

Who Cares About The 85 Percent? Reconsidering Survey Evidence Of Online Confusion In Trademark Cases

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Abstract

There is an assumption in US trademark law that the protection of consumer interests—a traditional pillar of trademark law—is best achieved by enjoining a defendant's use of a mark that creates a likelihood of confusion (with the plaintiff's mark) for 15% or more (sometimes less) of relevant consumers. Courts often use survey evidence to determine the existence of a likelihood of confusion. This article argues that the interests of all consumers are relevant in that determination. This means that assessing the costs, if any, imposed on nonconfused consumers should also be part of the equation. This can be accomplished in part by making better use of verbatim answers and by taking a deeper look into the information conveyed by the survey. Likelihood of confusion analyses should be both quantitative and qualitative.

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Introduction

Trademark law has been said to be anchored in consumer interests.¹ Is it? Because consumer interests are often seen as the appropriate overall normative basis of trademark law, tests measuring a likelihood of consumer confusion are regularly employed to justify remedies for alleged infringement.² Simply put, use of another's mark in a confusingly similar manner can be seen as systematically unfair (a) because it impedes the consumer's interest in keeping information in the marketplace fairly credible;³ (b) because it increases consumer search costs and, therefore, forces the consumer to "work harder," both online and offline;⁴ and (c) because it can change a consumer's decision to buy B's product instead of A's after having been lured to B's site or product by a confusing use of A's mark - But then unfair to whom? If the confusing use leads the consumer (via a similar use of a third party's ad for example) to a cheaper/better product, there is no obvious loss to the consumer. A systemic loss might still be said to be occurring, however, because the incentive to build goodwill and maintain product quality may be reduced if no adequate protection is available. If the consumer ends up buying a product she did not want (or worse, a counterfeit) then a loss to both

her and the owner of the mark is fairly easy to establish.

Most federal appellate circuits find a likelihood of confusion to be present (and thus infringement of a trademark), and remedies available to the trademark holder, if survey evidence shows that 15% of relevant consumers are likely to be confused by a defendant's use of a plaintiff's mark.⁵ This Article refers to the practice as the "15% Rule" and argues that the Rule amounts to a reductionist view of consumer interests and, more importantly, one which can lead to sub-optimal outcomes. The Article also demonstrates that the 15% Rule is hard to reconcile with the current approach of the same appellate courts in evaluating certain other areas of trademark law, such as the interface between trademark protection and free speech considerations.

The idea that "consumer interests" should go beyond a minority of potentially confused consumers is not new, though the concept has received relatively scant attention in the literature.⁶ There are at least two areas of current trademark law that buck the general trend of ignoring a large group of consumers to protect the interests of a smaller group. First, courts frequently will not issue an injunction even in the presence of *demonstrated* confusion of a small number (typically on an anecdotal scale) of consumers, thereby leading to a finding that—

¹ See Mark P. McKenna, *A Consumer Decision-Making Theory Of Trademark Law*, 98 VA. L. REV. 67, 111 (2012) ("[T]rademark law regulates the commercial marketplace and should therefore focus on actions that affect consumers in their capacity as marketplace actors. Simply having to think harder is not a harm to consumers as consumers unless it somehow impacts their decisions. As a result, courts should always ask not simply whether the defendant's practice is likely to cause confusion, but also whether it is likely to materially affect consumer purchasing decisions. Any use of a mark that does not impact consumer decisions should be deemed irrelevant to trademark law.")

² See Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 723-24 (2004).

³ Allison S. Brehm & Mariya Kupersmidt, *Ad Men and Adwords: How Trademark Law is Adapting to the Internet*, 28 COMM. LAW. 10, 10 (2011).

⁴ See Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 778-81 (2004).

⁵ See Lanham Act, 15 U.S.C. §§ 1114, 1125(c). See also *infra* Part I.C. Naturally, an affirmative defense such as fair use might apply.

⁶ A significant exception is Michael Grynberg, *Trademark Litigation As Consumer Conflict*, 83 N.Y.U. L. REV. 60, 61-62 (2008) (describing how "[t]rademark's traditional seller-conflict account gives insufficient weight to the interests of nonconfused consumers and their potential losses if the defendant is enjoined.)

in spite of "actual" confusion—there is no *likelihood of confusion* of a sufficient number of consumers (i.e. the 15% Rule).⁷ This arguably shows that courts are prepared to ignore a small number of confused consumers to protect consumers as a broader group. Yet once the confusion rate reaches 15% (and sometimes even less), the analytical outcomes are reversed. This Article questions whether that approach is warranted in every case. Indeed, and this is the second area alluded to above, courts have been much more willing to allow some confusion to protect interests beyond the boundaries of trademark law. For example, cases involving First Amendment issues, which are admittedly different because the courts do not find an absence of likelihood of confusion or infringement as much as they apply a defense to justify what would otherwise amount to an infringement.⁸ For

the purposes of this Article, those cases illustrate the courts' willingness to engage in a policy analysis beyond the rather mechanical application of the 15% Rule—or any other firm numerical cutoff.

Added to this analytical mix is the fact that each Circuit has developed a slightly different multi-factor test to evaluate likelihood of confusion.⁹ While the tests are not identical, they are all flexible.¹⁰ They are also subject to significant cognitive biases.¹¹ As just noted, a very small amount of actual confusion will not trigger remedies; however, a consumer confusion rate of 15% or more may strongly tilt the scales in the plaintiff's favor. Indeed, a major component of the evidence submitted to satisfy the various tests to determine a likelihood of confusion is actual confusion, often considered as the best available.^{12 13}

This Article does not wish to re-litigate

⁷See 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:13 (4TH ED.).

⁸As the court explained in *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211 (3rd Cir. 2005):

It must be recognized at the outset that 'fair use' presents a fact pattern different from that of a normal infringement suit. The typical situation in a trademark case involves the defendant's having passed off another's mark as its own or having used a similar name, confusing the public as to precisely whose goods are being sold. Likelihood of confusion is the sole issue. But the fair use defense, by reason of the circumstances giving rise to its applicability, alters the premise somewhat. The defendant is not purporting to be selling goods or services that the plaintiff has trademarked, but, rather, is using plaintiff's mark in order to refer to defendant's own goods or to the goods of the trademark owner in a way that might confuse the public as to the relationship between the two. [...] Accordingly, the legal framework still involves a showing that A's reference to B's mark will likely confuse the public, but the analysis does not end there, for the use may nonetheless be permissible if it is "fair." [emphasis added]

⁹See *infra* Part I.B.

¹⁰*Nautilus Group, Inc. v. ICON Health & Fitness, Inc.*, 372 F.3d 1330, 1346 (Fed. Cir. 2004). The Federal Circuit noted, quoting *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 942 (9th Cir. 2002), that "the application of this multifactor test should remain flexible and 'pliant.'"

¹¹See Grynberg, *supra* note 6, at 6.

¹²See, e.g., *World Carpets, Inc. v. Dick Littrell's New World Carpets*, 438 F.2d 482, 489 (5th Cir. 1971) ("There can be no more positive or substantial proof of the likelihood of confusion than proof of actual confusion.").

¹³Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581 (2006). While Beebe's article suggests that, based on a sampling of 331 district court opinions between 2000 to 2004, "surveys are rarely presented by parties or credited by courts," more recent judicial opinions and scholarly works continue to emphasize the importance of confusion survey evidence. Therefore, this paper proceeds under—and contends with—the enduring maxim that survey evidence is, in fact, highly persuasive in the trademark confusion analysis.

¹⁴For a reconsideration of confusion as the central tent of trademark law, see e.g. William McGeeveran and Mark P. McKenna *Confusion Isn't Everything* 89 NOTRE DAME L. REV. 253, 270-271 (2013) ("Why did courts gravitate toward viewing the elimination of consumer confusion as the animating purpose of trademark law? It would be impossible to say for certain, but we think a few factors likely contributed to the shift. One is the key role that the concept of consumer confusion played in mid-twentieth-century debates about the danger that expanding trademark rights would create barriers to market entry. [...] We also suspect the focus on confusion was attractive because it allowed courts, legislators, and advocates to avoid fully reconceptualizing trademark law after the collapse of consensus around trade diversion. Different accounts of trademark law's

fundamental aspects of trademark theory.¹⁴ Its purpose is more modest, but nonetheless crucial. The Article accepts the consumer interest narrative as the normative grounding of trademark law. It accepts that likelihood of confusion is a test for infringement that, if used adequately, can properly reflect those interests. It also acknowledges that survey evidence is often key in deciding whether to enjoin use of a potentially confusing mark. From that triple point of departure, the Article argues specifically that survey evidence should be used in a much different way than a mechanical determination of whether the 15% threshold has been reached at the arbitrary time point at which the survey was administered. The Article thus digs deeper into the mythical average or prototypical consumer who may be confused and looks at *all* likely consumers of a product or service in the rapidly evolving consumer marketplace.¹⁵ The reader less familiar with trademark law might be surprised that our approach is *not* how the law is currently applied. Does it not belie the fundamental anchoring of trademark law to ignore the interests of a vast majority of those it purports to protect? Yet that is precisely what courts often do in applying survey evidence.

