ Furthermore, the trademark keying cases have simply not arisen in many European countries, or in other countries outside of the EU.

<36> For example, in September 2004, a Hamburg, Germany, state court rejected a trademark keying lawsuit against Google Deutschland brought by Metaspinner Media.⁵⁷ In April 2005, a Vienna court dismissed a preliminary injunction against Google in *Longevity Health v. Google*.⁵⁸ In both cases, the courts found that Google had committed neither trademark infringement nor unfair competition when it sold advertising based on trademarked keywords. Finally, in March 2004, a British court of appeal held that appellant Reed Elsevier did not infringe or create confusion when it tied its Yahoo! advertisements to a trademarked term but did not display the trademarked term in the text of its ad.⁵⁹ In so holding, the court relied on its observation that Internet users know that "all sorts of banners appear when [they do] a search and they are or may be triggered by something in the search" to reject the "fanciful" assertion that likelihood of confusion would result from such use of a trademark. Furthermore, the court noted in dicta that such "invisible use" of a trademark might not be use at all for the purposes of Directive 97/55/EC, the trademark legislation at issue.

<37> Any predictions as to the direction of the American courts in light of the *GEICO* decision would be premature. It may be argued that the search engine-friendly stance taken by the *GEICO* court might merely represent the failure of GEICO to prove its case, largely due to its weak evidence of actual confusion. The upcoming *American Blind* case,⁶⁰ discussed above, may provide the plaintiff with the opportunity to overcome some of the issues that have hampered earlier plaintiffs. As previously noted, Google was denied summary judgment in early 2005 and the case is proceeding to trial.

<38> Nevertheless, as search engine users become more sophisticated "likelihood of confusion," and thus trademark infringement, may become more difficult to prove. Hesitancy by courts to find confusion in trademark keying cases is evident in Judge Berzon's *Brookfield* concurrence and the English *Reed* case.

<39> Even if trademark owners are unsuccessful in their attempts to impose liability on search engines, the next class of defendants in these cases will be the advertisers themselves. Advertisers should exercise caution when selecting keywords to trigger their advertisements, avoiding the selection of any terms that may reasonably infringe on the interests of a trademark owner. Heeding the message of *GEICO*, if they do elect to purchase the trademark of a competitor, they should not display the competitor's trademark in the header or text of the triggered advertisement. Furthermore, advertisers should protect their own interests by monitoring the use of their trademarks by other parties and by purchasing their own trademarks as keywords.⁶¹

PRACTICE POINTERS

- Trademark owners should become familiar with trademark complaint procedures for each search engine and follow through on complaints whenever appropriate.
- Advertisers should continue to leverage targeted advertising methods via search engines, such as targeted links, which have proven to be successful in efficiently and effectively reaching target groups.
- Advertisers should attempt to enhance their placement among paid search results by bidding on their own trademarks as search terms.
- Advertisers should regularly perform trademark searches to evaluate terms that may reasonably conflict with another company's trademark, and either avoid using those terms or select them as "negative terms" where available (e.g., through "negative matching" on Google or "keyword exclusions" on Yahoo!).
- Search engine operators should seek indemnification from advertisers when reserving trademarked terms that advertisers have requested as keywords.
- Search engine operators should dedicate sufficient resources to efficiently and effectively monitor advertising activity and ensure compliance with their trademark policies.

- Trademark owners, advertisers, and search engine operators should remain abreast of emerging law in this area and adjust their policies to provide the greatest flexibility for advertisers: As technology evolves, search engines are more widely used, and courts become more familiar with the relevant technology, courts' understanding of "confusion" and other factors in the trademark realm may change dramatically.

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Footnotes

1. Terrance J. Keenan, University of Washington School of Law, Class of 2006. Thank you to Nicole Nyman and Professor Anita Ramasastry for their input and encouragement.
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15. Olsen, *supra* note 5.
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21. Deborah Fallows, *Search Engine Users*, Pew Internet & Am. Life Project ii (2005), at

http://www.pewinternet.org/pdfs/PIP_Searchengine_users.pdf (last visited Feb. 14, 2005).

22. See, e.g., *Playboy Enters., Inc. v. Netscape Comm. Corp.*, 354 F.3d 1020, 1026-27 (9th Cir. 2004) (finding that expert study "establishes a strong likelihood" of initial interest confusion, but that defendant's critique of expert witness' methods and conclusions may justify reducing the weight afforded to his report); Transcript of Bench Trial at 286, *Government Employees Insurance Company v. Google, Inc.* (E.D. Va. 2004) (No. 1:04cv507) (finding that the plaintiff's expert evidence was insufficient to demonstrate trademark infringement where defendant barred the trademarked term from the titles or text of the sponsored ads), available at <http://www.patentlyobviousblog.com/files/geico1215.txt> (last visited Apr. 26, 2005).
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