

2015

## Initial Interest Confusion "Internet Troika" Abandoned? A Critical Look At Initial Interest Confusion As Applied Online

Connie D. Nichols

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### Recommended Citation

Connie D. Nichols, Initial Interest Confusion "Internet Troika" Abandoned? A Critical Look At Initial Interest Confusion As Applied Online, 17 *Vanderbilt Journal of Entertainment and Technology Law* 883 (2020)  
Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol17/iss4/2>

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**Bluebook 21st ed.**

Connie Davis Nichols, Initial Interest Confusion Internet Troika Abandoned: A Critical Look at Initial Interest Confusion As Applied Online, 17 VAND. J. ENT. & TECH. L. 883 (2015).

**ALWD 7th ed.**

Connie Davis Nichols, Initial Interest Confusion Internet Troika Abandoned: A Critical Look at Initial Interest Confusion As Applied Online, 17 Vand. J. Ent. & Tech. L. 883 (2015).

**APA 7th ed.**

Nichols, C. (2015). Initial interest confusion internet troika abandoned: critical look at initial interest confusion as applied online. Vanderbilt Journal of Entertainment and Technology Law, 17(4), 883-926.

**Chicago 17th ed.**

Connie Davis Nichols, "Initial Interest Confusion Internet Troika Abandoned: A Critical Look at Initial Interest Confusion As Applied Online," Vanderbilt Journal of Entertainment and Technology Law 17, no. 4 (Summer 2015): 883-926

**McGill Guide 9th ed.**

Connie Davis Nichols, "Initial Interest Confusion Internet Troika Abandoned: A Critical Look at Initial Interest Confusion As Applied Online" (2015) 17:4 Vand J Ent & Tech L 883.

**AGLC 4th ed.**

Connie Davis Nichols, 'Initial Interest Confusion Internet Troika Abandoned: A Critical Look at Initial Interest Confusion As Applied Online' (2015) 17(4) Vanderbilt Journal of Entertainment and Technology Law 883

**MLA 9th ed.**

Nichols, Connie Davis. "Initial Interest Confusion Internet Troika Abandoned: A Critical Look at Initial Interest Confusion As Applied Online." Vanderbilt Journal of Entertainment and Technology Law, vol. 17, no. 4, Summer 2015, pp. 883-926. HeinOnline.

**OSCOLA 4th ed.**

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# Initial Interest Confusion “Internet Troika” Abandoned?

## A Critical Look At Initial Interest Confusion As Applied Online

*Connie Davis Nichols\**

### ABSTRACT

*The Ninth Circuit’s opinion in Brookfield Communications, Inc. v. West Coast Entertainment Corp. seemingly created a standard to be applied in trademark infringement cases on the Internet. Despite the cautions contained within the Ninth Circuit’s holding, Brookfield ushered in an era in which many courts placed emphasis on three factors of the “likelihood of confusion” test finding initial interest confusion in many online infringement cases based solely on these three factors. For over a decade, inconsistent application within the Ninth Circuit and other jurisdictions created a disjointed body of case law on initial interest confusion online. The Ninth Circuit’s opinion in Network Automation, Inc. v. Advanced Systems Concepts, Inc. provides some clarity but necessitates a review of the applicable standard when determining infringement online. This Article evaluates and reviews the Ninth Circuit’s opinions in Brookfield and Network Automation and a sampling of circuit cases that have considered initial interest confusion in an online context. This Article suggests that the Ninth Circuit in Network Automation sought to clarify its holding in Brookfield and to reject subsequent holdings that misapplied the likelihood of confusion test in order to eliminate divergent holdings, most evident within the Ninth Circuit itself, regarding the appropriate analysis of trademark infringement online. The Article concludes by arguing that the likelihood of confusion*

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\* Associate Professor of Law at Baylor Law School. I would like to thank the International Trademark Association for the opportunity to participate in the INTA Trademark Scholarship Symposium in Hong Kong on May 12, 2014. Thanks to Peter Yu and Tee Jim Tan and the Symposium’s participants for their insights and suggestions. Finally, thank you to Cody Hill for his outstanding research assistance and the editors of the VANDERBILT JOURNAL OF ENTERTAINMENT & TECHNOLOGY LAW.

factors are flexible enough to address emerging technology without the cookie-cutter approach created by the misapplication or interpretation of Brookfield that was the “Internet Troika.”

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I. INTRODUCTION

“We must be acutely aware of excessive rigidity when applying the law in the Internet context; emerging technologies require a flexible approach.”<sup>1</sup>

Since the US Court of Appeals for the Ninth Circuit’s opinion in Brookfield Communications, Inc. v. West Coast Entertainment Corp. applied the initial interest confusion doctrine to the Internet, trademark holders have wielded their rights to an extent that has created an environment of what some have labeled “bullying,”<sup>2</sup> and others have classified as “trademark trolling.”<sup>3</sup> Indeed, the rigid

1. Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp., 174 F.3d 1036, 1054 (9th Cir. 1999).

2. The United States Patent and Trademark Office (USPTO) defines trademark bullying as “a trademark owner that uses its trademark rights to harass and intimidate another business beyond what the law might be reasonably interpreted to allow.” See Request for Comments: Trademark Litigation Tactics, U.S. PAT. & TRADEMARK OFF., http://www.uspto.gov/trademarks/litigation\_study.jsp (last modified Jan. 31, 2012, 10:34 AM).

3. “Trademark trolling,” like bullying, is often used to refer to vexatious litigation or claiming rights greater than those to which the trademark holder is entitled. This moniker was patterned after the other intellectual property “trolls” in patents and copyrights. See Arty, Rajendra, Trademark Trolls—A New Phenomenon?, INTELL. PROP. MAG., Dec. 3, 2012, at 30.

formula that the court in *Brookfield* sought to avoid evolved precisely into the standard procedure for online trademark infringement in many jurisdictions.<sup>4</sup> The last decade of courts' analyses of alleged trademark infringement online has been marked by the use of the "Internet Troika," a standard originating from the Ninth Circuit's ruling in *Brookfield*.<sup>5</sup> The various issues created by *Brookfield* including the disjointed case law amongst the circuits on initial interest confusion, the inconsistent applications by courts within the Ninth Circuit, and the Ninth Circuit's decision in *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*<sup>6</sup> warrant a review of the standard for determining trademark infringement online. This Article evaluates the Ninth Circuit's opinion in *Brookfield* and compares it to the court's most recent opinion in *Network Automation*.<sup>7</sup> This Article suggests that the court in *Network Automation* sought to clarify its limited holding in *Brookfield* and to disavow the holdings in subsequent cases in order to dispel the rampant confusion amongst courts, most evident within the Ninth Circuit itself, regarding the appropriate analysis of trademark infringement online. The *Network Automation* court pressed for clarity by reemphasizing the necessity of a full analysis of the traditional likelihood of confusion factors, articulated in *AMF Inc. v. Sleekcraft Boats*,<sup>8</sup> when determining trademark infringement online. Part II of the Article provides a brief overview of trademark law and infringement generally.<sup>9</sup> Part III provides a short history of the 1962 Amendments to the Lanham Act and traces the origin of initial interest confusion in the brick-and-mortar context.<sup>10</sup> Part IV outlines the development of the Internet Troika and initial interest confusion in an online context.<sup>11</sup> Part V provides an in-depth review of seventy-four post-*Brookfield* cases, charting each court's determination of initial interest confusion in the Internet context.<sup>12</sup>

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4. See *id.*

5. The "Internet Troika" is the three *AMF Inc. v. Sleekcraft Boats* factors that the Ninth Circuit in *Brookfield* used to determine whether there was a likelihood of confusion in the Internet context. Those factors as outlined by the court are: "(1) the similarity of the marks; (2) the relatedness of the goods and services offered; and (3) the simultaneous use of the Internet as a marketing channel." *Garden of Life, Inc. v. Letzer*, 318 F. Supp. 2d 946, 963-64 (C.D. Cal. 2004).

6. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137 (9th Cir. 2011).

7. See *infra* Part IV, Part V.

8. 599 F.2d 341 (9th Cir. 1979).

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

12. See *infra* Part V.

Part VI discusses the Ninth Circuit's most recent decision citing initial interest confusion and critically assesses the court's assertion that *Brookfield* has been misinterpreted based upon a reading of the *Brookfield* and *Playboy Enterprises, Inc. v. Netscape Communications Corp.*<sup>13</sup> opinions.<sup>14</sup> The Article concludes by arguing that a cookie-cutter application of a set of factors is not appropriate in determining likelihood of confusion in the trademark analysis. Instead, it is important to always evaluate all factors in the likelihood of confusion test and recognize that the factors articulated in each circuit are not exhaustive but rather provide a guide for reviewing claims of trademark infringement on a case-by-case basis.

## II. TRADEMARK AND INFRINGEMENT GENERALLY

It is important, before beginning a discussion of the initial interest confusion doctrine, to start with a brief overview of trademark law. Simply stated, a trademark is a word, phrase, symbol, design, or other feature used in commerce to distinguish one's goods or services.<sup>15</sup> Section 32(1) of the Lanham Act<sup>16</sup> defines infringement as:

Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,

shall be liable in a civil action by the registrant for the remedies hereinafter provided.<sup>17</sup>

Thus, the rights obtained in a trademark are limited property rights that only protect continued use of a mark in commerce against uses that create a likelihood of consumer confusion.<sup>18</sup> Indeed, the Supreme

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

14. *See infra* Part VI.

15. 15 U.S.C. § 1127 (2012).

16. Lanham (Trademark) Act, Pub. L. No. 79-489, § 32(1), 60 Stat. 427, 437 (1946) (codified as amended at 15 U.S.C. § 1114 (2012)).

17. 15 U.S.C. § 1114(1).

18. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004) ("The holder of a registered mark (incontestable or not) has a civil action against anyone employing an imitation of it in commerce when 'such use is likely to cause confusion, or to cause mistake, or to deceive.'" (quoting 15 U.S.C. § 1114(1)(a))).

Court provided the basic objectives of trademark law in *Qualitex Co. v. Jacobson Products Co.*<sup>19</sup> The Court stated simply that:

[T]rademark law, by preventing others from copying a source-identifying mark, “reduce[s] the customer’s costs of shopping and making purchasing decisions,” for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past. At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.<sup>20</sup>

As such, “the likelihood of confusion” standard evolved to determine when a trademark holder’s rights have been infringed.

In determining whether a user has infringed, after establishing ownership of a valid trademark and use in commerce, courts historically employ a multifactor likelihood of confusion test.<sup>21</sup> The first court to employ the multifactor “likelihood of confusion” test was the Second Circuit in *Polaroid Corp. v. Polarad Electronics Corp.*<sup>22</sup> The court in *Polaroid* found the following factors instructional in determining whether a particular use of a mark is likely to cause consumer confusion and, therefore, infringing the holder’s rights to the trademark:

- (1) the strength of the plaintiff’s mark;
- (2) the similarity of plaintiff’s and defendant’s marks;
- (3) the competitive “proximity of the products;”
- (4) the likelihood that plaintiff will “bridge the gap” and offer a product like defendant’s;
- (5) “actual confusion” between products;
- (6) good faith on the defendant’s part;
- (7) “the quality of defendant’s product;” and
- (8) “the sophistication of the buyers.”<sup>23</sup>

Each circuit subsequently adopted its own likelihood of confusion test, which differed somewhat from the *Polaroid* factors.<sup>24</sup>

19. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).

20. *Id.* at 163–64 (citations omitted) (quoting 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.01[2] (3d ed. 1994)).

21. See *infra* note 23 and accompany text (identifying the multifactor “likelihood of confusion” test recognized by each circuit); see also Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006) (empirically analyzing and comparing the “likelihood of confusion” test utilized by each circuit).

22. *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

23. *Id.*

24. FIRST CIRCUIT: “(1) the similarity of the marks; (2) the similarity of the goods [or services]; (3) the relationship between the parties’ channels of trade; (4) the relationship between the parties’ advertising; (5) the classes of prospective purchasers; (6) evidence of actual confusion; (7) defendant’s intent in adopting the mark; [and] (8) the strength of plaintiff’s mark.” *Star Fin. Servs., Inc. v. AASTAR Mortg. Corp.*, 89 F.3d 5, 10 (1st Cir. 1996) (quoting *Astra Pharm. Prods., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1205 (1st Cir. 1983)).

THIRD CIRCUIT: "(1) the degree of similarity . . . ; (2) the strength of the owner's mark; (3) the price of goods and other factors indicative of the care and attention expected of consumers when making a purchase; (4) the length of time defendant has used the mark without evidence of actual confusion arising; (5) the intent of defendant in adopting the mark; (6) evidence of actual confusion; (7) whether the goods, though not competing are marketed through the same channels of trade and advertised through the same media; (8) the extent to which the targets of the parties' sales efforts are the same; (9) the relationship of the goods in the minds of consumers because of the similarity of function; [and] (10) other facts suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant's market or that he is likely to expand into that market." *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir. 1983) (citing *Scott Paper Co. v. Scott's Liquid Gold Inc.*, 589 F.2d 1225, 1229 (3d Cir. 1978)).

FOURTH CIRCUIT: "a) the strength or distinctiveness of the [plaintiff's] mark; b) the similarity of the two parties' marks; c) the similarity of the goods/services the marks identify; d) the similarity of the facilities the two parties use in their businesses; e) the similarity of advertising used by the two parties; f) the defendant's intent; and g) actual confusion." *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984) (citing *Sun-Fun Prods. V. Suntan Research & Dev.*, 656 F.2d 186, 189 (5th Cir. 1981)).

FIFTH CIRCUIT: "(1) the type of the trademark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or services, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant's intent, and (7) any evidence of actual confusion." *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 194 (5th Cir. 1998) (citing *Conan Props., Inc. v. Conans Pizza, Inc.*, 752 F.2d 145, 149 (5th Cir. 1985)).

SIXTH CIRCUIT: "1. strength of the plaintiff's mark; 2. relatedness of the goods; 3. similarity of the marks; 4. evidence of actual confusion; 5. marketing channels used; 6. likely degree of purchaser care; 7. Defendant's intent in selecting the mark; [and] 8. likelihood of expansion of the product lines." *Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 648 (6th Cir. 1982) (quoting *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979)).

SEVENTH CIRCUIT: "[(1)] the type of trademark, [(2)] the similarity of design, [(3)] similarity of products, [(4)] identity of retail outlets and purchasers, [(5)] identity of the advertising media used, [(6)] the alleged infringer's intent, and [(7)] actual confusion." *Schwinn Bicycle Co. v. Ross Bicycles, Inc.*, 870 F.2d 1176, 1185 (7th Cir. 1989) (quoting *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 381-82 (7th Cir. 1976)).