To prove infringement, trademark owners must demonstrate that a "substantial" number of ordinarily prudent consumers

would be confused or misled as to source, sponsorship, or endorsement of goods or services.¹⁶ As already noted, however, a "substantial" number does not require a majority—far from it.¹⁷ In most, if not all, appellate circuits, survey evidence showing that 15% of likely consumers are likely to be confused by a use of the plaintiff's mark is sufficient for the court to impose remedies, and in particular to enjoin that use.¹⁸ Put conversely, even when 85 percent of respondents may not be confused in any way—and may even benefit from the allegedly infringing use—courts fashion remedies to protect the 15% minority of potentially confused consumers. In fact, several courts have relied on survey results even *below 15 percent* to support a finding of infringement.¹⁹ For example, the Eighth Circuit has found that results between 10 percent and 12 percent were enough to support a brick and mortar infringement determination.²⁰ The Southern District of New York has considered 8.5 percent to be "strong evidence" of likelihood of confusion.²¹ However, most courts—including those tackling online infringement claims²²—apply the 15 percent threshold.

In a nutshell, this Article's suggestion is that a new, more nuanced balancing test must be developed to factor in *the other* 85%. Indeed, in most areas of law, 85 percent is considered more than enough. Uni-

purposes converge on the undesirability of consumer confusion, even if they do not agree on much else. An emphasis on confusion allowed the recasting of trademark law as a form of protection for consumers rather than for producers.") (notes omitted).

¹⁵To a large extent we agree with the normative and theoretical analysis in Grynberg, *supra* note 6.

¹⁶Andrew Martineau, *Imagined Consumers: How Judicial Assumptions About the American Consumer Impact Trademark Rights, for Better and for Worse*, 22 DEPAUL J. ART TECH. & INTELL. PROP. L. 337, 350 (2012).

¹⁷*Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500, 507 (5th Cir. 1980).

¹⁸*See Exxon*, 628 F.2d at 507 (finding that a survey demonstrating confusion levels of 15% constituted "strong evidence indicating a likelihood of confusion"); *see also James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 279 (7th Cir. 1976) (stating that 15 percent confusion is not small nor de minimis).

¹⁹4 MCCARTHY, *supra* note 7, § 32, at 188.

²⁰*Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 399-402 (8th Cir. 1987).

²¹*Grotian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 365 F. Supp. 707, 716 (S.D.N.Y. 1973).

²²*See, e.g., 1-800 Contacts, Inc. v. Lens.com, Inc.*, 2013 WL 3665627 (10th Cir. 2013); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 159 (4th Cir. 2012); *3M Co. v. Mohan*, 2010 WL 5095676 (D. Minn. Nov. 24, 2010) (gesturing to low threshold confusion percentages).

fied responses from less than 85 percent of a population can elect a president, turn a bill into a law, and control a corporation. Far more than a majority, the "85 percent" typically holds significant clout. But trademarks are different: in the trademark context, courts often disregard the views of 85 percent of consumers—deferring, instead, to a 15 percent minority.²³

We begin by noting that this Article's suggestion is particularly timely in light of the Seventh Circuit decision, *Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store, Inc.*²⁴ Highlighting the shortcomings of survey evidence, the court acknowledged that "[a]lthough the ordinary consumer's mindset is central to trademark law and policy, neither courts nor commentators have made any serious attempt to develop a framework for understanding the conditions that may affect the attention that can be expected to be given to a particular purchase."²⁵ And while judicial opinions have disagreed over the competence levels of relevant consumers, the Seventh Circuit described the debate as essentially a "vacuous war of words, uninformed by any careful theoretical modeling of consumer psychology or empirical study of consumer behavior."²⁶ Our model seeks to transform this "uninformed" analysis into a thorough, holistic examination of *all* consumer aptitudes and interests.

It seems intuitively correct to state that the practice of considering a case won (by the plaintiff) once the 15% threshold has been reached self-evidently may ignore the interests of a majority of nonconfused con-

sumers. Our starting point is simple: those interests—which include a better marketplace for the majority and possibly more robust free speech protection—should be factored in and at the very least serve as a counterweight in closer cases. This Article turns that intuitive insight into an operational balancing test. In the test that we propose, if the likelihood of consumer confusion of a small minority is minimal but an injunction would impose a significant loss/cost on other consumers and/or significant speech restrictions, then the injunction should not issue. The plaintiff would not lose its right to a remedy, but its burden should be higher. Conversely, even if only 15% of relevant consumers are likely to be confused but there is no demonstrable or measurable loss by other consumers, then the use should be enjoined. In sum, this Article suggests that the interests of *all relevant consumers* be factored in.

This Article's suggestion makes the infringement calculus more inclusive and comprehensive. A likelihood of confusion rate of 15% would no longer be seen as an automatic threshold or trigger for injunctive relief. The nature of countervailing interests (most notably of other consumers) would be factored in. A strong showing of countervailing interests would justify asking for a higher a percentage and/or correlatively stronger evidence of a likelihood of confusion. By contrast, an absence of demonstrable countervailing interests could lead a court to issue an injunction with even fewer than 15% of consumers likely to be confused. In such cases, even a very small percentage (say 7-10%)

²³*Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500, 507 (5th Cir. 1980) (finding that a survey demonstrating confusion levels of 15% constituted "strong evidence indicating a likelihood of confusion"); see also *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 279 (7th Cir. 1976) (stating that 15 percent confusion is not small nor de minimis). There are other areas of law, such as civil rights, where protecting rights of a minority is both warranted and necessary. However, here the point is that these are percentages of the *same group*, namely likely users/consumers of the product or service in question.

²⁴*Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 2013 U.S. App. LEXIS 23124, *13-19 (7th Cir.).

²⁵*Id.* at *14 (quoting Thomas R. Lee, Glenn L. Christensen & Eric D. DeRosia, *Trademarks, Consumer Psychology, and the Sophisticated Consumer*, 57 EMORY L.J. 575, 575-76 (2008)).

²⁶*Kraft*, 2013 U.S. App. LEXIS 23124, at *14.

might be considered sufficient because protecting them comes at no cost to other consumers.

While trademark's confusion threshold has raised numerous, well-documented concerns in the brick and mortar context,²⁷ this Article focuses principally on its implications online, where the interests of the nonconfused consumer may be more easily vitiated and where, consequently, the proposed balancing test may be of most value. The dynamism of the online marketplace is such that consumers are getting savvier about certain uses of potentially confusing terms, in ways that trademark law may not be able to address but that may be examined under other areas of law.²⁸ Increasingly sophisticated online consumers catalyze web development by exploring and reacting to new technologies. This has led to a significant reduction in the doctrinal scope of initial interest confusion, which some see as disappearing.²⁹ Uses that may have been confusing to a significant percentage of consumers years ago may not generate the same confusion today; therefore, precedents should be applied—and also filtered and refined—with this in mind. By the same token, however, courts should be willing to accept that new forms of use of third party trademarks

may be confusing.

This Article provides concrete suggestions on how to balance the interests of potentially confused consumers with those of consumers who wish to allow an environment for robust and vibrant online commerce. The Article also suggests pulling back on certain forms of injunctive relief, or tailoring relief to encompass a broader set of objectives. That broader set of objectives is really what trademark law should have been about all along: namely focusing on the interests of all consumers in a balanced way, rather than automatically triggering bans on use of trademarks once a minimal confusion threshold has been reached. In the online environment, the threshold is, as just mentioned, subject to an additional temporal filter because consumers' understanding of marketing tricks and gimmicks evolves fairly rapidly.

This Article contends that—in an era where many consumers consider themselves Internet “experts”³⁰—it is high time for courts to look beyond survey statistics as more or less automatically triggering certain remedies. Strict reliance on bright line statistical thresholds is not only contrary to a true focus on consumer interests, it is also incompatible with the broader analytical approach suggested

²⁷ See, e.g., Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 451 (2010).

²⁸ See Daniel Gervais et al., *Is Profiting from the Online Use of Another's Property Unjust? The Use of Brand Names as Paid Search Keywords*, 53(2) IDEA 131 (2013) (suggesting that in specific cases unjust enrichment might be invoked to obtain remedies against certain uses of brands).

²⁹ The doctrine was developed to prevent consumers from being momentarily “confused” when taken to a web page or site other than what they were expecting, but quickly recognizing their “mistake.” See, e.g., Winnie Hung, *Limiting Initial Interest Confusion Claims in Keyword Advertising*, 27 BERKELEY TECH. L.J. 647, 670 (2012) (suggesting that “Ultimately, the availability of options, from ads to review sites, increases consumer sophistication and reduces the chance of initial interest confusion while creating healthy competition in the online consumer market.”).

³⁰ In a recent market study by PricewaterhouseCoopers, 72 percent of US respondents labeled themselves “confident” or “expert” online shoppers. PricewaterhouseCoopers, *Understanding How US Online Shoppers Are Reshaping the Retail Experience*, PWC (2012), available at http://www.pwc.com/en_us/us/retail-consumer/publications/assets/pwc-us-multichannel-shopping-survey.pdf.

³¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). In *eBay*, the Supreme Court emphasized the longstanding role of equitable discretion—rather than bright line tests or rules—in determining whether to accord injunctive relief in intellectual property cases. Specifically, the Court stated that there is no “general rule” prompting automatic injunctive relief for patent infringement; rather, “well-established principles of equity” apply in the patent context. The court indicated that in order to obtain permanent injunctive relief for patent infringement, a plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the

by the Supreme Court in *eBay*³¹ and recently echoed by the Ninth Circuit in *Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*³² The Article urges courts—in their exercise of the proposed balancing test—to thoroughly consider the verbatim survey responses proffered by consumer participants. These responses provide a window into “the conditions that may affect the attention that can be expected to be given to a particular purchase.”³³ They may also capture the costs and benefits associated with allegedly infringing online use for both confused and nonconfused consumers. Verbatim responses are thus vital to holistic online infringement analyses and may lead to judicial determinations that better align with the fundamental, consumer protective function of trademark law.

The Article proceeds as follows: Part I explicates the central role of confusion in US trademark law and policy, and specifically how courts assess survey evidence of likelihood of confusion. Part II discusses *online* mark uses and traces evolving judicial presumptions regarding the increasingly sophisticated consumer. It also demonstrates that, by filtering online content without considering nonconfused consumers, courts risk imposing undue

limitations on speech, decreasing healthy market competition, and chilling technological progress. Finally, Part III recommends concrete ways to ameliorate the situation, namely applying a new balancing test to assess confusion in a manner that reflects the interests of all relevant consumers. Specifically, the Article urges courts to weigh the percentage of confused consumers and the strength of the likelihood of confusion against the percentage of nonconfused consumers and the level of their loss if an injunction is granted.

I. Confusion as the Principal Tenet of Trademark Law

A. Confusion as Target

1. The “Dual Purpose” Of Trademark Law Is Served By Relying On Confusion

Trademarks are recognizable words, names, symbols, or devices affiliated with products or services.³⁴ Consumers rely on trademarks to identify brands and underlying quality associated with various marketplace options.³⁵ Take, for example, the Starbucks® coffee enthusiast. She bases her purchasing decisions on mental associations between the famous green mermaid

public interest would not be disserved by a permanent injunction.

³²*Herb Reed Enterprises, LLC v. Florida Ent. Mgmt., Inc.*, 2013 U.S. App. LEXIS 23938, at *16-25 (9th Cir.). The Ninth Circuit held that in order to obtain a preliminary injunction in a trademark infringement case, a plaintiff must establish 1) that it is likely to succeed on the merits; 2) that it is likely to suffer irreparable harm in the absence of preliminary injunctive relief; 3) that the balance of equities tips in its favor; and 4) that the public interest favors the grant of an injunction. In adopting the *eBay* principle—that a plaintiff must establish irreparable harm to obtain injunctive relief—the court eliminated the presumption of irreparable harm that once accompanied a showing of likelihood of success on the merits. *eBay*, 547 U.S. at 388. In the absence of this presumption, both plaintiffs and defendants will have significant opportunity to invoke survey evidence from confused and nonconfused consumers to persuade courts to grant or deny a preliminary injunction in light of the overarching, consumer-protective goals of trademark law.

³³*Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 2013 U.S. App. LEXIS 23124, *13-19, at *18 (7th Cir.).

³⁴4 MCCARTHY, *supra* note 7, § 3, at 1.

³⁵*Id.*

³⁶This – and specifically the use of the word “CHARBUCKS” in that context – is discussed ad nauseam in *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 79 U.S.P.Q.2d 1138 (S.D.N.Y. Dec 23, 2005), vacated by 477 F.3d 765 (2d Cir. 2007); on remand to 559 F.Supp.2d 472 (S.D.N.Y. 2008); affirmed in part, vacated in part by 588 F.3d 97 (2d Cir. 2009); on remand to 101 U.S.P.Q.2d 1212 (S.D.N.Y. 2011); affirmed, 108 U.S.P.Q.2d 1581 (2d Cir. 2013). As may be apparent from the previous list, Starbucks was not too happy with the use of Charbucks in relation to coffee but in the end lost its case against Black Bear Micro Roastery, a

and robust—if perhaps over-roasted for the palate of certain consumers³⁶—Arabica blends. These mental associations are valuable to both Starbucks and the consumer, as they allow Starbucks to establish goodwill³⁷ and the consumer to save search time in the marketplace and ensure the quality of her purchases.³⁸

One key difficulty that arises early on in trademark law policy analysis is whether protecting goodwill and preventing confusion (here as a way to reduce search costs) are separable objectives. The former is meant to benefit the trademark holder, and may be seen as a reward for the efforts made to generate the goodwill in the first place. The latter is focused on consumers.

The two often match, but not always.³⁹ A true consumer focus would theoretically protect the mark only to the extent that it protects consumer interests, and see goodwill protection as a positive “side effect” of protecting consumer interests. Otherwise, the goodwill and marks that symbolize it would get protection on a different basis, namely *in se*, as property.

The Lanham Act aims to “provide a cause of action against those who use deceptive or misleading marks, protect mark holders against unfair competition, [and] protect the ability of consumers to distinguish among competing producers.”⁴⁰ Section 32 establishes the infringement cause of action for registered marks:

(1) 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.⁴¹

Section 43 offers a similarly worded infringement cause of action for unregistered marks.⁴² The Act thus demonstrates that preventing confusion is the central objective of trademark law.⁴³ The next question

is: how does, and how *should*, this objective translate into an operational test.

As mentioned above, under the 15% Rule, to prove infringement, trademark holders must show that a substantial num-

small coffee shop in New Hampshire selling “Mister Charbucks” coffee blend.

³⁷ See *id.* “Goodwill” is the reputation associated with a particular trade or service mark.

³⁸ *Id.*

³⁹ See Grynberg, *supra* note 6.

⁴⁰ Lanham Act, 15 U.S.C. § 1114 (2005). See also Robert C. s & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. PA. J. BUS. L. 1013, 1020 (2012).

⁴¹ 15 U.S.C. § 1114 (2005).

⁴² 15 U.S.C. § 1125 (1995).

⁴³ *Id.*

⁴⁴ 4 MCCARTHY, *supra* note 7, § 23, at 94. “The reasonably prudent purchaser is expected to exercise the degree of ‘care,

ber of reasonably prudent consumers⁴⁴ are likely to be confused or misled as to source, sponsorship, or affiliation by unauthorized use of a mark.⁴⁵ Hence, little if any attention is paid to nonconfused consumers and the potential losses they may suffer because the presence of a small minority of potentially confused consumers is sufficient to enjoin the use of a mark.

But it gets worse. While courts traditionally frame their focus on likelihood of confusion as it impacts sales decisions, some circuits still recognize additional protection under the doctrine of initial interest confusion, alluded to briefly in the Introduction.⁴⁶ Initial interest confusion permits a finding of infringement when there is temporary confusion (dispelled long before a purchase is made), and thus before any real prejudice is caused. It is a doctrine aimed at preventing that ephemeral moment of doubt that consumers may experience when searching for a product, service, or related information.⁴⁷ The doctrine prohibits an infringer from getting his proverbial foot in the door, regardless of whether or not his actions impact consumer purchasing decisions or end up providing useful (and non-confusing) information to the consumer.⁴⁸

Initial interest confusion was first recognized in the 1970s in the brick and mortar marketplace; however, the doctrine gained much more prominence in connection with online trademark usage. In the

online context, application of initial interest confusion was found to be "proper where consumers believe a connection exists between the advertisement or search result produced and the keyword they selected or the website they were visiting, only to have that confusion removed once they visited the advertiser's site."⁴⁹ To illustrate the harm meant to be addressed by the initial interest confusion doctrine, the Ninth Circuit used—and other Circuits have echoed—a metaphor equating misleading online uses of a trademark with misleading signs on a freeway.⁵⁰ The Ninth Circuit suggested that misleading online marks, like misleading billboards on a highway, may cause consumers to pull off at a "wrong exit."⁵¹ Unable to find the desired brand, consumers browse a competitor's product or service in order to avoid having to "get back on the highway" and repeat the search.⁵²

Having to get back on a physical highway after getting off at the wrong exit is a waste of time with no appreciable benefits for most drivers. The same is not self-evidently true when all the user has to do is hit the "Back" button on a web browser. Still, the Ninth Circuit analogy prompted subsequent infringement determinations based on simple, very short-lived diversions to a defendant's website.⁵³ In fact, "[n]umerous courts have allowed findings of trademark infringement simply on the basis that a consumer may be 'at-

caution and power of perception' appropriate to the kind of choice he faces in the marketplace. In considering the likelihood of confusion, the court considers the 'general impression of the ordinary purchaser, buying under the normally prevalent conditions of the market and giving the attention such purchasers normally give in buying that class of goods.'"