EIGHTH CIRCUIT: "(1) the strength of the owner's mark; (2) the similarity between [the parties'] marks; (3) the alleged infringer's intent to 'pass off' its goods as those of the trademark owner in adopting the mark; (4) the type of product, its costs, and the conditions of purchase; (5) the products' competitive proximity; and (6) incidents of actual confusion." *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 626 (8th Cir. 1987) (citing *SquirtCo. v. Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir. 1980)).

NINTH CIRCUIT: "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. type of goods and the degree of care likely to be exercised by the purchaser; 7. Defendant's intent in selecting the mark; and 8. likelihood of expansion of the product lines." *Sleekcraft*, 599 F.2d at 348-49.

TENTH CIRCUIT: (a) the degree of similarity between [the marks] in (i) appearance; (ii) pronunciation . . . ; (iii) verbal translation of the pictures or designs involved; (iv) suggestion; (b) the intent of the actor in adopting the designation; (c) the relation in use and manner of marketing between the goods or services marketed by the actor and those marketed by the other; [and] (d) the degree of care likely to be exercised by purchasers of the goods or services involved. *Beer Nuts, Inc. v. Clover Club Foods Co.*, 711 F.2d 934, 940 (10th Cir. 1983) (quoting RESTATEMENT OF TORTS § 729 (1938)).



While each circuit's factors vary slightly, circuits agree that no one factor is dispositive. Rather, all circuits maintain that the factors must be balanced in light of the individual facts of each case.<sup>25</sup> Indeed, a finding of a likelihood of confusion after the balancing of the factors is necessary to establish infringement under the Lanham Act.<sup>26</sup>

The use of a multifactor likelihood of confusion test has thrived and has been the basis in determining other forms of confusion that constitute an infringement of trademark rights. Despite no court yet employing additional factors after its circuit developed its multifactor test, courts continue to maintain that the multifactor list is not exhaustive and is only demonstrative of the factors to consider when determining infringement. While the focus of the trademark infringement analysis centers on prevention of certain types of consumer confusion and consumer fraud, courts nonetheless have found that trademark law also serves other important policies such as: (1) increasing the quality of products by incentivizing investments in marks that are readily identified by consumers, and (2) protecting the goodwill investment of a mark holder.<sup>27</sup> The introduction of the "initial interest confusion" doctrine exemplified the courts' use of the

ELEVENTH CIRCUIT: "(1) type of mark, (2) similarity of mark, (3) similarity of the products the marks represent, (4) similarity of the parties' retail outlets and customers, (5) similarity of advertising, (6) defendant's intent and (7) actual confusion." *Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc.*, 122 F.3d 1379, 1382 (11th Cir. 1997) (citing *Dieter v. B & H Indus. of Sw. Fla., Inc.*, 880 F.2d 322, 326 (11th Cir. 1989)).

FEDERAL CIRCUIT: "(1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. (2) The similarity or dissimilarity and nature of the goods . . . described in an application or registration or in connection with which a prior mark is in use. (3) The similarity or dissimilarity of established, likely-to-continue trade channels. (4) The conditions under which and buyers to whom sales are made, i.e. 'impulse' v. careful, sophisticated purchasing. (5) The fame of the prior mark . . . (6) The number and nature of similar marks in use on similar goods. (7) The nature and extent of any actual confusion. (8) The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion. (9) The variety of goods on which a mark is or is not used . . . (10) The market interface between the applicant and the owner of a prior mark . . . (11) The extent to which applicant has a right to exclude others from use of its mark on its goods. (12) The extent of potential confusion . . . (13) Any other established fact probative of the effect of use." *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003) (quoting *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973)).

25. See, e.g., *Natural Organics, Inc. v. Nutraceutical Corp.*, 426 F.3d 576, 578 (2d Cir. 2005).

26. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780 (1992).

27. See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1896 (2007) (suggesting that courts "felt social and economic pressure to broaden their understanding of the goodwill embodied in a trademark"); see also Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 525-27 (1988) (noting that trademarks exist to enhance consumer decisions and to create incentives for firms to produce desirable products).

multifactor likelihood of confusion test to condemn conduct that impacts the above-referenced policies of trademark protection.<sup>28</sup>

### III. EXPANSION BEYOND POINT OF SALE AND SOURCE CONFUSION: THE INTRODUCTION OF INITIAL INTEREST CONFUSION

Likelihood of confusion, as discussed in Part II, is the essential element of a trademark infringement action. It has been generally accepted as the “heuristic device to assist in determining whether confusion exists.”<sup>29</sup> Over the years, however, the concept of likelihood of confusion has expanded significantly from its origins. Originally, the basis for trademark infringement stemmed only from claims that purchasers were likely to be confused or deceived as to the origins or source of the products. In 1962, the Lanham Act was amended to delete the words “purchasers” and “source or origin” from the definition of infringement.<sup>30</sup> The legislative history suggests that amendment was intended to make the likelihood of confusion analysis the focal point of trademark infringement and not the product purchase.<sup>31</sup> In reviewing the legislative intent of the 1962

28. See Connie Davis Powell, *We All Know It's a Knock-Off! Re-Evaluating the Need for the Post-Sale Confusion Doctrine in Trademark Law*, 14 N.C. J.L. & TECH. 1, 8 (2012) (explaining that contemporary trademark policy can be divided into two core approaches: consumer protection and protection of the goodwill of the mark).

The goodwill approach seeks to protect the investment in a trademark by the owner from misappropriation and trade diversion. This approach does not focus on confusion by consumers, but rather seeks to protect the investment of the trademark owner. The protection of the goodwill developed in a trademark is also assured in the Lanham Act by providing a qualified property right to the owner for as long as the mark is used in commerce to designate the source of goods and services. The two approaches of trademark policy are embodied in the Lanham Act's definition of infringement. The Lanham Act protects the goodwill of the trademark by providing the remedy to the trademark holder for unauthorized use of a trademark. Likewise, the Lanham Act guards against deception in the marketplace and thereby protects the consumer.

*Id.* at 8–9 (citations omitted); see also William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269–70 (1987) (arguing that the consumer protection and the goodwill approach work concurrently to create an efficient marketplace by lowering search costs for the consumer and providing an incentive to the brand holder to invest monies in the brand); Marshall A. Leaffer, *The New World of International Trademark Law*, 2 MARQ. INTELL. PROP. L. REV. 1, 5–6 (1998).

A reliable, stable, and efficiently structured trademark system benefits consumer and business interests alike. Trademarks serve the interests of consumers because they reduce search costs and allow buyers to make rational purchasing and repurchasing decisions with speed and assurance [while simultaneously creating] incentives for firms to create and market products of desirable qualities, particularly when these qualities are not observable before purchase.

*Id.*

29. *Sullivan v. CBS Corp.*, 385 F.3d 772, 778 (7th Cir. 2004).

30. See S. REP. NO. 87-2107 (1962), reprinted in 1962 U.S.C.C.A.N. 2844, 2850.

31. See *id.* at 2844, 2847, 2850–51. “One change is the omission of the underlined words from the following quotation from clause (a): ‘on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source or origin of such goods or

amendment, many courts found the amendment to extend the reach of the Lanham Act beyond mere purchasers.<sup>32</sup> Thus, courts began to recognize additional types of confusion such as pre-sale confusion and post-sale confusion—types of confusion that are based upon timing, but governed by the established likelihood of confusion test.<sup>33</sup> Indeed, this rationale by the courts allowed for the introduction of “initial interest confusion,” another concept based upon timing of the confusion.

Building upon the 1962 amendment to the Lanham Act and the expansion theory that protection reached beyond purchasers and the point of sale, the concept of pre-sale or initial interest confusion<sup>34</sup> was introduced by the Second Circuit in *Grottrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*.<sup>35</sup> In establishing the concept of initial interest confusion, the Second Circuit was tasked with sorting through the details of an intricate relationship between two piano companies, ultimately finding that there was intent by Grottrian-Steinweg to capitalize on the Steinway trademark by its adoption of the “Steinweg”<sup>36</sup> name and slogan.<sup>37</sup> While the court found that no consumer would believe at the time of purchase of a Grottrian-Steinweg piano that they were in fact purchasing a Steinway piano, the court explained “the harm to Steinway . . . is the likelihood that a consumer, hearing the ‘Grottrian-Steinweg’ name and thinking it has some connection with ‘Steinway’, would consider it on that basis.”<sup>38</sup> The court continued its discussion by stating plainly that “[t]he ‘Grottrian-Steinweg’ name . . . would attract potential customers

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services.” *Id.* at 2850 (emphasis added). “The purpose of the proposed change is to coordinate the language here with that used elsewhere and to omit the word ‘purchasers’, since the provision actually relates to potential purchasers as well as to actual purchasers. The word ‘purchasers’ is eliminated so as to avoid the possibility of misconstruction of the present language of the statute.” *Id.* at 2847.

32. See *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 295 (3d Cir. 2001).

33. See *id.*

34. The Ninth Circuit has been often credited with creating the idea of initial interest confusion. However, initial interest confusion dates back to 1975. See Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 108, 109 n.10 (2005) (noting that the court-created initial interest confusion doctrine “was first adopted over thirty years ago and has been vastly expanded in recent years with the advent of the Internet”).

35. See *Grottrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331, 1342 (2d Cir. 1975) (finding actual confusion at point of purchase was not necessary for a likelihood of confusion analysis for initial interest confusion).

36. The history of both companies’ names merited discussion in the case. The owners of the Steinway had changed their name from Steinweg to Steinway upon immigrating to the United States from Germany. Indeed, one of the sons remained in Germany and continued to make pianos and sold the company to Grottrian and partners. See *id.* at 1333–34.

37. See *id.* at 1342.

38. See *id.*; see also *supra* note 36 and accompanying text (explaining the significance of the history of the companies’ names).

based on the reputation built up by Steinway . . . .”<sup>39</sup> The court noted that the initial interest confusion would arise from the businesses’ similar names. Thus, in *Grotrian*, the Second Circuit created “pre-sale” or “initial interest” confusion.<sup>40</sup>

The Second Circuit in *Mobil Oil Corp. v. Pegasus Petroleum Corp.* further honed the concept articulated in *Grotrian*.<sup>41</sup> Here, the court opined that the use of the name “Pegasus” by the defendant was an impermissible trade upon the reputation built by Mobil Oil, who had adopted and used the Pegasus as its company’s symbol.<sup>42</sup> In determining whether there was infringement by the defendant, the court found that while no third party would do business with Pegasus Petroleum believing it to be related to Mobil Oil, “an oil trader might listen to a cold phone call from Pegasus Petroleum . . . when otherwise he might not, because of the possibility that Pegasus Petroleum is related to Mobil.”<sup>43</sup> This pre-sale confusion or initial interest confusion, according to the court, “works a sufficient trademark injury.”<sup>44</sup>

Not all circuits were quick to adopt the initial interest confusion doctrine. The Federal Circuit in *Weiss Associates, Inc. v. HRL Associates, Inc.* stated: “[t]his court . . . does not address or embrace the theory of initial confusion.”<sup>45</sup> Similarly, the First Circuit declined to find infringement based upon initial, fleeting confusion in *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*<sup>46</sup> In *Astra*, Astra Pharmaceutical attempted to enjoin Beckman from using “ASTRA” on a computerized blood analysis machine.<sup>47</sup> In determining that there was no likelihood of confusion, the court used its eight-factor likelihood of confusion test.<sup>48</sup> The key factor, the court found, was the sophistication of the purchasers.<sup>49</sup> The court determined that the cost of the equipment and the fact that the equipment was sold only to hospital chemistry labs eliminated any likelihood of confusion.<sup>50</sup> The court acknowledged that there was a possibility of brief confusion when a nurse or technician familiar with

39. *Grotrian*, 523 F.2d at 1342. Again, the court noted that the pronunciation put forth made the two names sound confusingly similar. *Id.*

40. *See id.*

41. *See Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 260 (2d Cir. 1987).

42. *See id.*

43. *Id.*

44. *See id.*

45. *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 1549 (Fed. Cir. 1990).

46. *See Astra Pharm. Prods., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1207-08 (1st Cir. 1983).

47. *See id.* at 1203.

48. *See id.* at 1205.

49. *See id.* at 1206.

50. *See id.*

the blood analyzer encounters a representative from the Astra Pharmaceutical company.<sup>51</sup> However, the court declined to find sufficiently actionable confusion based upon initial interest.<sup>52</sup>

Prior to the Internet line of cases, there were only a dozen or so cases reported finding trademark infringement based upon initial interest confusion.<sup>53</sup> Indeed, the courts in these reported cases were not concerned with actual confusion or the protection of the consumer from deception but rather the protection of the goodwill developed by a company in each of their respective trademarks.<sup>54</sup> Prior to the Internet line of cases, courts only recognized the doctrine of initial interest confusion in two limited circumstances: (1) when the dispute involved companies that provided similar goods or services,<sup>55</sup> or (2) where companies market to the same limited customer base.<sup>56</sup> It is worth noting that, even in these limited circumstances, courts did not abandon the multifactor test. And, in most instances, courts provided an in-depth review of each of the factors as it related to the specifics of the case at bar.

#### IV. INITIAL INTEREST CONFUSION AND THE INTERNET—*BROOKFIELD* AND THE INTERNET TROIKA

The first case to apply the initial interest confusion doctrine to the Internet was *Brookfield*.<sup>57</sup> In *Brookfield*, the Ninth Circuit created a simplified test to determine whether the use of a trademark as a metatag was likely to cause consumer confusion.<sup>58</sup> Indeed, the Ninth

51. See *id.* at 1207.

52. See *id.* In so finding, the court suggested that only confusion that would affect “the ultimate decision of a purchaser whether to buy a particular product” is actionable and the sophistication of the purchaser dictated a finding of no likelihood of confusion. See *id.*

53. See Rothman, *supra* note 34, at 122–24, 140, 158.

54. See Jason Allen Cody, *Initial Interest Confusion: What Ever Happened to Traditional Likelihood of Confusion Analysis?*, 12 FED. CIRCUIT B.J. 643, 660 (2003) (noting that courts that have recognized initial interest confusion have done so “to prevent a junior user of a mark from misappropriating the goodwill of a trademark owner and from securing an advantage otherwise unavailable”).

55. See generally *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455 (4th Cir. 1996) (finding likelihood of confusion with competing hosiery products: L’eggs Looks and Legs Looks); *McNeil-PPC, Inc. v. Guardia Drug Co.*, 984 F. Supp. 1066 (E.D. Mich. 1997) (granting injunctive relief for likelihood of confusion for trade dress confusion between ULTRA LACTAID and ARBOR ULTRA LACTASE); *Blockbuster Entm’t Grp. v. Layco, Inc.*, 869 F. Supp. 505 (E.D. Mich. 1994) (finding likelihood of confusion between VIDEOBUSTER and BLOCKBUSTER); *Jordache Enters., Inc. v. Levi Strauss & Co.*, 841 F. Supp. 506 (S.D.N.Y. 1993) (evaluating likelihood of confusion in the context of two popular jean makers).