⁴⁵See *supra* Part I.C. This "substantial" amount does not necessitate a majority. In most situations, judges are persuaded by confusion rates of well below 50 percent.

⁴⁶Elizabeth S. Ritter & Mark H. Jaffe, *The Uncertain Future of Initial Interest Confusion*, 4(6) *LANDSLIDE* 55 (2012).

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹Paul L. Bonewitz, *Beyond Confusion: Reexamining Trademark Law's Goals in the World of Online Advertising*, 81 *ST. JOHN'S L. REV.* 899, 911 (2007).

⁵⁰*Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999).

⁵¹*Id.*

⁵²*Id.*

⁵³Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 *EMORY L.J.* 507, 566 (2005).

tracted,' 'distracted,' [or] 'interested'" by other choices, regardless of the duration of attraction, distraction, or interest.⁵⁴ Although several Circuits have recently criticized the highway analogy—as "it is the work of a fraction of a second on the Internet to discover that [it] is not the Web site you are looking for and to click the mouse button to go back to your starting point"⁵⁵—some courts continue to rely on mere seconds (or less) of Internet diversion as a sufficient basis for a finding of initial interest confusion and trademark infringement.⁵⁶ This is a good example of an area where consideration of the broader interests of *all* Internet users may be called for. In other words, this Article suggests that even if there is minimal "harm" experienced by a small minority of users who waste a second or two before hitting the Back button, there may be substantial benefits for other users who appreciate the additional information and discovering options they may not have been aware of. Again, this is assuming no lasting likelihood of confusion is present, especially confusion leading to the purchase of the wrong (undesired) product.

Whether as likelihood of confusion (likely to lead to a different purchasing decision) or as only initial interest confusion

(where applicable), courts have applied a number of similar tests to evaluate confusion.

2. The Debate Over Dilution Illustrates The Risk Of Avoiding Confusion As Target

A propertarian focus, that is, considering trademarks as property protectable absent consumer confusion, informed Congress's action when it passed and later strengthened the tort of trademark dilution for famous marks, in response to what it apparently saw as undue hesitation by courts in its application.⁵⁷ The Federal Trademark Dilution Act and subsequent Trademark Dilution Revision Act ("TDRA") may be viewed as recognition of the protection of trademarks ostensibly *unmoored from consumer interests*—that is, without a need to demonstrate the impact on relevant consumers.⁵⁸ Dilution can happen by blurring or tarnishment. Tarnishment cases have often dealt with "adult" products presented in association with various "non-adult" products, such as the Barbie doll.⁵⁹ The practice results in a negative association in the minds of consumers, diluting the "non-adult" product's goodwill even absent any likelihood of confusion.⁶⁰ There is arguably a systemic interest of consumers in preserving the signaling func-

⁵⁴ Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 122 (2005).

⁵⁵ 4 MCCARTHY, *supra* note 7, § 25, at 69. 4 MCCARTHY § 25:69.

⁵⁶ See, e.g., *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1239-40 (10th Cir. 2006); *Morningware, Inc. v. Hearthware Home Products, Inc.*, 673 F. Supp.2d 630, 636-38 (N.D. Ill. 2009).

⁵⁷ See Federal Trademark Dilution Act, 15 U.S.C. § 1125(c) (1995); Trademark Dilution Revision Act (TDRA), 15 U.S.C. § 1125(c) (2006). The TDRA revised the Federal Trademark Dilution Act in three significant ways: (i) a likelihood of dilution, rather than actual dilution, is now required to establish dilution; (ii) courts may apply four factors to determine whether a mark is famous and protection is denied to marks that are famous in only "niche" markets; and (iii) courts may apply six factors to determine whether a mark is likely to cause dilution by blurring. See House Report on Trademark Dilution Act of 2005 at 8, 25.

⁵⁸ Lanham Act, 15 U.S.C. § 1125(c) ("Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.").

⁵⁹ See *Mattel, Inc. v. McBride*, 48 U.S.P.Q.2d 1467 (S.D.N.Y. 1998), but a parody defense might be applicable. See *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

⁶⁰ This phenomenon has been studied by several experts. See e.g., Gail Tom et al., *Mere exposure and the endowment effect on consumer decision making*, 141(2) J. PSYCHOL. 117-125 (2007).

tion of trademarks they know and trust in such cases that borders normatively on confusion. Blurring is more difficult, as it happens when consumers "actually associate" the plaintiff's mark with the defendant's product while knowing that the source is different—that is, without reaching the level of likelihood of confusion. The mark may "lose its ability to serve as a unique identifier of the plaintiff's product."⁶¹ Not surprisingly, claims of dilution by blurring have not worked particularly well in cases where no likelihood of confusion could be shown to exist. Put differently, courts that find dilution by blurring often find that trademark infringement (a likelihood of confusion) is also present.

The TDRA replaced the standard of *actual dilution* with a standard of *likelihood of dilution*, which courts have interpreted as requiring evidence of "actual association."⁶² Parsing that distinction (between a likelihood of confusion and actual association leading to a likelihood of blurring) has not been easy nor is the normative grounding of blurring *sans* dilution obvious to the authors of the Article. At the very least, it represents a departure from traditional trademark law.

While trademark infringement, which is based on a likelihood of confusion, is and remains consumer-focused, dilution could be argued in appropriate cases as also consumer-focused. In the dilution context, this Article would suggest that courts factor in what consumers lose if a use is enjoined as diluting a famous mark. The Ar-

ticle does not, however, delve further into the dilution analysis.

B. The Multifactor Tests to Evaluate Confusion

Courts assess infringement in light of policy goals, identified as the protection of consumers and the improvement of the quality of information in the marketplace.⁶³ To evaluate traditional likelihood of confusion and initial interest confusion claims, circuits employ varying (but fairly similar) multi-factor tests.⁶⁴ These factors are non-exhaustive and assigned different weights, depending upon the specific facts of a case.⁶⁵

In the context of traditional (source) confusion, the Ninth Circuit, for example, relies on the *Sleekcraft* factors: 1) strength of the plaintiff's mark; 2) proximity of the goods; 3) similarity of the plaintiff's and defendant's 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.⁶⁶ Similarly, the Second Circuit's *Polaroid* test considers: 1) strength of the plaintiff's mark; 2) degree of similarity between plaintiff's and defendant's marks; 3) proximity of products or services covered by the marks; 4) likelihood that plaintiff will bridge the gap; 5) evidence of actual consumer confusion; 6) defendant's good faith in adopting the mark; 7) the qual-

⁶¹Playboy Enters., Inc. v. Welles, 279 F.3d 796, 805 (9th Cir.2002).

⁶²"Actual association" is also mentioned as a factor in the statute. See 15 U.S.C. § 1125(c)(2)(B)(vi). In Starbucks Corp. v. Wolfe's Borough Coffee, Inc. 101 U.S.P.Q.2d 1212 (SDNY 2011): "As the Second Circuit explained in Starbucks IV, the ultimate analytical question presented by a dilution-by-blurring claim is whether there is an association, arising from the similarity of the relevant marks, that impairs the distinctiveness of the famous mark." See also Mead Data Central v. Toyota Motor Sales, U.S.A., 875 F.2d 1026, 1030-31 (2d Cir.1989). The court similarly noted that dilution requires "mental association."

⁶³William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 265-66 (1987) ("Our overall conclusion is that trademark law, like tort law in general (trademark law is part of the branch of tort law known as unfair competition) can best be explained on the hypothesis that the law is trying to promote economic efficiency.").

⁶⁴See, e.g., Beebe, *supra* note 13.

⁶⁵*Id.*

⁶⁶AMP Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979).

ity of defendant's product or service; and 8) consumer sophistication.⁶⁷ Studies have shown that some factors, such as the defendant's bad faith, play a much more significant role in outcomes than would be expected.⁶⁸

To evaluate *initial interest* confusion in the online environment, most courts borrow from the traditional confusion analysis, as they "consider initial interest confusion to be a subset of confusion."⁶⁹ The Ninth Circuit, for example, has operated under several modified versions of the *Steekcraft* approach.⁷⁰ Initially, the court relied on the "Internet Trinity" or "Internet Troika" test, which inquired into 1) the similarity of the trademarks; 2) the relatedness of the goods; and 3) the simultaneous use of the Internet as a marketing channel.⁷¹ In 2011, however, the Ninth Circuit updated its approach and emphasized that trademark law should be applied flexibly in Internet cases.⁷² The court suggested that the most relevant factors to assess online confusion are: (1) the strength of the plaintiff's 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.⁷³

While no single factor is dispositive

in the multifaceted likelihood of confusion and initial interest confusion analyses, many courts purport to place considerable weight on evidence of actual confusion.⁷⁴ Even when "all other circumstances point to a finding of non-infringement, significant evidence of actual confusion dramatically alters the equation"⁷⁵ and may prompt a finding of infringement. In both the online and brick and mortar context, consumer surveys are readily employed as evidence of actual confusion.⁷⁶

C. Surveys as Evidence of Actual Confusion

Surveys are used to measure consumer attitudes and beliefs with regard to particular products, names, or concepts.⁷⁷ Generally, experts gather responses from limited participant pools and generalize results to a larger population.⁷⁸ Litigants then employ the data to persuade courts that a "substantial number" of consumers would be confused by an unauthorized use of a mark.⁷⁹ Over the past several decades, both courts and commentators have held consumer surveys in high regard because surveys can "provide direct evidence about consumer perceptions that expert testimony lacks and elicit multifaceted information about perceptions that mere

⁶⁷ *Polaroid Corp. v. Polaroid Electronics Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

⁶⁸ See Beebe, *supra* note 13, at 1628. Other than the general societal interest in punishing bad faith actors, it is not clear how emphasizing that factor above others directly serves consumer interests.

⁶⁹ Hung, *supra* note 29, at 650.

⁷⁰ *Brookfield*, 174 F.3d at 1053-54.

⁷¹ *Id.*

⁷² *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137 (9th Cir. 2011) (discarding the Internet "troika" as the exclusive test to determine likelihood of confusion in the online environment).

⁷³ *Id.*

⁷⁴ Mark D. Robins, *Actual Confusion in Trademark Infringement Litigation: Restraining Subjectivity Through a Factor-Based Approach to Valuing Evidence*, 2 NW. J. TECH. & INTELL. PROP. 117 (2004). As already noted, bad faith seems to play a much more prominent role than previously believed. See Beebe, *supra* note 13, at 1628.

⁷⁵ Robbins, *supra* note 74, at 117.

⁷⁶ Peter Weiss, *The Use of Survey Evidence in Trademark Litigation: Science, Art or Confidence Game?*, 80 TRADEMARK REP. 71, 72 (1990).

⁷⁷ See Bird & Steckel, *supra* note 40, at 1015-16.

⁷⁸ *Id.*

⁷⁹ *Id.*

visual comparison does not provide."⁸⁰

There is a disconnect here. Courts will consider anecdotal evidence that a few consumers are confused (as relevant but insufficient), but enjoin use of a mark when there is a *likelihood* of confusion of only 15% (demonstrated by survey evidence), even with no evidence of any cases of demonstrated, "real-world" confusion. As mentioned in the Introduction, the former scenario is one of at least two categories of cases where courts indirectly accept to trump the interests of the few for those of the many. Yet somehow, as soon as the 15% Rule kicks in, the interests of up to 85% of consumers seem to fall off the policy table. The disconnect thus stems from the fact that courts are fully prepared to encounter a few (let's call them "hopeless") consumers (say 1-5%) who may be confused but whose confusion is ignored, while a likelihood of confusion of 15% of consumers (sometimes significantly less) will suffice to enjoin.

This Article argues that the underlying premise of the former case should inform the pattern as well: if only 15% of relevant consumers are likely to be confused but a vast majority are not, and *that majority may lose something useful* from the issuance of an injunction, then those 15% should not be considered as automatically sufficient to justify the injunction. Put differently, a balancing test should be employed that measures the losses of the non-confused consumers in the presence of an

injunction. This proposal, it seems to the authors of this Article, is fully congruent with the more flexible approach on injunctive relief formulated in *eBay*.⁸¹

Normatively, the two fact patterns (5% v. 15% confusion) seem relatively close. Yet in the first case the court fully recognizes the interests of the 95% of nonconfused consumers; in the latter, for reasons the Article calls into question, it ignores the interests of the 85%. This Article argues that surveys can be used to mitigate what strikes the Authors as suboptimal and often inequitable. Before turning to an improved operational solution, however, let us consider current methods of collecting and utilizing consumer survey data in the trademark arena.

1. Survey Formats and Admissibility

Three survey formats are commonly used to measure trademark confusion as to source or connection: the "Eveready" format, the "Squirt" format, and the "Exxon" format.⁸² Under the "Eveready" format, survey respondents are asked to state what company is responsible for an allegedly infringing mark.⁸³ The format does not notify participants of what the plaintiff's mark is; instead, it presumes that participants are aware of the mark from prior marketplace exposure.⁸⁴ In contrast, the "Squirt" approach places the plaintiff's mark and the allegedly infringing mark side by side, then asks respondents

⁸⁰*Id.* See also *A.T. Cross Company v. TMP Distributing, Inc.*, 226 USPQ 521, 524 (D Minn 1985) (The court finds that the plaintiff's survey demonstrates the existence of actual confusion'); *Mutual of Omaha Insurance Co. v. Novak*, 836 F.2d 397, 5 USPQ2d 1314, 1317 (CA 8 1987), *aff'd* in part 648 F.Supp 905, 231 USPQ 963 (D Neb 1986) ("As to incidents of actual confusion, [plaintiff] produced evidence of actual confusion in the form of a survey We consider this appropriate, for surveys are often used to demonstrate actual consumer confusion.")

⁸¹See *supra* note 31 and accompanying text.

⁸²See Itamar Simonson, *The Effect of Survey Method on Likelihood of Confusion Estimates: Conceptual Analysis and Empirical Test*, 83 TRADEMARK REP. 364, 366-67 (1993); see also 4 MCCARTHY, *supra* note 7, § 32, at 173.

⁸³Simonson, *supra* note 82, at 366-67.

⁸⁴J.B. Swann, *Likelihood of Confusion Studies and the Straightened Scope of Squirt*, 98 TRADEMARK REP. 739, 746 (2008). "In cases involving strong marks, the *Eveready* test should be considered the gold standard for fundamental cognitive and marketing reasons."

⁸⁵See Simonson, *supra* note 84, at 366-67.

whether they believe the plaintiff's mark and the defendant's mark are produced by the same company.⁸⁵ Finally, the "Exxon" method prompts respondents to state the first thing that comes to mind when viewing an allegedly infringing mark.⁸⁶

While different survey formats often yield divergent results, they all have the potential to collect illuminating, open-ended commentary from participants.⁸⁷ Responses to questions regarding *why* consumers are or are not confused may be particularly relevant to the infringement analysis.⁸⁸ For example, in the context of online confusion, survey responses may indicate that many consumers were temporarily thrown off by similar font size, graphic shape, misleading advertisement placement, or hyperlink text. Conversely, responses may suggest that most users were not confused because of obvious placement of an unaffiliated advertisement or webpage link, significant differences in text or graphic presentation, or widely accepted (and anticipated) search engine ranking practices.

Further, responses to open-ended queries may indicate that an allegedly infringing mark actually improved consumers' online experiences. In this Article's submission, all surveys (whether because courts direct that they be done that way or because defendants provide their own), should specifically ask consumers

whether they derived any benefit from the use (most notably of course, those who were not likely to be confused). For example, did they learn about a new product or service in a valuable way? Did they learn something about the product or service they were about to purchase that they consider useful? These potential responses are relevant and valuable in light of trademark law's focus on protecting consumers and promoting efficient consumer practices.

Experts employ a variety of methods to collect admissible survey data, including shopping mall and "snailmail" questionnaires, face-to-face interviews, and telephone and Internet queries.⁸⁹ Administration varies depending on the purported form of confusion—for example, alleged online confusion is often measured via online surveys.⁹⁰ Regardless of the method of administration, all surveys involve a sample population, a list of questions, and a method of analysis.⁹¹ Each aspect of the survey must be designed by an independent expert acting in accordance with accepted scientific practices.⁹² This means that the sample population must be selected in an unbiased way to represent the purchasers or potential purchasers of the product or service at issue.⁹³ Additionally, questions must be clear, non-leading, and designed to minimize potential sources of bias.⁹⁴ And once the data is gathered, all re-

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²Kent D. Van Liere & Sarah Butler, *Emerging Issues in the Use of Surveys in Trademark Infringement on the Web* 3-5 (NERA Economic Consulting, LSI Advanced Trademark & Advertising Law Conference, Working Paper, 2007), available at http://www.nera.com/nera-files/PUB_Survey_Trademark_Internet.pdf.

⁹³*Id.*

⁹⁴*Id.* at 6. "In a confusion study, the research must be able to address confusion over the source or origin of the goods and confusion over the sponsorship, approval or affiliation of the producer of the goods or services. Responses to open-ended questions in confusion surveys can serve as an internal control and . . . should indicate whether the source of confusion has come from the mark or has been caused by something else."