56. See, e.g., *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188 (5th Cir. 1998); *Porsche Cars N. Am., Inc. v. Manny’s Porshop, Inc.*, 972 F. Supp. 1128 (N.D. Ill. 1997); *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200 (N.D. Ga. 1995).

57. *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036 (9th Cir. 1999).

58. See *id.* at 1054–55. The litigation involved the use of the term “MovieBuff” as a domain name by West Coast Entertainment for its video rental stores. *Brookfield*, which made

Circuit, in reviewing the facts of the case, determined that the use of the traditional eight-factor test was not well suited for analyzing the issue.<sup>59</sup> In deciding the issue, the court used what has been termed the “Blockbuster Analogy” to justify its rationale for its finding. The court opined:

Using another’s trademark in one’s metatags is much like posting a sign with another’s trademark in front of one’s store. Suppose West Coast’s competitor (let’s call it “Blockbuster”) puts up a billboard on a highway reading—“West Coast Video: 2 miles ahead at Exit 7”—where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast’s store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there. Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by West Coast. Nevertheless, the fact that there is only initial consumer confusion does not alter the fact that Blockbuster would be misappropriating West Coast’s acquired goodwill.<sup>60</sup>

The court then proceeded to consider only the following *Sleekcraft* factors: “(1) the virtual identity of marks, (2) the relatedness of plaintiff’s and defendant’s goods, and (3) the simultaneous use of the Web as a marketing channel” to find a likelihood of confusion based on the initial interest confusion doctrine.<sup>61</sup> These three factors later became known as the “Internet Troika.” In making this determination, the court stated:

Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using “moviebuff.com” or “MovieBuff” to divert people looking for “MovieBuff” to its web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark.<sup>62</sup>

The Ninth Circuit’s holding in *Brookfield* was the beginning of a long line of cases establishing what seemingly became the standard for online trademark infringement.<sup>63</sup> But while the *Brookfield* holding

“MovieBuff” software for the entertainment industry, learned of this use by West Coast Entertainment. Brookfield subsequently obtained a federal registration for “MovieBuff.” Brookfield instituted suit shortly thereafter, alleging that West Coast Entertainment’s use of MovieBuff in its metatags and as a domain name infringed Brookfield’s trademark. *See id.* at 1043.

59. *See id.* at 1062 n.24.

60. *Id.* at 1064.

61. *Id.* at 1054 n.16 (quoting *Comp Exam’r Agency, Inc. v. Juris, Inc.*, No. 96-0213, 1996 WL 376600, at \*1 (C.D. Cal. Apr. 26, 1996)).

62. *Id.* at 1062.

63. *See, e.g.*, *PACCAR Inc. v. TeleScan Techs., LCC*, 319 F.3d 243, 253 (6th Cir. 2003) (citing *Brookfield*, 147 F.3d at 1062, to support the conclusion that initial interest confusion is actionable); *Promatek Indus., Ltd., v. Equitrac Corp.*, 300 F.3d 808, 812 (7th Cir. 2002) (adopting *Brookfield*, 147 F.3d at 1062); *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 293 (3d Cir. 2001) (citing *Brookfield*, 147 F.3d at 1057, to support the conclusion that initial interest confusion is actionable); *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456,

was widely embraced as precedent for initial interest confusion online,<sup>64</sup> some courts remained reluctant to fully adopt the holding without additional consideration.<sup>65</sup> Indeed, a member of the Ninth Circuit seemed troubled by *Brookfield's* wholesale adoption. In a concurring opinion in *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, Judge Berzon questioned the validity and impact of the Ninth Circuit's ruling in *Brookfield*.<sup>66</sup> Writing separately, Judge Berzon expressed her concern that the *Brookfield* holding "would expand the reach of initial interest confusion from situations in which a party is initially confused to situations in which a party is never confused."<sup>67</sup> Judge Berzon continued by writing that

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465 (7th Cir. 2000) (adopting *Brookfield*, 147 F.3d at 1062, 1064); Faegre & Benson, LLP v. Purdy, 367 F. Supp. 2d 1238, 1246–47 (D. Minn. 2005) (supporting *Brookfield*, 147 F.3d at 1066, but allowing for fair use of plaintiff's trademark in context of criticism); Bayer HealthCare LLC v. Nagrom, Inc., 72 U.S.P.Q.2D 1751, 1755 (D. Kan. 2004) (citing *Brookfield*, 147 F.3d at 1057, 1062, as basis for liability under initial interest confusion theory); Comerica Inc. v. Fifth Third Bankcorp, 282 F. Supp. 2d 557, 573 (E.D. Mich. 2003) (citing *Brookfield*, 147 F.3d at 1057, for finding that there is increased chance of initial interest confusion on Internet); Bayer Corp. v. Custom Sch. Frames, LLC, 259 F. Supp. 2d 503, 509 (E.D. La. 2003) (citing *Brookfield*, 147 F.3d at 1057, 1062, to support its holding that use of trademark terms in metatags was infringing); Northland Ins. Cos. v. Blaylock, 115 F. Supp. 2d 1108, 1120 (D. Minn. 2000) (citing *Brookfield*, 147 F.3d at 1062, with approval but limiting case's holding to circumstances in which defendant stands to benefit financially); BigStar Entm't, Inc. v. Next Big Star, Inc., 105 F. Supp. 2d 185, 210–11 (S.D.N.Y. 2000) (indicating approval of *Brookfield*, 147 F.3d at 1056, while citing and distinguishing facts); N. Light Tech., Inc. v. N. Lights Club, 97 F. Supp. 2d 96, 115 (D. Mass. 2000) (citing *Brookfield*, 147 F.3d at 1057, to support the conclusion that trademark infringement is more likely online than offline); OBH, Inc. v. Spotlight Magazine, Inc., 86 F. Supp. 2d 176, 190 (W.D.N.Y. 2000) (citing *Brookfield*, 147 F.3d at 1062–63, to support application of initial interest confusion to domain name); Shepard's Co. v. Thomson Corp. *ex rel.* W. Grp. Div., No. C-3-99-318, 1999 WL 777944, at \*6 (S.D. Ohio July 15, 1999) (citing *Brookfield*, 147 F.3d at 1062–65, for initial interest confusion theory); N.Y. State Soc'y of Certified Pub. Accountants v. Eric Louis Assocs., Inc., 79 F. Supp. 2d 331, 342 (S.D.N.Y. 1999) (citing *Brookfield*, 147 F.3d at 1062, to support use of initial interest confusion in metatags and domain name cases).

64. See 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 23:5–6 (4th ed. 2011) (embracing initial interest confusion generally and the *Brookfield* holding).

65. See, e.g., *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 466 (E.D.N.Y. 2011) ("The Court agrees with the criticism that the harm caused by initial interest confusion in the internet context is minimal as 'with one click of the mouse and a few seconds delay, a viewer can return to the search engine's results and resume searching for the original website.'" (quoting *Bihari v. Gross*, 119 F. Supp. 2d 309, 320 n.15 (S.D.N.Y. 2000))); *J.G. Wentworth, S.C.C. Ltd. P'ship v. Settlement Funding LLC*, No. CIV.A.06-0597, 2007 WL 30115, at \*7 (E.D. Pa. Jan. 4, 2007) (citations omitted) ("I respectfully disagree with the Ninth Circuit's conclusion in *Brookfield*."); *Tdata Inc. v. Aircraft Tech. Publishers*, 411 F. Supp. 2d 901, 908 n.8 (S.D. Ohio 2006) ("Although the Sixth Circuit has noted the import the Ninth Circuit assigns to these 'three most important factors,' the Sixth Circuit has arguably not expressly adopted the Internet trinity approach as controlling. Because the three factors are subsumed in the traditional eight-factor approach, the Court assigns the former approach some persuasive—but not controlling—weight." (quoting *PACCAR*, 319 F.3d 254–55)).

66. See *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1034–36 (9th Cir. 2004) (Berzon, J., concurring).

67. *Id.* at 1034.

the holding in *Brookfield* could lead to a finding of infringement “when a consumer is never confused as to source or affiliation, but instead knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the list produced by the search engine so informs him.”<sup>68</sup>

Notwithstanding the caution and criticism expressed by Judge Berzon of *Brookfield* in *Playboy*, the Internet Troika became the *sine qua non* for trademark infringement online. Initial interest confusion became widely accepted as a cause of action citing *Brookfield* as support. While courts seemed eager to accept the departure from the traditional likelihood of confusion test, there was not a consensus among academics as to the legitimacy of the abbreviated likelihood of confusion test.

Scholar Jennifer Rothman expressed skepticism of both the *Brookfield* holding, and its unquestioned adoption, in *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*.<sup>69</sup> In the article, Rothman pinpoints the deficiencies in the initial interest confusion doctrine as applied to the Internet and advocates for a solution that considers (a) all factors of the likelihood of confusion test and (b) whether there is more than de minimis confusion of a potential customer of the product.<sup>70</sup> Rothman maintains that the change in technology and the overall sophistication of consumers necessitates a new rule.<sup>71</sup> Notwithstanding the criticism of the implications of permitting *Brookfield* to subsist as controlling, *Brookfield* remained the standard for allegations of online trademark infringement.<sup>72</sup>

68. *Id.* at 1034–35.

69. *See* Rothman, *supra* note 34.

70. *See id.* at 179 (arguing that courts should eliminate initial interest confusion and reclaim pre-sale confusion); *see also id.* at 183 (“Limiting actionable confusion to that which is more than de minimis allows for the use of disclaimers to remedy short-lived pre-sale confusion.”).

Allowing a finding of trademark infringement on the basis of mere “initial interest” does not promote any of the goals of trademark law. One of the greatest dangers of initial interest confusion is that it is often used to deny consumers access to information about the goods and services offered by competing sellers. Such information is crucial for the efficient operation of competitive markets and protects the public’s ability to choose between reasonably-priced products. Application of initial interest confusion harms consumers by eliminating such choices and information without any compensating benefit.

*Id.* at 129.

71. *See id.* at 179–89.

72. It is important to note that despite major criticism of the holding in *Brookfield*, a subsequent practice utilizing technology to link trademarks with search results prompted courts and scholars to shift in focus from initial interest confusion to whether use of trademarks as keywords to trigger sponsored advertising constituted a “use in commerce” of the trademark. *See generally* Uli Widmaier, *Use, Liability and the Structure of Trademark Law*, 33 HOFSTRA L. REV. 603 (2004) (discussing the plethora of litigation on the use of keywords and trademark “use” generally).



Similarly, Eric Goldman criticized the initial interest confusion doctrine as applied in the Internet context in *Deregulating Relevancy in Internet Trademark Law*.<sup>73</sup> Referring to the emergence of the initial interest confusion doctrine in online trademark disputes as “[t]rademark law’s assault on the Internet,” Goldman noted that without limitations, “trademark law has the capacity to counterproductively destroy the Internet’s utility for everyone.”<sup>74</sup>

While the criticism of the *Brookfield* holding and adoption of the trinity of factors to establish Internet trademark infringement have been noted, Graeme Dinwoodie sought to provide insight into the rationale for what today seems illogical for establishing trademark infringement online.<sup>75</sup> Dinwoodie writes:

The court’s willingness to find confusion based on these three factors alone would appear to reflect an enhanced concern that consumer confusion might easily result online given the popularization of the use of the Internet without concomitant public understanding of the medium.<sup>76</sup>

Dinwoodie submits that the Ninth Circuit, and subsequently other circuits, has taken a paternalistic approach to trademark law policy, finding that consumers need protection in this new medium of communication.<sup>77</sup> The courts, in adopting the Internet Troika, expanded trademark protection online through “reactive lawmaking”—the fiction identified in Dinwoodie’s work as adjustments of pre-existing laws to new social norms.<sup>78</sup> According to Dinwoodie:

Numerous judicial expansions of trademark law have been effected by generalized reference to the need to protect consumer association notwithstanding that traditional rules of trademark law had not previously offered relief in the factual circumstances in question.<sup>79</sup>

This, of course, is the case with initial interest confusion online. Indeed, the Ninth Circuit stated as much in *GoTo.com v. Walt Disney*, as it continued to promulgate its review of online infringement using only three factors—“(1) the similarity of the marks, (2) the

73. Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 509 (2005).

74. *Id.* (“[T]rademark law could jeopardize the Internet’s potential as an information resource and a catalyst for competition [because] emerging trademark law doctrines have allowed trademark owners to excise socially beneficial content and to take unprecedented control over their channels of distribution.”).

75. See Graeme Dinwoodie, *Trademark Law and Social Norms* (Sept. 5, 2006) (unpublished manuscript) (on file with Iowa Law Review), available at <http://www.oiprc.ox.ac.uk/papers/EJWP0207.pdf>.

76. *Id.* at 16.

77. See *id.* at 17.

78. See *id.* at 12–18. Reactive lawmaking, according to Dinwoodie, is the assertion that pre-existing legal norms are being applied to new social realities. See *id.* at 12.

79. *Id.* at 1.

relatedness of the goods or services, and (3) the ‘simultaneous use of the Web as a marketing channel.’”<sup>80</sup>

While the academics debated the legitimacy of the Internet Troika and the rationale of the various jurisdictions’ decisions to apply this limited likelihood of confusion test to allegations of infringement on the Internet, courts were utterly confused about which test to apply for consumer confusion online. The following section takes a sampling of cases citing initial interest confusion and categorizes them based on the approach applied by each court.

#### V. POST-BROOKFIELD CONFUSION AMONGST COURTS

Notably, Circuit Judge O’Scannlain authored both the *Brookfield* and the *GoTo.com*<sup>81</sup> opinions, which triggered the beginning of the confusion amongst lower courts and other circuit courts regarding the appropriate analysis of initial interest confusion in online trademark infringement disputes. Citing his previous opinion in *Brookfield*, Judge O’Scannlain opined in *GoTo.com*, “[i]n *Brookfield*, we noted how only a subset of the *Sleekcraft* factors are needed to reach a conclusion as to whether there is a likelihood of confusion. We emphasize that observation here. . . .”<sup>82</sup> Judge O’Scannlain’s rationale for these opinions can best be described as stemming from a paternalistic concern that individuals are easily susceptible to being confused on the Internet and that trademark law

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80. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000) (quoting *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1054 n.16 (9th Cir. 1999)); *see also id.* at 1206–07 (stating “for now, we can safely conclude that the use of remarkably similar trademarks on different web sites creates a likelihood of confusion amongst Web users” even if the parties were not offering directly competing products). The court stated:

With respect to Internet services, even services that are not identical are capable of confusing the public. Although even Web tyros can distinguish between a web site that, for example, provides discounted travel tickets and one that provides free Web-based e-mail, a user would almost certainly assume a common sponsorship if the sites’ trademarks were the same. The yahoo.com web site is just one example of Web genies that coordinate a bevy of distinct services under a common banner. Indeed, Disney’s own portal shows the potential for one company to provide a host of unrelated services. Whereas in the world of bricks and mortar, one may be able to distinguish easily between an expensive restaurant in New York and a mediocre one in Los Angeles, the Web is a very different world. Our ever-growing dependence on the Web may force us eventually to evolve into increasingly sophisticated users of the medium, but, for now, we can safely conclude that the use of remarkably similar trademarks on different web sites creates a likelihood of confusion amongst Web users. The ever-growing number of tentacled conglomerates may force us to conclude that even one hundred and one products could all be sponsored by a single consortium.