⁹⁵*Id.*

sponses must be analyzed and reported in accordance with prevailing scientific standards.⁹⁵

In general, admissible surveys must pass the "threshold criteria of having a proper foundation, being relevant and having been conducted according to accepted principles."⁹⁶ Specifically, Federal Rule of Evidence 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁹⁷

Under the Federal Rules of Evidence, courts function as the gatekeeper of survey evidence; once a survey is admitted, "follow-on issues of methodology, survey design, reliability, critique of conclusions and the like go to the weight of the survey rather than its admissibility."⁹⁸ Trademark litigants have a broad opportunity to challenge an opponent's survey—and ultimately, the factfinder will scrutinize the quality of the data to determine its probative value in light of all facts of a case.⁹⁹

2. Difficulty Associated With Online Confusion Surveys

There is no such thing as a perfect survey.¹⁰⁰ This is due, in part, to respondents' tendency to behave differently in a survey setting than in real life—as well as temporal and monetary constraints that inhibit experts from exploring all data permutations.¹⁰¹ However, while all confusion surveys have flaws, experts have identified particular difficulty with developing surveys to assess confusion in the online marketplace.¹⁰²

For example, National Economic Research Associates ("NERA") has published a Working Paper explaining that online trademark confusion makes it difficult for experts to 1) locate the correct consumer population; 2) determine the appropriate form of survey administration; 3) determine how to use technical language; 4) set up the research to accurately reflect the market conditions; and 5) evaluate appropriateness of traditional trademark survey questions.¹⁰³ Primarily, "courts have made no definitive determinations on whether the confusion rate should be based on all consumers who have purchased or plan on purchasing the product and will use the Internet to locate the product or service, or if the confusion rate should be calculated only on the basis of those who would use the marked term/key word at issue to conduct a search."¹⁰⁴ The results of the survey—specifically, the levels of documented confusion—may vary greatly, depending on the researcher's definition

⁹⁵ 4 MCCARTHY, *supra* note 7, § 32, at 158.

⁹⁷ FED. R. EVID. 702.

⁹⁶ 4 MCCARTHY, *supra* note 7, § 32, at 158.

⁹⁹ *Id.*

¹⁰⁰ 4 MCCARTHY, *supra* note 7, § 32, at 178.

¹⁰¹ *Id.*

¹⁰² See Van Liere & Butler, *supra* note 92, at ii.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 15.

of this relevant population.¹⁰⁵ Additionally, studies suggest that survey participants frequently interpret terms like "web-page," "link," "site," and "click" differently than researchers intend.¹⁰⁶ Because surveys measuring online confusion are often administered via the Internet, varying connection speeds and web browsers may cause respondents to experience differing presentations of the allegedly infringing mark.¹⁰⁷ Finally—and perhaps most importantly—survey participants tend to provide shorter answers when typing than when responding verbally.¹⁰⁸ According to NERA, this "difference in the quality of open-ended responses could be pivotal for initial interest trademark surveys which need to be sure that responses indicating confusion are supported by the reason articulated in the open-ended response."¹⁰⁹

This laundry list of potential shortcomings begs the question—who would rely on statistical thresholds without digging deeper into the survey from which they were obtained? The short answer: judges, apparently.

D. Judicial Reliance on Survey Data

In many cases, "one might sum it all up by saying that the function of surveys in trademark litigation is to plumb the minds of the public in order to make up the minds of the judges."¹¹⁰ This gets even worse when considering that surveys focus on identifying a relatively small minority of potentially confused consumers while ignoring the role of the majority. Despite the substantial shortcomings of presently-employed survey data—particularly in the context of online confusion—courts tend to assign enormous weight to survey results and then to focus on only part of what the survey reveals. This Article does not call the practice of using survey evidence into question but suggests that the surveys should be engineered to provide courts with the *full picture*—that is a picture of the interests of *all* relevant consumers. Courts, in turn, should utilize this full picture to issue remedies that similarly encompass the interests of *all* relevant consumers.

Confusion surveys are widely touted as "one of the most classic and most persuasive and most informative forms of trial evidence that trademark lawyers utilize in both prosecuting and defending against

¹⁰⁵ *Id.* at 4.

¹⁰⁶ *Id.* at 16.

¹⁰⁷ *Id.* at 15.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Peter Weiss, *The Use of Survey Evidence in Trademark Litigation: Science, Art or Confidence Game?*, 80 TRADEMARK REP. 71, 86 (1990).

¹¹¹ Beebe, *supra* note 13, at 1641.

¹¹² See, e.g., *Pharmacia Corp. v. Alcon Labs, Inc.*, 201 F. Supp. 2d 335, 373 (D.N.J. 2002) ("The Court is aware that Pharmacia is not legally required to conduct a confusion survey. But under the circumstances of this case, Pharmacia's failure to conduct any confusion survey weighs against its request for a preliminary injunction. Such a failure, particularly when the trademark owner is financially able, justifies an inference that the plaintiff believes the results of the survey will be unfavorable.") (internal quotations omitted); *Eagle Snacks, Inc. v. Nabisco Brands, Inc.*, 625 F. Supp. 571, 583 (D.N.J. 1985) ("Failure of a trademark owner to run a survey to support its claims of brand significance and/or likelihood of confusion, where it has the financial means of doing so, may give rise to the inference that the contents of the survey would be unfavorable, and may result in the court denying relief."); *King-Size, Inc. v. Frank's King-Size Clothes, Inc.*, 547 F. Supp. 1138, 1162 (S.D. Tex. 1982) ("Plaintiffs did not present to the Court a survey or any other direct evidence of actual confusion. The Court views these omissions as both suspect and significant."); *Information Clearing House, Inc. v. Find Magazine*, 492 F. Supp. 147 (S.D.N.Y. 1980) (Finding it "significant that plaintiff, though possessed of the financial means, did not undertake a survey of public consumer reaction to the products under actual marketing conditions"); *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 441 F. Supp. 1220, 1230-1 (S.D.N.Y. 1980) ("During the period the parties have used their marks, their sales volume has expanded and hundreds of thousands of

trademark claims of all sorts."¹¹¹ In fact, some courts apply an *adverse inference on likelihood of confusion claims if a plaintiff has the resources to conduct a survey, but fails to do so*.¹¹² The Article suggests that similar negative inferences could logically be drawn from a failure to provide information on consumers who are not confused and would derive a benefit from the use. As discussed below, surveys should also provide courts indicia to test the depth of the alleged likelihood of confusion.

While many litigants do currently provide courts with verbatim survey responses to open-ended (albeit, insufficiently comprehensive) questions, a review of trademark confusion caselaw suggests that judges rely far more on quantitative statistical data (the percentage threshold) than on *qualitative analyses* of the verbatim responses.¹¹³ In fact, most opinions only discuss statistical results and do not even mention the content of responses.¹¹⁴ Courts conducting both traditional confusion and initial interest confusion analyses appear comfortable determining infringement without thoroughly examining participants' commentary on *how* or *why* they are (or are not) confused.¹¹⁵ The Authors suggest that this leaves a significant amount of consumer interests in the shadows and renders survey results highly questionable. This approach needs to be reexamined, especially as new online business models are emerging and where the costs of shutting down a new way of doing business may harm nonconfused consumers. As this Article sees it, there is no corollary to the 15% Rule that foresight bias

should necessarily tip towards confusion in such cases. In doing so the determination should be fair to those whose interests are at stake on this side of the policy edger, namely the nonconfused consumers. A sound, procompetitive policy might dictate restraint and allowing these new models to experiment. However, before we entertain cultivation of a pro-competitive approach, let us briefly consider the current judicial approach to evaluation of survey data.

In the Fifth Circuit case, *Exxon Corporation v. Texas Motor Exchange, Inc.*, plaintiff Exxon alleged that defendant's "Texon" mark—associated with defendant's automobile repair services—infringed plaintiff's "EXXON" mark for petroleum products, service stations, and car care services.¹¹⁶ After evaluating Exxon's confusion survey evidence, the Fifth Circuit opined that "where in a properly conducted survey, 15% of respondents associated defendant's TEXON auto repair service mark with plaintiff's EXXON gasoline mark and 23% associated TEXON with gasoline, the survey 'constitutes strong evidence indicating a likelihood of confusion.'"¹¹⁷ However, the opinion failed to even mention verbatim responses underlying the "strong" confusion data.¹¹⁸ Analyses of these responses may have revealed that while a small percentage of the consumer population *associated* the word TEXON with EXXON, few actually believed that TEXON or EXXON were the same company or affiliated in any way. This type of feedback would suggest that the risk of consumers mistakenly purchas-

units of their respective commodities have been sold, often in the same department stores and specialty shops. It is therefore significant that the defendant failed to offer evidence that a single purchaser was confused, misled or deceived as to the source or origin of the product he or she was buying."

¹¹³See *Exxon*, 628 F.2d 500, 507; see also *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 279 (7th Cir. 1976).

¹¹⁴See, e.g., *Exxon*, 628 F.2d at 507; *Burrough*, 540 F.2d at 279.

¹¹⁵See, e.g., *Exxon*, 628 F.2d at 507; *Burrough*, 540 F.2d at 279.

¹¹⁶*Exxon*, 628 F.2d at 507.

¹¹⁷4 MCCARTHY, *supra* note 7, § 32, at 188 (discussing *Exxon*, 628 F.2d at 507).

¹¹⁸*Exxon*, 628 F.2d at 507.

ing TEXON services under the assumption that they were receiving EXXON services (a weighty consumer harm) was very slim. Further, survey respondents—particularly members of the nonconfused majority—may have stated that they actually benefitted from the defendant's use of TEXON in association with its auto repair service. For example, the TEXON mark could have alerted a significant percentage of consumers to the presence of an automobile service facility during a vehicle maintenance emergency. The TEXON mark may have enabled nonconfused consumers to compare rival auto repair services, ultimately resulting in better-informed purchasing decisions. Because trademark law aims to promote and protect consumer interests (frequently captured by verbatim survey responses), the court's infringement analysis could have benefitted from a thorough evaluation of these responses, from both confused and non-confused participants.