*Id.* (citations omitted).

81. *See GoTo.com*, 202 F.3d 1199; *Brookfield*, 174 F.3d 1036.

82. *GoTo.com*, 202 F.3d at 1206.

necessarily needed to fill the gap.<sup>83</sup> Judge O’Scannlain’s paternalistic view of Internet users sharply differed from Judge Berzon’s view, which was expressed in *Playboy*.<sup>84</sup> As previously noted, the Ninth Circuit’s opinion in *Brookfield* and its subsequent endorsement of the initial interest confusion doctrine in the Internet context in *GoTo.com*<sup>85</sup> and *Interstellar Starship Services, Ltd. v. Epix, Inc.*<sup>86</sup> caused significant confusion amongst courts across the country.

*Brookfield* ushered in an era of increased initial interest confusion allegations in trademark litigation, with many courts relying on *Brookfield* as the template for establishing infringement. This Section summarizes the results of an analysis of seventy-four total opinions—twenty-four by the various US Courts of Appeal and fifty by various US District Courts—which considered initial interest confusion in the Internet context and cited to *Brookfield* between 1999 and 2013. These courts’ opinions were placed into four possible categories based on the courts’ analysis of initial interest confusion: (1) courts that employed the traditional likelihood of confusion analysis, addressing all of the relevant factors; (2) an analysis that elevated the Internet Troika factors and either excluded the remaining likelihood of confusion factors or employed a burden-shifting analysis that did not comport with traditional likelihood of confusion analysis; (3) an analysis that relied solely on the Internet Troika factors articulated in *Brookfield* and its progeny, or in some cases, even fewer factors; or (4) an analysis that incorporated a fair use framework.

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83. See *id.* at 1207 (“We now reiterate that the Web, as a marketing channel, is particularly susceptible to a likelihood of confusion since . . . it allows for competing marks to be encountered at the same time, on the same screen.”).

Although the use of computers may once have been the exclusive domain of an elite intelligentsia, even modern-day Luddites are now capable of navigating cyberspace. Furthermore, the question in this analysis is not how sophisticated web surfers are but, rather, how high the cost is of choosing one service—that is, one web site—over another on the Web. We agree with our previous conclusion that this cost is negligible: it is simply a single click of a mouse. . . . Navigating amongst web sites involves practically no effort whatsoever, and arguments that Web users exercise a great deal of care before clicking on hyperlinks are unconvincing.

See also *id.* at 1209 (citations omitted).

84. See *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1035 (9th Cir. 2004) (Berzon, J., concurring) (emphasizing Internet users’ sophistication and an individual’s ability to make a choice) (“There is a big difference between hijacking a customer to another website by making the customer think he or she is visiting the trademark holder’s website (even if only briefly), . . . and just distracting a potential customer with another *choice*, when it is clear that it is a choice.”).

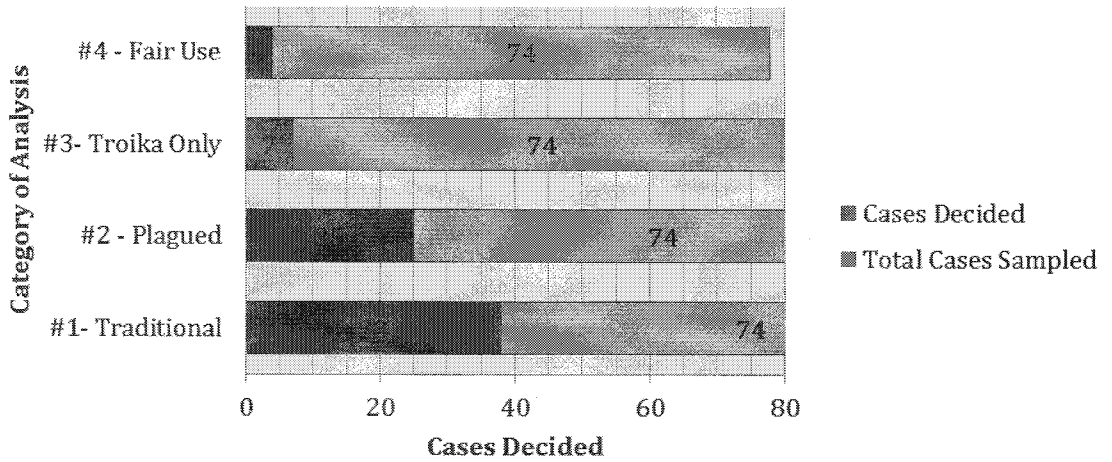
85. *GoTo.com*, 202 F.3d 1199.

86. 304 F.3d 936 (9th Cir. 2002).

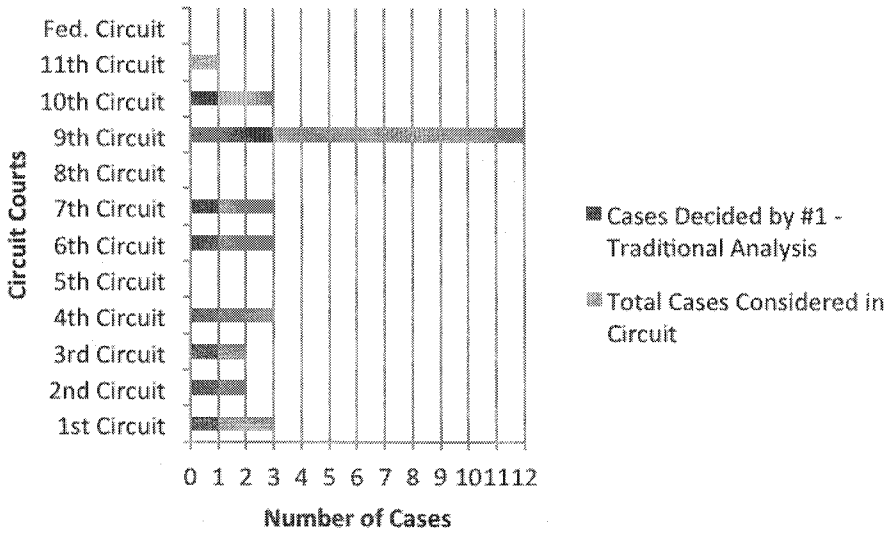
Figure 1. Table Summarizing Findings

	#1 Traditional	#2 Influenced	#3 Troika Only	#4 Fair Use	Total
<b>First Circuit</b>	1st - 1 D.C.'s - 1	1st - 1 D.C.'s - 1	1st - 0 D.C.'s - 0	1st - 0 D.C.'s - 0	1st - 2 D.C.'s - 2 <b>4 Total</b>
<b>Second Circuit</b>	2nd - 1 D.C.'s - 6	2nd - 0 D.C.'s - 1	2nd - 0 D.C.'s - 1	2nd - 0 D.C.'s - 1	2nd - 1 D.C.'s - 9 <b>10 Total</b>
<b>Third Circuit</b>	3rd - 1 D.C.'s - 5	3rd - 0 D.C.'s - 1	3rd - 0 D.C.'s - 0	3rd - 0 D.C.'s - 0	3rd - 1 D.C.'s - 6 <b>7 Total</b>
<b>Fourth Circuit</b>	4th - 1 D.C.'s - 0	4th - 0 D.C.'s - 1	4th - 1 D.C.'s - 0	4th - 0 D.C.'s - 0	4th - 2 D.C.'s - 1 <b>3 Total</b>
<b>Fifth Circuit</b>	5th - 0 D.C.'s - 1	5th - 0 D.C.'s - 0	5th - 0 D.C.'s - 1	5th - 0 D.C.'s - 0	5th - 0 D.C.'s - 2 <b>2 Total</b>
<b>Sixth Circuit</b>	6th - 1 D.C.'s - 2	6th - 1 D.C.'s - 0	6th - 0 D.C.'s - 0	6th - 0 D.C.'s - 0	6th - 2 D.C.'s - 2 <b>4 Total</b>
<b>Seventh Circuit</b>	7th - 1 D.C.'s - 3	7th - 1 D.C.'s - 0	7th - 0 D.C.'s - 0	7th - 0 D.C.'s - 0	7th - 2 D.C.'s - 3 <b>5 Total</b>
<b>Eighth Circuit</b>	8th - 0 D.C.'s - 1	8th - 0 D.C.'s - 0	8th - 0 D.C.'s - 0	8th - 0 D.C.'s - 0	8th - 0 D.C.'s - 1 <b>1 Total</b>
<b>Ninth Circuit</b>	9th - 3 D.C.'s - 9	9th - 6 D.C.'s - 10	9th - 0 D.C.'s - 3	9th - 2 D.C.'s - 1	9th - 11 D.C.'s - 23 <b>34 Total</b>
<b>Tenth Circuit</b>	10th - 1 D.C.'s - 0	10th - 1 D.C.'s - 0	10th - 0 D.C.'s - 1	10th - 0 D.C.'s - 0	10th - 2 D.C.'s - 1 <b>3 Total</b>
<b>Eleventh Circuit</b>	11th - 0 D.C.'s - 0	11th - 1 D.C.'s - 0	11th - 0 D.C.'s - 0	11th - 0 D.C.'s - 0	11th - 1 D.C.'s - 0 <b>1 Total</b>
<b>Totals</b>	Circuits - 10 D.C.'s - 28 <b>Total - 38</b>	Circuits - 11 D.C.'s - 13 <b>Total - 24</b>	Circuits - 1 D.C.'s - 6 <b>Total - 7</b>	Circuits - 2 D.C.'s - 2 <b>Total - 4</b>	Circuits - 24 D.C.'s - 49 <b>Total - 74</b>

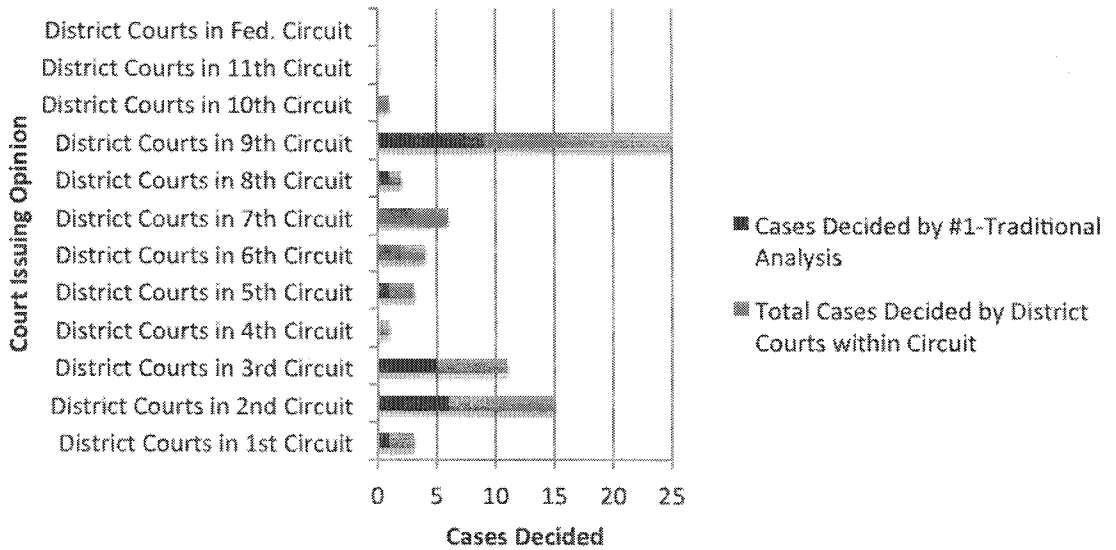
**Figure 2. Analysis of Total Cases**



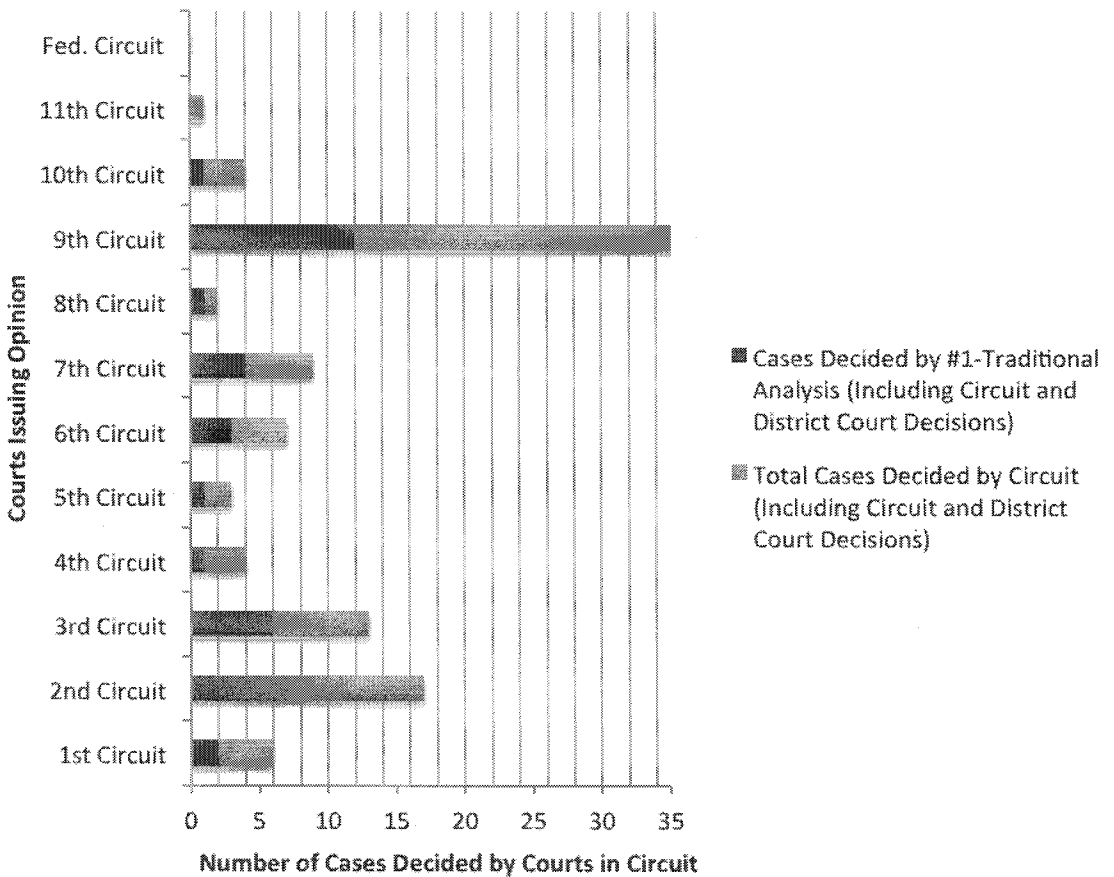
**Figure 3a. Traditional Analysis by Circuit Courts**



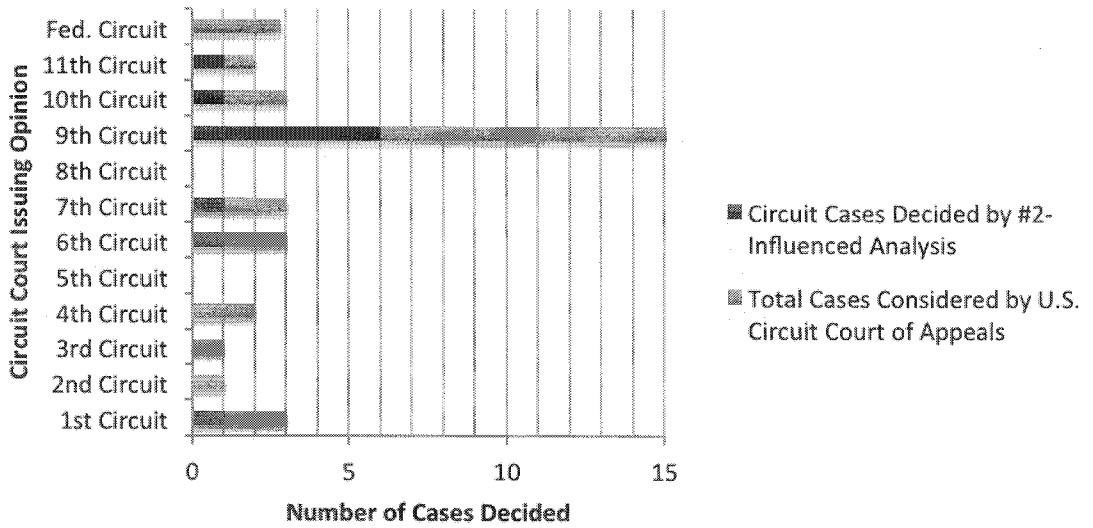
**Figure 3b. Traditional Analysis by District Courts**



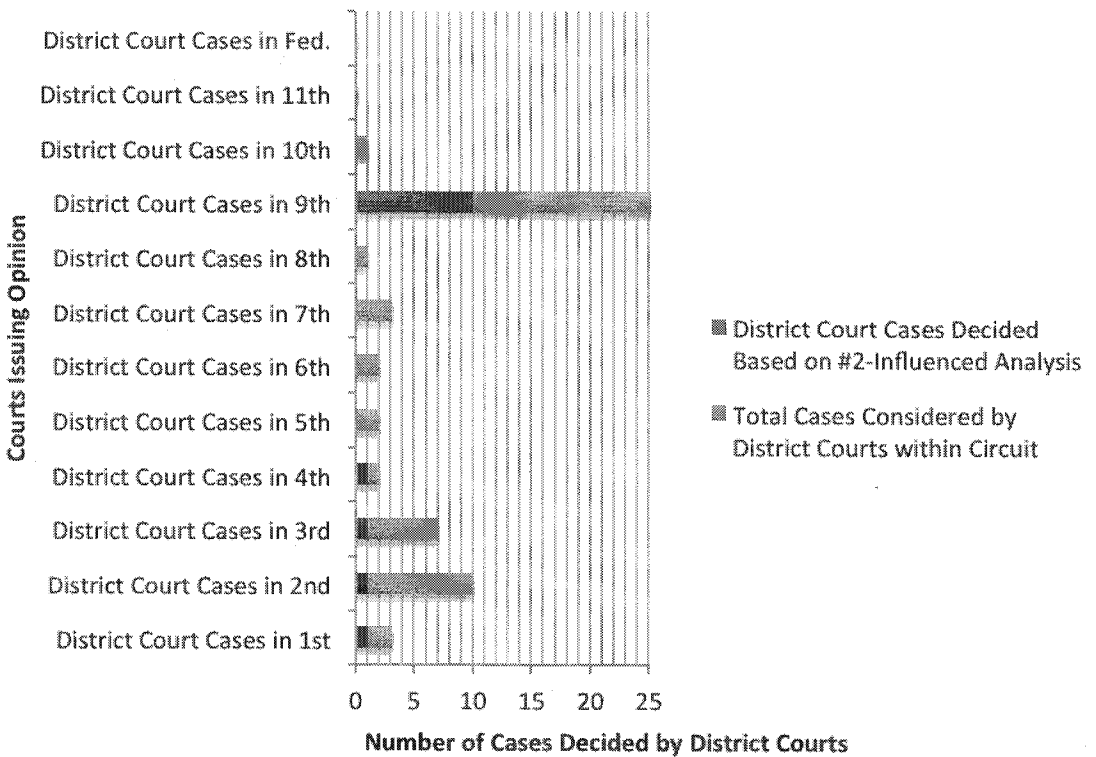
**Figure 3c. Total Cases Decided by #1- Traditional Analysis**



**Figure 4a. Circuit Court Opinions Influenced by *Brookfield***

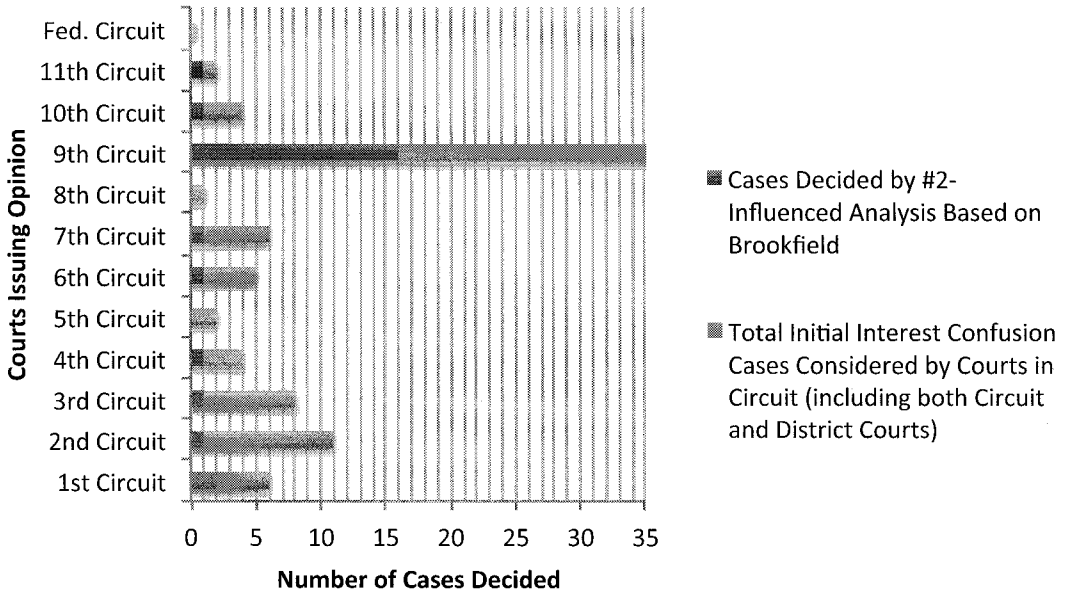


**Figure 4b - District Court Cases Influenced by *Brookfield***

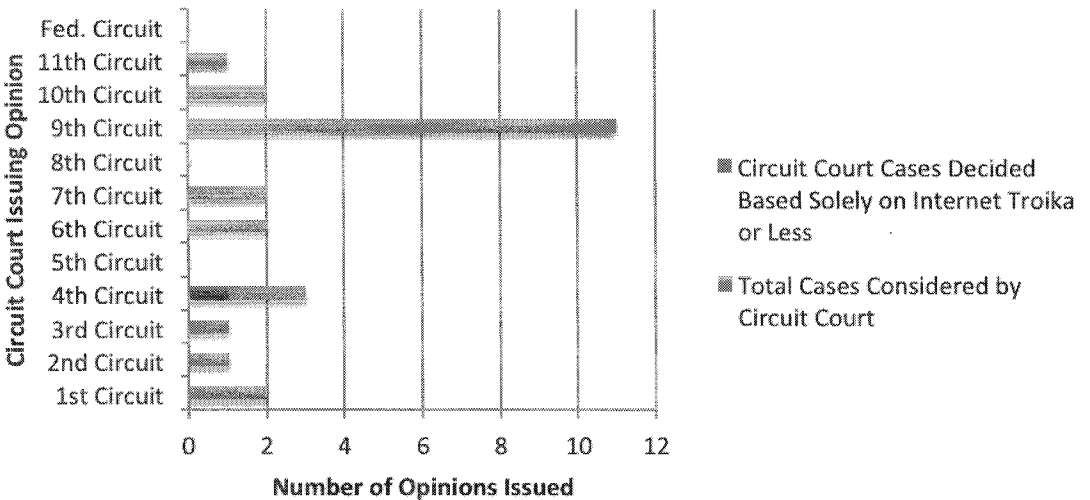




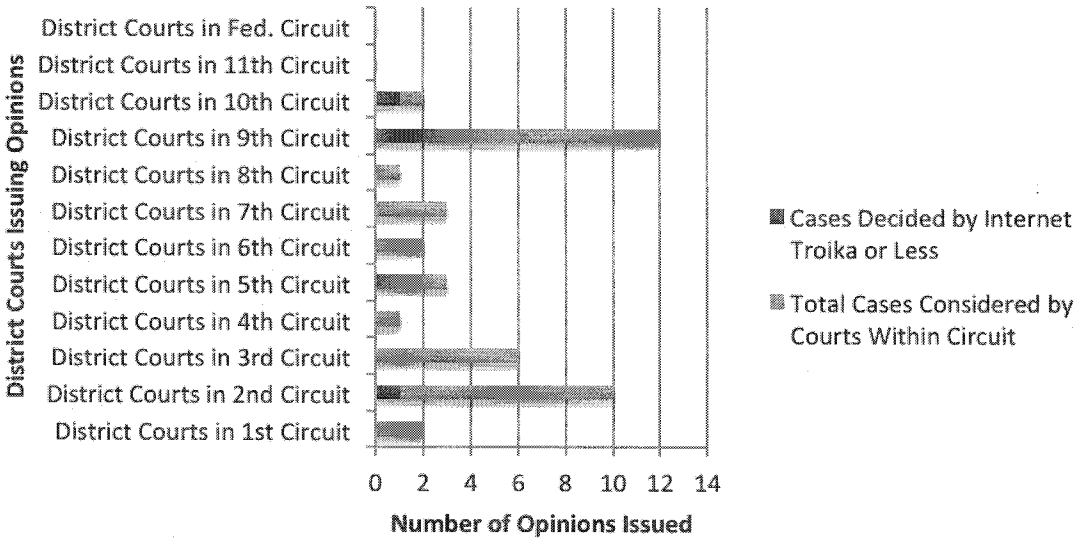
**Figure 4c. Total Cases Employing Influenced Analysis Based on Brookfield**



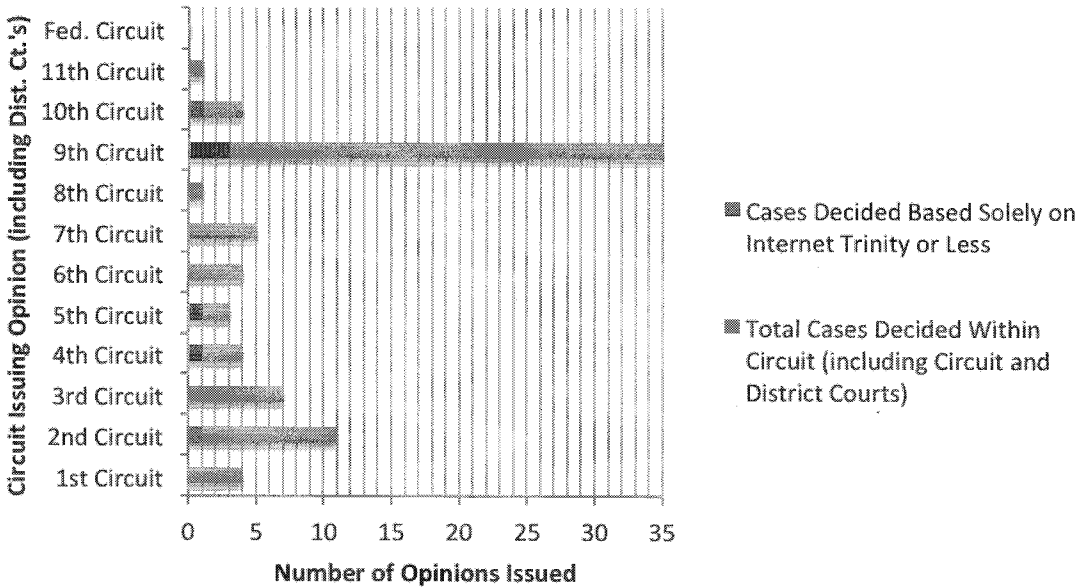
**Figure 5a. Circuit Court Opinions Based Solely on Internet Troika or Less**



**Figure 5b. District Court Decisions Based on Internet Troika or Less**



**Figure 5c. Total Cases Decided by Internet Troika or Less**



## VI. NETWORK AUTOMATION: THE NEW STANDARD?

After more than ten years of the abbreviated Internet Troika factors being the standard for trademark infringement online, the Ninth Circuit, in *Network Automation*, revisited the issue to consider whether the new test properly achieved the goals of trademark law. The Ninth Circuit, in its review, reversed the district court's ruling applying the Internet Troika.<sup>87</sup> In reversing the lower court's finding, the Ninth Circuit reiterated its adherence to two long-stated principles: (1) that the factors articulated in *Sleekcraft* are non-exhaustive, and (2) that the factors "should be applied flexibly, particularly in the context of Internet commerce."<sup>88</sup> Indeed, the court concluded that the trial court erred in applying the Internet Troika test to a keyword case without complete consideration of all the *Sleekcraft* factors.<sup>89</sup> The court pointedly stated that the Internet Troika test was intended only for Internet domain name infringement cases and was not intended to be a substitution for adherence to the above-stated principles.<sup>90</sup>

A. *The Holding*

*Network Automation* involved the two polarizing issues in online trademark infringement—whether use of trademarks as a keyword constitutes use in commerce and initial interest confusion. The case provided great facts for the Ninth Circuit to address both issues. Network Automation, Inc. (Network Automation) and Advanced Systems Concepts, Inc. (Advanced Systems) were competitors in the job-scheduling software market.<sup>91</sup> Network Automation purchased Advanced Systems' federally registered trademark ACTIVEBATCH as a search-engine keyword, which triggered Network Automation's sponsored ads in the search results for ACTIVEBATCH.<sup>92</sup> The sponsored ads did not contain the ACTIVEBATCH mark in their title or text.<sup>93</sup> However, Network Automation identified itself in the URL associated with the sponsored ad.<sup>94</sup> After receiving several cease and desist letters from Advanced Systems, Network Automation filed for a declaratory judgment that

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87. See *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1142 (9th Cir. 2011).