Like the *Exxon* court, the Seventh Circuit in *James Burrough Limited v. Sign of Beefeater, Inc.* indicated that a 15 percent confusion rate was probative of likely confusion. Specifically, the court stated that 15 percent confusion between the plaintiff's "Beefeater" distillery mark and the defendant's "Sign of the Beefeater" restaurant mark was not small or *de minimis*.¹¹⁹ The court indicated that the survey results were "probative of likely confusion," but the opinion did not discuss any of the 85 percent's responses to *why* queries.¹²⁰ Perhaps nonconfused participants benefitted from the defendant's "Sign of the Beefeater" mark because it alerted them to the presence of a food and beverage establishment and enabled them to make travel decisions accordingly. But again, the Seventh Circuit did not discuss the potential interests of the

majority.

Analyses of verbatim responses in both *Exxon* and *James Burrough* would not necessarily have changed the courts' ultimate infringement determinations. They could have, however, offered a valuable window into the specific aspects of the defendants' mark uses that were or were not confusing and the costs to the nonconfused consumers of enjoining the use of the plaintiffs' marks. In other words, responses may have illuminated the ways in which the allegedly infringing practices enhanced consumer efficiency or contributed to other consumer benefits—as these considerations align with the overall consumer-protective focus of trademark law.

While *Exxon* and *James Burrough* involved survey evidence of brick and mortar confusion, the potential value of verbatim survey responses applies—perhaps even more persuasively—in the online trademark infringement analysis. In the context of (temporally contingent) initial interest confusion, verbatim responses have significant potential to shed light on the aspects of a defendant's use that confuse or do not confuse consumers, for how long, and whether the defendant's practices benefit consumers or enhance efficiency in the longer term and/or for most other users. In light of apparent judicial reliance on statistical data in the confusion analysis, Part II will take a close look at the modern online consumer, then highlight the grave costs associated with ignoring feedback from the nonconfused 85 percent.

¹¹⁹ *Burrough*, 540 F.2d at 279.

¹²⁰ *Id.*

II. Trademark Confusion and the Future of the Internet Marketplace

The online environment evolves rapidly, allowing consumers to research and secure purchases with increasing speed and efficiency. But with this rapid evolution comes the potential for new forms of confusion and—new ways to generate this confusion.

A. Areas of Online Confusion

Throughout the last two decades, courts have entertained traditional confusion and initial interest confusion claims involving domain name cybersquatting,¹²¹ metatags,¹²² and keyword advertising.¹²³ To assess infringement, courts have usually employed versions of the multifactor confusion analyses discussed in Part I.B. In each of these situations, courts have tended to accord significant weight to survey data that met the threshold “substantial” confusion percentage (that is, typically under the 15% Rule).

In the context of cybersquatting, confusion and initial interest confusion claims arise when a defendant’s domain name conflicts with a prior trademark and lures web users to the defendant’s website instead of the plaintiff’s.¹²⁴ Courts have found infringement where a defendant used a relatively famous trademark as a

domain name and “inevitably trade[s] on the favorable cachet associated with that company, its works and its reputation.”¹²⁵ Some courts have even held that placing a disclaimer disavowing affiliation on a webpage with a conflicting domain name does not remedy the initial interest confusion if the defendant succeeded in luring users to his website, regardless of how long consumers remained on the page.¹²⁶ Though these cases show courts’ willingness to expand infringement doctrines, they may no longer be of much direct relevance. Cybersquatting was a popular, heavily litigated practice in the 1990s. However, the 1999 Anticybersquatting Consumer Protection Act eliminated much of the practice by establishing a cause of action against defendants that use another entity’s mark in a website domain name with the bad faith intent to profit from the other entity’s mark.¹²⁷

In the context of metatags, courts have found infringement when a defendant hid another company’s word mark in its own website in order to “confuse and divert someone looking for a Web site that is sponsored by [the other company’s] trademark.”¹²⁸ While users cannot easily perceive the tags, search engines pick up on the words and place the defendant’s website at the top of the results page associated with a search for the other entity’s trademark.¹²⁹ Even when metatags divert users to websites that are obviously not affiliated

¹²¹ 4 MCCARTHY, *supra* note 7, § 25, at 78. “Cybersquatting” or “cyber-piracy” is the use of domain names that are confusingly similar to trademarks or persons’ names.

¹²² 4 MCCARTHY, *supra* note 7, § 25, at 69. “A ‘meta tag’ is a list of words normally hidden in a Web site that acts as an index or reference source identifying the content of the Web site for search engines. This has been analogized to the subject index of a card catalog indicating the general subject of a book.”

¹²³ Hung, *supra* note 29, at 647. “Keyword advertising refers to the display of text ads on search engines, in which advertisers pay to show their ads alongside search results for specific ‘keywords’ or search queries.”

¹²⁴ 4 MCCARTHY, *supra* note 7, § 23, at 69.

¹²⁵ *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 944 (9th Cir. 2002).

¹²⁶ See, e.g., *New York State Soc. of Certified Pub. Accountants v. Eric Louis Associates, Inc.*, 79 F. Supp. 2d 331, 342 (S.D.N.Y. 1999).

¹²⁷ Rothman, *supra* note 54, at 172.

¹²⁸ 4 MCCARTHY, *supra* note 7, § 23, at 188, § 25, at 69.

¹²⁹ *Id.*

with the actual mark owner, courts have found initial interest confusion simply because consumers landed "somewhere in cyberspace" that they did not intend to go—even if just for a few seconds.¹³⁰ As with cybersquatting, however, these cases are no longer directly applicable. Most search engines no longer use metatag technology.¹³¹

Nowadays, companies take advantage of search engine results in other ways, often by paying for their links to be ranked high on the list of "hits" for specific keywords—frequently consisting of trademarked words or phrases.¹³² Additionally, companies can pay search engines for advertising space associated with these keywords.¹³³ When Internet users enter the keyword into the search bar, "the search results screen, in addition to the usual list of results, also shows 'banner advertising' or 'sponsored links' to the companies that bought the right to have their link appear."¹³⁴ While the keyword may encompass another entity's trademark, the purchasing company's banner advertisements or sponsored links usually do not reference the other entity's mark.¹³⁵ Instead, the ads provide words and graphics associated with the purchasing company and its own products or services.¹³⁶ Nonetheless, many trademark owners erroneously¹³⁷ complain that search engines are responsible for trademark infringement, claim-

ing that in selling the trademarked word or phrase as a keyword, search engines are also selling the mark itself.¹³⁸ Additionally, mark holders sue search engines and advertisers, claiming that keyword advertising confuses users into believing that the ads associated with the keywords are authorized or approved by the underlying mark holder.¹³⁹ Over the last few years, many companies have pursued trademark infringement claims involving keyword advertising, frequently rooted in theories of consumer diversion.¹⁴⁰

B. Emergence of the Savvy Online Consumer

Consumers learn quickly, and many technologies that were once confusing are now regarded as vital tools for online research and consumption. User-friendly search engines and high-speed connections allow Internet users to locate vast amounts of information and transition rapidly between pages. Shoppers can read reviews (from experts and fellow consumers, but also from paid reviewers), compare products side by side, and easily locate the lowest prices. Not surprisingly, most users are savvy enough to target and refine their searches and avoid many unwanted advertisements.¹⁴¹ Reacting to this heightened level of sophistication, online marketers have increasingly fragmented ad-

¹³⁰ *Id.* at § 25:69.

¹³¹ *See id.*

¹³² *Id.* at § 25:70:25.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ These claims are unsuccessful because search engines only sell the advertising space associated with the search—not the underlying trademark itself. *See generally* Matthew A. Kaminer, *The Limitations of Trademark Law in Addressing Trademark Keyword Banners*, 16 SANTA CLARA HIGH TECH. L.J. 35, 37 (2000).

¹³⁸ 4 MCCARTHY, *supra* note 7, § 25, at 70.

¹³⁹ *Id.*

¹⁴⁰ *See, e.g.*, *Network Automation, Inc. v. Advanced Systems Concepts*, 638 F.3d 1137, 1152-54 (9th Cir. 2011).

¹⁴¹ *See* Hung, *supra* note 29, at 666.

¹⁴² *Id.*

vertisements to reach smaller niche groups that are able to readily distinguish between products.¹⁴² This suggests that courts should also be willing to weigh the interests of nonconfused consumers before eliminating a competing use from the marketplace.

In some ways, courts have begun to respond to the increasing sophistication of the modern Internet user.¹⁴³ A review of Ninth Circuit caselaw for example demonstrates the evolving judicial assessment of the average online consumer. The cases discussed below do not necessarily involve survey evidence of confusion. They are presented solely to illustrate judicial acknowledgement of average Internet user sophistication—which is at odds with many courts' continuing focus on the minority during the infringement analysis.