88. *Id.* at 1149.

89. See *id.* at 1154.

90. See *id.*

91. *Id.* at 1142–44.

92. *Id.* at 1143.

93. *Id.*

94. *Id.*

its purchase of ACTIVEBATCH as a keyword did not constitute trademark infringement.<sup>95</sup> Advanced Systems counterclaimed for trademark infringement and moved for a preliminary injunction.<sup>96</sup>

The district court issued a preliminary injunction against Network Automation's use of ACTIVEBATCH as a search-engine keyword, finding that Advanced Systems was likely to succeed on the merits for likelihood of confusion using the "Internet trinity" factors: (1) "the similarity of the marks," (2) "relatedness of the goods or services," and (3) "simultaneous use of the Web as a marketing channel."<sup>97</sup> The district court found that all three of these factors favored Advanced Systems.<sup>98</sup> On appeal, the Ninth Circuit vacated the injunction.<sup>99</sup> The court quickly disposed of the "use in commerce" issue by adopting the Second Circuit's holding in *Rescuecom Corp. v. Google, Inc.*<sup>100</sup> The court then shifted its attention to what it considered the reigning issue in the case—likelihood of confusion.<sup>101</sup> As such, the court focused its attention on the likelihood of confusion analysis and provided an in-depth analysis of initial interest confusion after a renewed review of the arguments presented in the case.<sup>102</sup>

Network Automation argued that its use of the ACTIVEBATCH mark was legitimate "comparative, contextual advertising."<sup>103</sup> Indeed, Network Automation further contended that its use presented sophisticated consumers—the target consumer for the software that both parties sell to—with clear choices on the availability of services other than those provided by Advanced Systems.<sup>104</sup> Advanced Systems, however, characterized Network Automation's behavior as "hijacking [its potential customers'] attention with intentionally unclear advertisements" that were likely to cause consumer confusion.<sup>105</sup> The Ninth Circuit began its analysis of the arguments of the parties by reciting the standard for likelihood of confusion—*Sleekcraft*.<sup>106</sup> "The *Sleekcraft* factors are intended as an adaptable proxy for consumer confusion, not a rote checklist," wrote

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95. *Id.*

96. *Id.*

97. *Id.* at 1143–44.

98. *See id.* at 1143.

99. *See id.* at 1142.

100. *See id.* at 1145 (citing *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127 (2d Cir. 2009) (holding that use of a trademark as a keyword to trigger sponsored advertisements is "use in commerce" under the Lanham Act)).

101. *See id.* at 1145.

102. *See id.* at 1145–55.

103. *Id.* at 1145.

104. *See id.*

105. *Id.*

106. *See id.* at 1145–46.

Judge Wardlaw for the court.<sup>107</sup> Indeed, the court explained that the *Sleekcraft* test must be applied in “a flexible manner,”<sup>108</sup> understanding that the eight factors are not exhaustive and that only some of the factors are relevant to determine whether confusion is likely based upon the facts of the case.<sup>109</sup> After setting the stage for the discussion of trademark infringement in the Internet context, the court embarked upon the task of explaining its holding in *Brookfield*.

The Ninth Circuit wrote that when it first encountered the issue of likelihood of confusion for trademark infringement online in *Brookfield*, the court cautioned the circuit that the Internet and emerging technologies require a “flexible approach.”<sup>110</sup> Indeed, the Ninth Circuit declared that courts have adopted a mechanical approach to dealing with trademark infringement and in doing so, have misinterpreted the circuit’s emphasis on the three factors used to decide *Brookfield*—the “Internet trinity” or “Internet Troika”—as being the sole factors to consider when there is an allegation of trademark infringement online.<sup>111</sup> The court wrote: “[w]e did not intend *Brookfield* to be read so expansively as to forever enshrine these three factors . . . as the test for trademark infringement on the Internet.”<sup>112</sup> And “[d]epending on the facts of each specific case arising on the Internet, other factors may emerge as more illuminating . . .”<sup>113</sup> Turning to the *Sleekcraft* factors, the court held that the most relevant factors for keyword-advertising cases were: “(1) the strength of the mark; (2) the evidence of actual confusion; (3) the type of goods and degree of care likely to be exercised by the purchaser; and (4) the labeling and appearance . . . and the surrounding context [of the search] results page.”<sup>114</sup> Finally, the court

107. *Id.* at 1145 (citing *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1030 (9th Cir. 2010) (“This eight-factor analysis is ‘pliant,’ illustrative rather than exhaustive, and best understood as simply providing helpful guideposts.”); *Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir. 1998) (“The factors should not be rigidly weighed; we do not count beans.”); *Eclipse Assocs. Ltd. v. Data Gen. Corp.*, 894 F.2d 1114, 1118 (9th Cir. 1990) (“These tests were not meant to be requirements or hoops that a district court need jump through to make the determination.”)).

108. *Id.* at 1145.

109. *See id.*

110. *See id.* at 1145–46 (“When we first confronted issues of trademark infringement and consumer confusion in the Internet context over a decade ago in *Brookfield*, we noted that “[w]e must be acutely aware of excessive rigidity when applying the law in the Internet context; emerging technologies require a flexible approach.”) (quoting *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999)).

111. *See id.* at 1148.

112. *Id.*

113. *Id.*

114. *Id.* at 1154. It is important to note that the court identified in its opinion in *Brookfield* the view that each Internet issue was entitled to its own review. The court noted that the Internet Troika was the test for domain disputes, but not metatags, and it continued to note that the test was equally deficient for keyword advertising. *See id.* at 1148.

announced that when seeking to establish initial interest confusion, the trademark owner “must demonstrate likely confusion, not mere diversion.”<sup>115</sup>

### *B. Deconstructing the Holding in Network Automation*

The Ninth Circuit seized the opportunity in *Network Automation* to address what it had determined to be a misunderstanding of its holding in *Brookfield* at a time when courts and scholars were no longer fixated on the “use in commerce” issue.<sup>116</sup> Further, the court took the opportunity to highlight the discussions of the appropriate standard for reviewing likelihood of confusion on the Internet in the two major cases discussing the issue in the Ninth Circuit.<sup>117</sup> Emphasizing the language in each opinion, which cautions against a mechanical approach to applying the *Sleekcraft* factors, the court further bolstered its position with regard to likelihood of confusion and initial interest confusion on the Internet.<sup>118</sup>

Notwithstanding the court’s urging, it is important to thoroughly critique the holding in *Network Automation*. The last ten plus years since the holding in *Brookfield* had been marked by the Internet Troika—the *sine qua non* for trademark infringement on the Internet.<sup>119</sup> Based upon the court’s discussion, it easily appears that the court had determined that many cases using *Brookfield* as the standard may have been decided wrongly.<sup>120</sup> Two questions will be

115. *Id.* at 1149.

116. *See id.* at 1148. The court quickly embraced the Second Circuit’s holding in *Rescuecom Corp. v. Google, Inc.* and provided very little discussion on the issue of use in commerce, viewing the issue as one that had been resolved by the circuits. *See id.* at 1144–45 (citing *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127 (2d Cir. 2009) (holding that Google’s sale of trademarks as search engine keywords is a use in commerce)).

117. *See id.* at 1145–49 (discussing *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036 (9th Cir. 1999) and *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020 (9th Cir. 2004)).

118. *See id.*

119. *See* 4 MCCARTHY, *supra* note 64, § 24:39.

120. *Network Automation*, 638 F.3d at 1148.

While the district court analyzed each of the *Sleekcraft* factors, it identified the three most important factors as (1) the similarity of the marks, (2) the relatedness of the goods or services, and (3) the simultaneous use of the Web as a marketing channel, for any case addressing trademark infringement on the Internet. For this proposition the district court cited *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199 (9th Cir. 2000), which followed *Brookfield* in emphasizing these three factors. However, we did not intend *Brookfield* to be read so expansively as to forever enshrine these three factors—now often referred to as the “Internet trinity” or “Internet Troika”—as the test for trademark infringement on the Internet. *Brookfield* was the first to present a claim of initial interest confusion on the Internet; we recognized at the time it would not be the last, and so emphasized flexibility over rigidity. Depending on the facts of each specific case arising on the Internet, other factors may emerge as more illuminating on the question of consumer confusion.

*Id.* (citations omitted).

helpful in critiquing the court's *Network Automation* decision. First, whether the assertion of a misunderstanding made in the *Network Automation* opinion parallels the holding in *Brookfield*? And second, why did an *en banc* panel not overrule *Brookfield* as suggested by Judge Berzon in *Playboy*?<sup>121</sup>

### 1. Holding Confusion

The court in *Network Automation* asserts that courts have misinterpreted the holding advanced in *Brookfield* despite the court's warnings that the factors to be considered are not fluid and must be determined on a case-by-case basis.<sup>122</sup> The language most oft cited as the establishment of the Internet Troika reads as follows:

The factors that we have considered so far—the similarity of marks, the relatedness of product offerings, and the overlap in marketing and advertising channels—lead us to the tentative conclusion that *Brookfield* has made a strong showing of likelihood of confusion.<sup>123</sup>

Indeed, the language says that the finding based upon the Internet Troika is “tentative.” The court further wrote:

Because it is possible that the remaining factors will tip the scale back the other way if they weigh strongly enough in West Coast's favor, we consider the remaining likelihood of confusion factors . . . .<sup>124</sup>

The court suggested here that a finding for the plaintiff on the Internet Troika creates a burden-shifting presumption of confusion.<sup>125</sup> While the court does not expressly find confusion based solely on the Internet Troika, the Ninth Circuit created a scenario where the traditional likelihood of confusion analysis test was altered in such a

121. See *Playboy*, 354 F.3d at 1035 (Berzon, J., concurring).

There will be time enough to address the continuing vitality of *Brookfield* should the labeled advertisement issue arise later. I wanted to flag the issue, however, as another case based on the metatag aspect of *Brookfield* was decided recently, *Horphag Research Ltd. v. Pellegrini*, 337 F.3d 1036 (9th Cir. 2003), so the issue is a recurring one. Should the question arise again, in this case or some other, this court needs to consider whether we want to continue to apply an insupportable rule.

*Id.*

122. See *Network Automation*, 638 F.3d at 1148.

123. *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1058 (9th Cir. 1999)

124. *Id.*

125. See *id.*; see also *Perfumebay.com Inc. v. eBay, Inc.*, 506 F.3d 1165, 1174–75 (9th Cir. 2007) (internal quotation marks omitted) (“Because the three primary factors for internet trademarks weigh against Perfumebay, the remaining *Sleekcraft* factors, actual confusion, marketing channels utilized, degree of consumer care, Perfumebay's intent, and likelihood of expansion into other markets, must weigh strongly against a likelihood of confusion to avoid the finding of infringement.”); *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 942 (9th Cir. 2002) (citations omitted) (internal quotation marks omitted) (“When this controlling troika, or internet trinity, suggests confusion is . . . likely, the other factors must weigh strongly against a likelihood of confusion to avoid the finding of infringement.”).

way that it has been severely misapplied within its own circuit for over a decade.<sup>126</sup>

Based on the results of the study of cases decided by courts within the Ninth Circuit faced with the initial interest confusion on the Internet issue, these courts wrongly analyzed over half of the claims before them by not considering all of the *Sleekcraft* factors. Based on the analysis, district courts within the Ninth Circuit wrongly analyzed thirteen of the twenty-four cases considering initial interest confusion in the online context following the *Brookfield* decision. Further, the Ninth Circuit itself employed a flawed analysis to assess such claims in six of the eleven cases before it between the court's opinions in *Brookfield* and *Network Automation*. The charts below depict the results of this study, highlighting the cases before courts within the Ninth Circuit during this time period.

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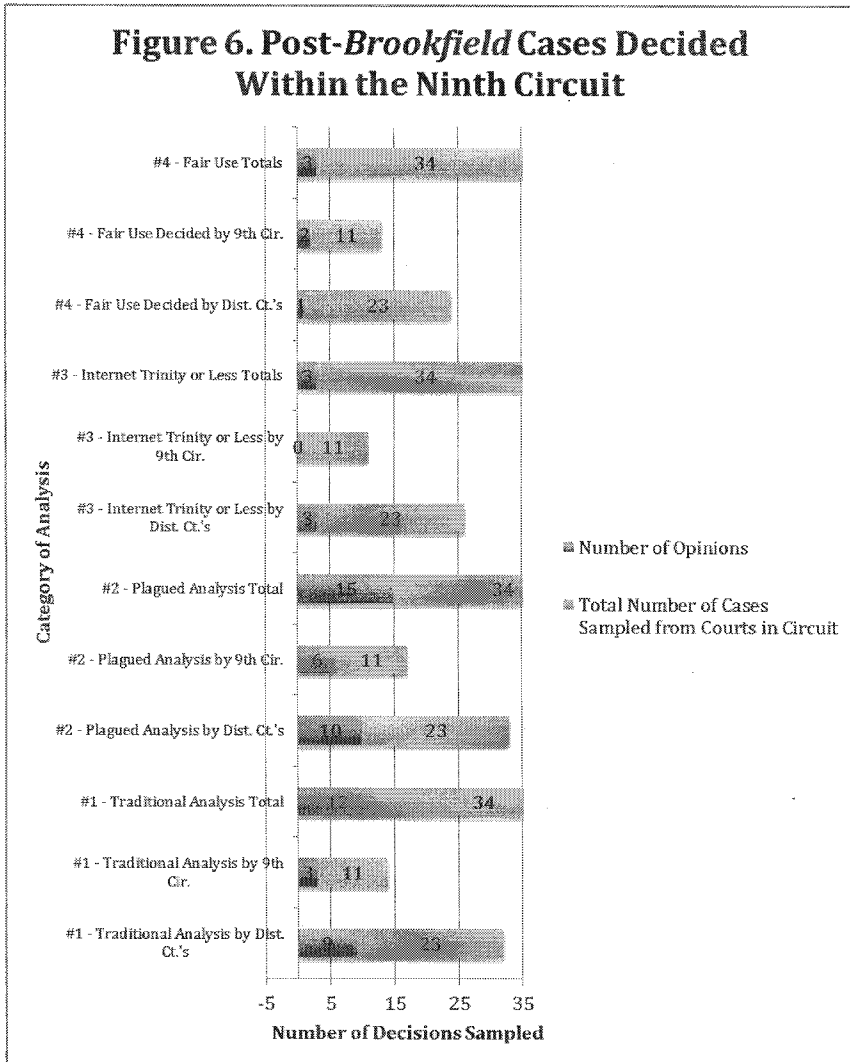
126. See, e.g., *Productive People, LLC v. Ives Design*, No. CV-09-1080-PHX-GMS, 2009 WL 1507560 (D. Ariz. May 29, 2009) (employing a heightened burden-shifting approach upon the alleged trademark infringer); *Skydive Ariz., Inc. v. Quattrocchi*, No. CV 05-2656-PHX-MHM, 2009 WL 6597892 (D. Ariz. Feb. 2, 2009); *Suarez Corp. Indus. v. Earthwise Techs., Inc.*, 636 F. Supp. 2d 1139, 1145 (W.D. Wash. 2008) (citations omitted) (internal quotation marks omitted) ("If those three factors suggest that confusion is likely, a finding of infringement will follow unless the other *Sleekcraft* factors weigh strongly against a likelihood of confusion."); *Soilworks, LLC v. Midwest Indus. Supply, Inc.*, 575 F. Supp. 2d 1118, 1132 (D. Ariz. 2008) ("In sum, the undisputed evidence in this case establishes that Soilworks diverts the initial attention of potential Internet customers to its websites by using Midwest's Soil-Sement trademark in keywords and metatags."); *Storus Corp. v. Aroa Mktg., Inc.*, No. C-06-2454 MMC, 2008 WL 449835, at \*5 (N.D. Cal. Feb. 15, 2008) (internal quotation marks omitted) ("In sum, there is no triable issue with respect to any of the three factors of the internet trilogy, and defendants have failed, on behalf of Aroa, to make any showing, let alone the requisite strong showing, that the remaining factors weigh against a finding of a likelihood of confusion."); *Shainin II, LLC v. Allen*, No. C06-420P, 2006 WL 1319405, at \*9 (W.D. Wash. May 15, 2006) (failing to make any definitive findings regarding the likelihood of confusion factors) ("[T]he use of another's trademarks in metatags may result in 'initial interest confusion' by diverting Internet users to the defendant's website, thereby allowing the defendant to benefit the goodwill the plaintiff has developed in its marks."); *Garden of Life, Inc. v. Letzer*, 318 F. Supp. 2d 946 (C.D. Cal. 2004) (adopting the heightened burden-shifting approach against the alleged infringer); *Flow Control Indus., Inc. v. AMHI, Inc.*, 278 F. Supp. 2d 1193, 1199 (W.D. Wash. 2003) ("[M]et tagging a website with a competitor's mark creates 'initial interest confusion' in violation of the Lanham Act."); *Network Network v. CBS, Inc.*, No. CV 98-1349NM(ANX), 2000 WL 362016, at \*8 (C.D. Cal. Jan. 18, 2000) (denying defendant's motion for summary judgment and granting plaintiff's motion for summary judgment in part) (failing to address the traditional likelihood of confusion factors in assessing a claim of initial interest confusion). *But see, e.g., Palantir Techs. Inc. v. Palantir.net, Inc.*, No. C 07-03863 CRB, 2008 WL 152339 (N.D. Cal. Jan. 15, 2008) (granting motion for a preliminary injunction after analyzing all *Sleekcraft* factors).



**Summary Table of Analysis by Courts within the Ninth Circuit**

	<b>#1 Traditional</b>	<b>#2 Influenced</b>	<b>#3 Troika Only</b>	<b>#4 Fair Use</b>	<b>Total</b>
<b>Ninth Circuit</b>	9th – 3 D.C.’s – 9	9th – 6 D.C.’s – 10	9th – 0 D.C.’s – 3	9th – 2 D.C.’s – 1	9th – 11 D.C.’s – 23 <b>34 Total</b>

**Figure 6. Post-Brookfield Cases Decided Within the Ninth Circuit**



## 2. To Correct or Not To Correct the Confusion, That is the Question

Judge Berzon's concurring opinion in *Playboy* sharply criticized the Ninth Circuit's abbreviated version of the initial interest confusion doctrine and the overbroad interpretation that it has been given by other jurists.<sup>127</sup> Specifically, Judge Berzon noted that clearly labeled ads should not give rise to a trademark infringement claim because the consumer is not confused when the website is clearly labeled.<sup>128</sup> Judge Berzon wrote in *Playboy*: "I concur in Judge Nelson's careful opinion in this case, as it is fully consistent with the applicable precedents. I write separately, however, to express concern that one of those precedents was wrongly decided and may one day, if not now, need to be reconsidered *en banc*."<sup>129</sup> The concern, as so eloquently stated in the concurring opinion in *Playboy*, remained that *Brookfield* expanded the reach of initial interest confusion from situations in which a consumer is initially confused to situations where consumers are never confused.<sup>130</sup> This concern was seemingly addressed by the court in *Network Automation* by its consideration of all of the *Sleekcraft* factors and its emphasis on the importance of a fourth factor: whether a consumer knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the consumer is informed by the context of the link.<sup>131</sup>

With regard to this fourth factor, the Ninth Circuit noted that the district court correctly examined the text of Network Automation's sponsored links but failed to consider "the surrounding context."<sup>132</sup> Noting that in *Playboy*, the court had found it important that the

127. See *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1034–36 (9th Cir. 2004) (Berzon, J., concurring).

128. See *id.* at 1034–35.

I do not think it is reasonable to find initial interest confusion when a consumer is never confused as to source or affiliation, but instead knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the list produced by the search engine so informs him. There is a big difference between hijacking a customer to another website by making the customer think he or she is visiting the trademark holder's website (even if only briefly), which is what may be happening in this case when the banner advertisements are not labeled, and just distracting a potential customer with another *choice*, when it is clear that it is a choice. True, when the search engine list generated by the search for the trademark ensconced in a metatag comes up, an internet user might *choose* to visit westcoastvideo.com, the defendant's website in *Brookfield*, instead of the plaintiff's moviebuff.com website, but such choices do not constitute trademark infringement off the internet, and I cannot understand why they should on the internet.

*Id.*

129. *Id.* at 1034.

130. See *id.* at 1035.

131. See *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1154 ("The appearance of the advertisements and their surrounding context on the user's screen are similarly important here.")

132. *Id.*

alleged infringer's search engine did not clearly segregate the sponsored advertisements from the objective results, the Ninth Circuit explained that analysis of the "labeling and appearance of the advertisements as they appear on the results page includes more than the text of the advertisement, and must be considered as a whole."<sup>133</sup> Considering the technological evolution of online search engines between 1999, when *Brookfield* was decided, and 2011, the date of the *Network Automation* opinion, the Ninth Circuit found the fact that "Google and Bing have partitioned their search results pages so that the advertisements appear in separately labeled sections for 'sponsored' links" to be particularly relevant in *Network Automation*.<sup>134</sup> As such, the Ninth Circuit found that the district court erred by failing to weigh the *Sleekcraft* factors flexibly to match the specific facts of the case at hand.<sup>135</sup> Stating its departure from any endorsement of sole reliance upon the three-part test identified in *Brookfield*,<sup>136</sup> the court noted that these factors, while "highly illuminating in the context of domain names," fail to "discern whether there is a likelihood of confusion in a keywords case."<sup>137</sup> As such, after a detailed and flexible analysis of all of the *Sleekcraft* factors in the context of the facts in this particular case, the Ninth Circuit stated:

Given the nature of the alleged infringement here, the most relevant factors to the analysis of the likelihood of confusion are: "(1) the strength of the mark; (2) the evidence of actual confusion; (3) the type of goods and degree of care likely to be exercised by the purchaser; and (4) the labeling and appearance of the advertisements and the surrounding context on the screen displaying the results page."<sup>138</sup>

Based on the court's explicit emphasis upon the importance of analyzing all of the *Sleekcraft* factors to reach a finding based on the most relevant factors on a case-by-case basis, the Ninth Circuit found the district court abused its discretion by solely relying upon the Internet Troika in *Network Automation*.<sup>139</sup>

There is no doubt that the Ninth Circuit's opinion in *Network Automation* sought to correct the longstanding misapplication of the

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133. *Id.*

134. *Id.*

135. *See id.*

136. *See, e.g., GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000) (following *Brookfield* to emphasize the Internet Troika factors as the most important factors in online trademark infringement: "(1) the similarity of the marks, (2) the relatedness of the goods or services, and (3) the 'simultaneous use of the Web as a marketing channel'" (quoting *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999))).

137. *Network Automation*, 638 F.3d at 1154.

138. *Id.*

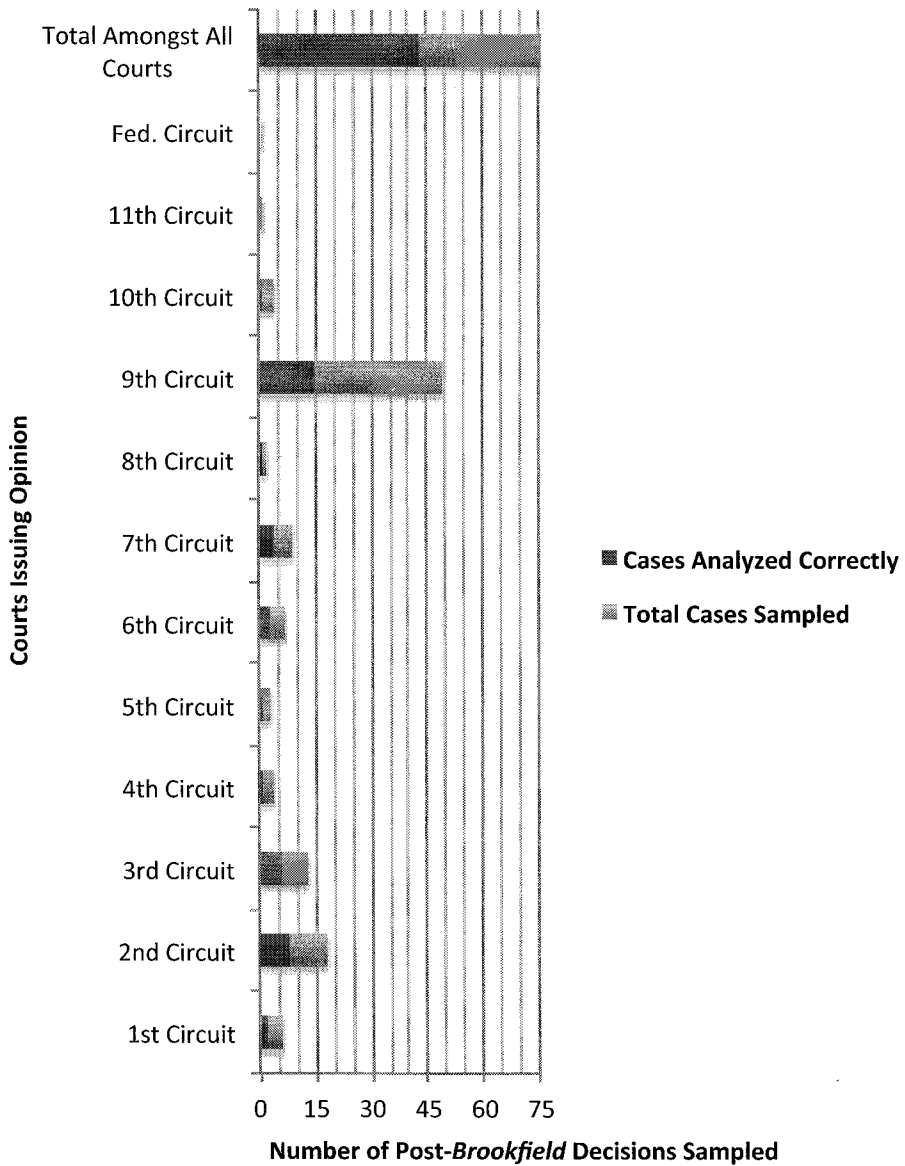
139. *See id.* (citations omitted) ("The district court did not weigh the *Sleekcraft* factors flexibly to match the specific facts of this case. It relied on the Internet 'troika' . . . . Because the linchpin of trademark infringement is consumer confusion, the district court abused its discretion in issuing the injunction.").

*Brookfield* holding in its own circuit. The fact that the misapplication spread beyond its circuit to other courts is somewhat troubling; nonetheless, *Network Automation* provided the clarification that was long needed despite the *Brookfield* court's caution against such a formulaic approach. *Network Automation* amounts to a departure from the Internet Troika and a return to the likelihood of confusion factors. The Ninth Circuit presented no new standard but rather re-endorsed the standard that has served trademark law well.

## VII. CONCLUSION

A decade long application of the Internet Troika has come to a screeching halt. The *Brookfield* court cautioned that its holding was never a standard to be used in all cases. Nevertheless, its import was the creation of a standard that was inappropriate as a general standard for trademark infringement online. Undoubtedly, some courts got it wrong, but what the review of a sampling of cases indicates is that a number of courts got it right—staying true to the likelihood of confusion factors. Indeed, in the review of the seventy-four post-*Brookfield* cases, the courts that fell into the first category, employing the traditional likelihood of confusion analysis to claims of online initial interest confusion, and the fourth category, finding fair use, correctly analyzed the claims before the court. Thus, in total, forty-three of the seventy-four cases sampled were analyzed correctly. The chart below reflects these results. What the sampling reveals is that the likelihood of confusion factors work, even in a changing world of technology, providing the flexibility that is necessary in evolving technology.

### Figure 7. Courts That Correctly Analyzed Claims



APPENDIX

**Table 1.** Post-*Brookfield* Cases Sampled According to Circuit

This table identifies all of the seventy-four cases sampled, which were classified according to each court’s analysis of the claim of online trademark infringement before it. These results include both district and circuit court cases, classified according to the respective circuit for which each court issuing an opinion falls.

<b>Circuit of Issuing Court</b>	<b>Cases Sampled</b>	<b>Classification of Analysis</b>
<u>First Circuit</u>	1. Hasbro, Inc. v. Clue Computing, Inc., 232 F.3d 1 (1st Cir. 2000).  2. N. Light Tech., Inc. v. N. Lights Club, 236 F.3d 57 (1st Cir. 2001).  3. Philbrick v. eNom, Inc., 593 F. Supp. 2d 352 (D. New Hampshire 2009).  4. Northern Light Tech., Inc. v. Northern Lights Club, 97 F. Supp. 2d 96 (D. Mass. 2000), <i>aff'd</i> 236 F.3d 57 (1st Cir. 2001).	1. #1-Traditional Analysis  2. #2-Influenced by <i>Brookfield</i>  3. #1-Traditional Analysis  4. #2-Influenced by <i>Brookfield</i>
<u>Second Circuit</u>	5. Savin Corp. v. Savin Group, 391 F.3d 439 (2d Cir. 2004).  6. Ascentive, LLC v. Op. Corp., 842 F. Supp. 2d 450 (E.D.N.Y. 2011).  7. BigStar Entm’t, Inc. v. Next Big Star, Inc., 105 F. Supp. 2d 185 (S.D.N.Y 2000).	5. #1-Traditional Analysis  6. #1-Traditional Analysis  7. #1-Traditional Analysis

	8. OBH, Inc. v. Spotlight Magazine, Inc., 86 F. Supp. 2d 176 (W.D.N.Y. 2000).	8. #1-Traditional Analysis
	9. S&L Vitamins, Inc. v. Australian Gold, Inc., 521 F. Supp. 2d 188 (E.D.N.Y. 2007).	9. #1-Traditional Analysis
	10. Savin Corp. v. Savin Group, No. 02 Civ. 9377 SAS, 2003 WL 22451731 (S.D.N.Y. Oct. 24, 2003), <i>aff'd in part, vacated in part</i> , 391 F.3d 439 (2d Cir. 2004).	10. #1-Traditional Analysis
	11. Mattel, Inc. v. Internet Dimensions Inc., No. 99 Civ. 100066(HB), 2000 WL 973745 (S.D.N.Y. July 13, 2000).	11. #1-Traditional Analysis
	12. 777388 Ontario Ltd. v. Lencore Acoustics Corp., 105 F. Supp. 2d 56 (E.D.N.Y. 2000).	12. #2-Influenced by <i>Brookfield</i>
	13. Movado Grp., Inc. v. Matagorda Ventures, Inc., No. 98 Civ. 6223 LMM, 2000 WL 1855120 (S.D.N.Y. Dec. 19, 2000).	13. #3-Internet Troika or Less
	14. Bihari v. Gross, 119 F. Supp. 2d 309 (S.D.N.Y. 2000).	14. #4-Fair Use
<u>Third Circuit</u>	15. Checkpoint Sys., Inc. v. Check Point Software Techs., Inc., 269 F.3d 270 (3d Cir. 2001).	15. #1-Traditional Analysis
	16. J.G. Wentworth, S.C.C. Ltd. P'ship v. Settlement Funding LLC, No. 06-0597, 2007 WL 30115 (E.D. Pa. Jan. 4, 2007).	16. #1-Traditional Analysis

	<p>17. Bijur Lubricating Corp. v. Devco Corp., 332 F. Supp. 2d 722 (D. New Jersey 2004).</p> <p>18. Tillery v. Leonard &amp; Sciolla, LLP, 437 F. Supp. 2d 312 (E.D. Pa. 2006).</p> <p>19. Zurco, Inc. v. Sloan Valve Co., 785 F. Supp. 2d 476 (W.D. Pa. 2011).</p> <p>20. Pa. Bus. Bank v. Biz Bank Corp., 330 F. Supp. 2d 511 (E.D. Pa. 2004).</p> <p>21. 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273 (D. New Jersey 2006).</p>	<p>17. #1-Traditional Analysis</p> <p>18. #1-Traditional Analysis</p> <p>19. #1-Traditional Analysis</p> <p>20. #1-Traditional Analysis</p> <p>21. #2-Influenced by <i>Brookfield</i></p>
<u>Fourth Circuit</u>	<p>22. Lamparello v. Falwell, 420 F.3d 309 (4th Cir. 2005).</p> <p>23. People for Ethical Treatment of Animals v. Doughney, 263 F.3d 359 (4th Cir. 2001).</p> <p>24. Gov't Emps. Ins. Co. v. Google, Inc., No. 1:04CV507, 2005 WL 1903128 (E.D. Va. Aug. 8, 2005).</p>	<p>22. #1-Traditional Analysis</p> <p>23. #3-Internet Troika or Less</p> <p>24. #2-Influenced by <i>Brookfield</i></p>
<u>Fifth Circuit</u>	<p>25. MCW, Inc. v. Badbusinessbureau.com, LLC, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004).</p> <p>26. Bayer Corp. v. Custom Sch. Frames, LLC, 259 F. Supp. 2d 503 (E.D. La. 2003).</p>	<p>25. #1-Traditional Analysis</p> <p>26. #3-Internet Troika or Less</p>
<u>Sixth Circuit</u>	<p>27. Audi AG v. D'Amato, 469 F.3d 534 (6th Cir. 2006).</p>	<p>27. #1-Traditional Analysis</p>



	<p>28. PACCAR Inc. v. Telescan Techs., LLC, 319 F.3d 243 (6th Cir. 2003).</p> <p>29. Tdata Inc. v. Aircraft Technical Publishers, 411 F. Supp. 2d 901 (S.D. Ohio 2006).</p> <p>30. Wells Fargo &amp; Co. v. WhenU.com, Inc., 293 F. Supp. 2d 734 (E.D. Mich. 2003).</p>	<p>28. #2-Influenced by <i>Brookfield</i></p> <p>29. #1-Traditional Analysis</p> <p>30. #1-Traditional Analysis</p>
<u>Seventh Circuit</u>	<p>31. Eli Lilly &amp; Co. v. Natural Answers, Inc., 233 F.3d 456 (7th Cir. 2000).</p> <p>32. Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808 (7th Cir. 2002).</p> <p>33. Trans Union LLC v. Credit Research, Inc., 142 F. Supp. 2d 1029 (N.D. Ill. 2001).</p> <p>34. Pure Imagination, Inc. v. Pure Imagination Studios, Inc., No. 03 C 6070, 2004 WL 2967446 (N.D. Ill. Nov. 15, 2004).</p> <p>35. Dwyer Instruments, Inc. v. Sensocon, Inc., 873 F. Supp. 2d 1015 (N.D. Ind. 2012).</p>	<p>31. #1-Traditional Analysis</p> <p>32. #2-Influenced by <i>Brookfield</i></p> <p>33. #1-Traditional Analysis</p> <p>34. #1-Traditional Analysis</p> <p>35. #1-Traditional Analysis</p>
<u>Eighth Circuit</u>	<p>36. Edina Realty, Inc. v. TheMLSONline.com, No. Civ. 04-4371JRTFLN, 2006 WL 737064 (D. Minn. March 20, 2006).</p>	<p>36. #1-Traditional Analysis</p>
<u>Ninth Circuit</u>	<p>37. Nissan Motor Co. v. Nissan Computer Corp., 246 F.3d 675 (9th Cir. 2000) (unpublished opinion).</p>	<p>37. #1-Traditional Analysis</p>

	<p>38. Entrepreneur Media, Inc. v. Smith, 279 F. 3d 1135 (9th Cir. 2002).</p> <p>39. Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137 (9th Cir. 2011).</p> <p>40. GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199 (9th Cir. 2000).</p> <p>41. Interstellar Starship Servs., Ltd. v. Epix, Inc., 304 F.3d 936 (9th Cir. 2002).</p> <p>42. Horphag Research, Ltd. v. Pellegrini, 337 F.3d 1036 (9th Cir. 2003).</p> <p>43. Playboy Enters., Inc. v. Netscape Commc'ns Corp., 354 F.3d 1020 (9th Cir. 2004).</p> <p>44. Picture It Sold, Inc. v. iSOLD IT, LLC, 199 Fed. Appx. 631 (9th Cir. 2006) (unpublished opinion).</p> <p>45. Perfumebay.com v. eBay Inc., 506 F.3d 1165 (9th Cir. 2007).</p> <p>46. Playboy Enters., Inc. v. Welles, 279 F.3d 796 (9th Cir. 2002).</p> <p>47. Toyota Motor Sales v. Tabari, 610 F.3d 1171 (9th Cir. 2010).</p> <p>48. Google Inc. v. Am. Blind &amp; Wallpaper, No. C 03-5340JF(RS), 2007 WL 1159950 (N.D. Cal. April 18, 2007).</p>	<p>38. #1-Traditional Analysis</p> <p>39. #1-Traditional Analysis</p> <p>40. #2-Influenced by <i>Brookfield</i></p> <p>41. #2-Influenced by <i>Brookfield</i></p> <p>42. #2-Influenced by <i>Brookfield</i></p> <p>43. #2-Influenced by <i>Brookfield</i></p> <p>44. #2-Influenced by <i>Brookfield</i></p> <p>45. #2-Influenced by <i>Brookfield</i></p> <p>46. #4-Fair Use</p> <p>47. #4-Fair Use</p> <p>48. #1-Traditional Analysis</p>
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	<p>49. Nissan Motor Co. v. Nissan Computer Corp., 89 F. Supp. 2d 1154 (C.D. Cal. 2000), <i>aff'd</i> 246 F.3d 675 (9th Cir. 2000) (unpublished opinion).</p> <p>50. Designer Skin, LLC v. S&amp;L Vitamins, Inc., 560 F. Supp. 2d 811 (D. Ariz. 2008).</p> <p>51. Paradise Canyon, LLC v. Integra Invs., LLC, No. 2:07-cv-17010RLH-GWF, 2008 WL 746919 (D. Nevada Mar. 18, 2008).</p> <p>52. Mirina Corp. v. Marina Biotech, 770 F. Supp. 2d 1153 (W.D. Wash. 2011).</p> <p>53. Herbalife Int'l, Inc. v. Lumene N. Am. LLC, No. CV 07-5040 AHM (RCx), 2007 WL 4225776 (C.D. Cal. Oct. 15, 2007).</p> <p>54. Munhwa Broad. Corp. v. Solafide, Inc., No. SA CV 07-699 DOC (ANx), 2007 WL 2667451 (C.D. Cal. July 16, 2007).</p> <p>55. Glow Indus., Inc. v. Lopez, 273 F. Supp. 2d 1095 (C.D. Cal. 2003).</p> <p>56. Golden W. Fin. v. WMA Mortg. Servs., Inc., No. C 02-05727 CRB, 2003 WL 1343019 (N.D. Cal. Mar. 13, 2003).</p> <p>57. Soilworks, LLC v. Midwest Indus. Supply, Inc., 575 F. Supp. 2d 1118 (D. Ariz. 2008).</p>	<p>49. #1-Traditional Analysis</p> <p>50. #1-Traditional Analysis</p> <p>51. #1-Traditional Analysis</p> <p>52. #1-Traditional Analysis</p> <p>53. #1-Traditional Analysis</p> <p>54. #1-Traditional Analysis</p> <p>55. #1-Traditional Analysis</p> <p>56. #1-Traditional Analysis</p> <p>57. #2-Influenced by <i>Brookfield</i></p>
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	<p>58. Network Network v. CBS, Inc., No. CV 98-1349NM(ANX), 2000 WL 362016 (C.D. Cal. Jan. 18, 2000).</p> <p>59. Skydive Ariz., Inc. v. Quattrocchi, No. CV 05-2656-PHX-MHM, 2009 WL 6597892 (D. Ariz. Feb. 2, 2009).</p> <p>60. Storus Corp. v. Aroa Mktg., Inc., No. C-06-2454 MMC, 2008 WL 449835 (N.D. Cal. Feb. 15, 2008).</p> <p>61. Suarez Corp. Indus. v. Earthwise Techs., Inc., 636 F. Supp. 2d 1139 (W.D. Wash. 2008).</p> <p>62. Flow Control Indus. Inc. v. AMHI Inc., 278 F. Supp. 2d 1193 (W.D. Wash. 2003).</p> <p>63. Shainin II, LLC v. Allen, No. C06-420P, 2006 WL 1319405 (W.D. Wash. May 15, 2006).</p> <p>64. Productive People, LLC v. Ives Design, No. CV-09-1080-PHX-GMS, 2009 WL 1507560 (D. Ariz. May 29, 2009).</p> <p>65. Palantir Techs. Inc. v. Palantir.net, Inc., No. C 07-03863 CRB, 2008 WL 152339 (N.D. Cal. Jan. 15, 2008).</p> <p>66. Garden of Life, Inc. v. Letzer, 318 F. Supp. 2d 946 (C.D. Cal. 2004).</p> <p>67. Fin. Express LLC v. Nowcom Corp., 564 F. Supp. 2d 1160 (C.D. Cal. 2008).</p>	<p>58. #2-Influenced by <i>Brookfield</i></p> <p>59. #2-Influenced by <i>Brookfield</i></p> <p>60. #2-Influenced by <i>Brookfield</i></p> <p>61. #2-Influenced by <i>Brookfield</i></p> <p>62. #2-Influenced by <i>Brookfield</i></p> <p>63. #2-Influenced by <i>Brookfield</i></p> <p>64. #2-Influenced by <i>Brookfield</i></p> <p>65. #2-Influenced by <i>Brookfield</i></p> <p>66. #2-Influenced by <i>Brookfield</i></p> <p>67. #3-Internet Troika or Less</p>
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	<p>68. Caesars World, Inc. v. Milanian, 247 F. Supp. 2d 1171 (D. Nevada 2003).</p> <p>69. Key3Media Events, Inc. v. Convention Connection, Inc., No. CV-S-001311-KJD-RJJ, 2002 WL 385546 (D. Nevada Jan. 25, 2002).</p> <p>70. J.K. Harris &amp; Co. v. Kassel, 253 F. Supp. 2d 1120 (N.D. Cal. 2003).</p>	<p>68. #3-Internet Troika or Less</p> <p>69. #3-Internet Troika or Less</p> <p>70. #4-Fair Use</p>
<u>Tenth Circuit</u>	<p>71. 1-800 Contacts v. Lens.com, Inc., 722 F.3d 1229 (10th Cir. 2013).</p> <p>72. Australian Gold v. Hatfield, 436 F.3d 1228 (10th Cir. 2006).</p> <p>73. Bayer Healthcare LLC v. Nagrom, Inc., No. Civ.A. 03-2448-KHV, 2004 WL 2216491 (D. Kan. Sept. 7, 2004).</p>	<p>71. #1-Traditional Analysis</p> <p>72. #2-Influenced by <i>Brookfield</i></p> <p>73. #3-Internet Troika or Less</p>
<u>Eleventh Circuit</u>	<p>74. N. Am. Med. Corp. v. Aziom Worldwide, Inc., 522 F.3d 1211 (11th Cir. 2008).</p>	<p>74. #2-Influenced by <i>Brookfield</i></p>
<u>Federal Circuit</u>	<p><i>No Cases Sampled from Federal Circuit.</i></p>	