In the 1999 initial interest confusion case, *Brookfield Communications, Inc. v. West Coast Entertainment, Corp.*, the Ninth Circuit determined that the defendant's URL "moviebuff.com" infringed the plaintiff's "MOVIEBUFF" software mark.¹⁴⁴ The court based its decision on two general assumptions regarding online consumer behavior.¹⁴⁵ Primarily, the court believed that instead of consulting search engines, consumers would blindly guess at web addresses until they reached the desired URL.¹⁴⁶ While this may have been true for novice Internet users in the 1990s, the court failed to note that such behavior "wasted time, ignored the existence of search engines, and was a boon to Internet cyber-

squatters."¹⁴⁷ Additionally, the court operated under the overall presumption that users were easily frustrated and misled by the online environment—a presumption that endured throughout most circuits for nearly a decade.¹⁴⁸ However, the Internet and its users have evolved since 1999, and the Ninth Circuit has since adopted a more sophisticated portrait of the average online consumer.

By 2002, in *Interstellar Starship Services v. Epix, Inc.*, the Ninth Circuit had acknowledged that Internet users had mastered the art of trial and error in their searches.¹⁴⁹ Holding that the defendant's use of the domain name "epix.com" for a photograph website did not cause a likelihood of initial interest confusion with plaintiff's electronic imaging brand, "EPIX," the court stated that "any consumer looking for Epix, who mistakenly guessed that it could be found at *www.epix.com*, would realize in one hot second that she was in the wrong place and either guess again or resort to a search engine."¹⁵⁰

Then in 2010 the Ninth Circuit recognized an even higher level of online consumer sophistication. In *Toyota Motor Sales, Inc. v. Tabari*, the court found that that the defendant's domain names "buy-a-lexus.com" and "buyorleaselexus.com" did not infringe on the plaintiff's "LEXUS" mark.¹⁵¹ The court indicated that consumers' momentary hesitation when viewing the domain names was "sensible agnosticism" rather than confusion.¹⁵² It further clarified that:

¹⁴³ Martineau, *supra* note 16, at 355 (explaining that "[p]resumptions about consumer behavior can be especially important in cyberspace infringement cases, because the ever-evolving Internet is new territory for both judges and consumers alike.")

¹⁴⁴ *Brookfield Comm'ns, Inc. v. West Coast Entm't. Corp.*, 174 F.3d 1036, 1041-45 (9th Cir. 1999).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See Martineau, *supra* note 16.

¹⁴⁸ *Brookfield*, 174 F.3d at 1036.

¹⁴⁹ *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 304 F.3d 936, 946 (9th Cir. 2002).

¹⁵⁰ *Id.*

¹⁵¹ *Toyota Motor Sales, Inc. v. Tabari*, 610 F.3d 1171, 1175-79 (9th Cir. 2010)

¹⁵² *Id.*

[C]onsumers who use the internet for shopping are generally quite sophisticated about such matters and won't be fooled into thinking that the prestigious German car manufacturer sells boots at mercedes-boots.com, or homes at mercedeshomes.com, or that comcastsucks.org is sponsored or endorsed by the TV cable company just because the string of letters making up its trademark appears in the domain.¹⁵³

Similarly, in its 2011 opinion in *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, the Ninth Circuit stated that "the default degree of consumer care is becoming more heightened as the novelty of the Internet evaporates and online commerce becomes commonplace."¹⁵⁴ In that case, two companies—Network Automation and Advanced Systems Concepts—both advertised their software products on the web.¹⁵⁵ Network purchased the keyword encompassing one of Advanced Systems' trademarks and advertised its own product using sponsored links.¹⁵⁶ The opinion emphasized the need for flexible application of the law in the context of emerging technologies and ultimately held that Network's use of the Advanced Systems' trademark as a search engine advertising keyword was not likely to cause initial interest confusion.¹⁵⁷

As the progression of Ninth Circuit caselaw demonstrates, the average Internet user is increasingly savvy. This consumer knows what she is looking for and how to

get it. She is likely in a prime position to assess Internet efficiency and suggest ways in which the technology can be improved. And chances are, she often falls into the nonconfused consumer group. This Article asserts that the interests of savvy online consumers should also be factored in a proper trademark infringement analysis.

C. Costs of Ignoring the 85 Percent

The overarching goal of trademark law is indeed to protect *all* consumers. Therefore, when only 15 percent of consumers may be confused (in some cases, only very briefly and/or not to the point of affecting the ultimate purchasing decision), courts should not disregard, as they now do, feedback from or about the nonconfused 85 percent.¹⁵⁸ The practice of issuing injunctions in weak cases is particularly concerning in the online infringement context, as nonconfused survey participants often fit the "sophisticated consumer" mold described above.¹⁵⁹ The Internet is obviously one of society's most useful tools—and by catering to a confused minority, especially if only slightly or temporarily confused, courts risk imposing undue limitations on speech, interfering with healthy market competition, and chilling innovation.

In other words, nonconfused consumers may incur losses when use of a trademark is enjoined to protect a small minority (15% or even less) of confused consumers. Sometimes—though not always—the loss will be significant. In the following

¹⁵³ *Id.*

¹⁵⁴ *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137 (9th Cir. 2011).

¹⁵⁵ *Id.* at 1142-44.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1154.

¹⁵⁸ *Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500, 507 (5th Cir. 1980) (finding that a survey demonstrating confusion levels of 15% constituted "strong evidence indicating a likelihood of confusion"); see also *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 279 (7th Cir. 1976) (stating that 15 percent confusion is not small nor de minimis).

¹⁵⁹ *Network*, 638 F.3d at 1152-54.

pages, this Article identifies factors that a court could take into account in evaluating such loss.

1. Limiting Free Speech

Questions regarding the permissibility of web content arise in varying legal contexts and often require courts to engage in "big picture" analyses of costs and benefits associated with content allowance. The authors of this Article submit that the current judicial approach to online First Amendment violations is far more holistic than the very same courts' approach to online trademark infringement. To illustrate, we juxtapose the judicial approach to web-based Establishment Clause issues with online trademark issues. While Establishment Clause jurisprudence¹⁶⁰—like trademark law—places some restrictions on web content to promote public welfare, Establishment Clause standards are often more conscientious of—and beneficial to—the majority than those used in the trademark confusion analysis.¹⁶¹ The dichotomy is particularly apparent in the context of religious content on public school websites.

The First Amendment generally prohibits government entities (including public schools) from promoting or condemn-

ing religion.¹⁶² Courts invoke several tests to analyze whether a particular governmental practice violates the Establishment Clause.¹⁶³ Under the *Lemon* test, a court must determine 1) whether a law or government action has a bona fide secular purpose; 2) whether state action has the primary effect of advancing or inhibiting religion; and 3) whether the action excessively entangles government with religion.¹⁶⁴ Similarly, the "endorsement test" inquires into whether a government practice amounts to an endorsement of religion.¹⁶⁵ Under the endorsement approach, a government action is invalid if it causes a reasonable, objective, and informed observer to perceive that the action is approving or disapproving of religion.¹⁶⁶ Frequently, the endorsement test is subsumed into the first two prongs of the *Lemon* analysis.

In the context of public schools' online practices, the Establishment Clause prohibits school websites from promoting or condemning religion by way of text, graphics, videos, links, or any other virtual media.¹⁶⁷ To determine whether a public school website violates the Establishment Clause, courts have considered 1) whether the website is secular in purpose; 2) whether "it would be objectively reason-

¹⁶⁰The Establishment Clause of the First Amendment to the US Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

¹⁶¹See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁶²*Id.*

¹⁶³*Id.* at 612-13.

¹⁶⁴*Id.*

¹⁶⁵*Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984).

¹⁶⁶*Id.*

¹⁶⁷See, e.g., *Harper v. Poway Unified School Dist.*, 545 F. Supp. 2d 1072, 1092-93 (S.D. Ca. 2007). In that case, a student alleged that her school district violated the Establishment Clause by 1) posting links on the school website that expressed a theological position in acceptance of homosexuality and 2) assigning a student detention for wearing a T-shirt that said "Homosexuality is shameful." The school maintained that the webpage was for secular purposes only, intended to help parents deal with students' issues regarding homosexuality. After evaluating the webpage—coupled with the school's detention practices—the court determined that "a reasonable, informed and objective observer would find that the purpose of the District in creating and maintaining its website was primarily geared toward promoting tolerance, fostering a supportive environment for all students and protecting the rights of homosexual students." It further noted that "a reasonable, informed and objective observer would not view the principal and primary effect of defendants' inclusion of the website links at bar as adopting one particular religious viewpoint." The court also opined that the site was predominantly secular in purpose and did not excessively entangle government with religion. Ultimately, the court held that the school district's actions were not in violation of the Establishment Clause.

able to construe the [public school] action as primarily sending a message that it endorses or disapproves of religion"; and 3) whether the public school's online behavior excessively entangles government with religion.¹⁶⁸ Courts then restrict the school's virtual behavior based on the hypothetical "reasonable, objective, and informed" observer's responses to online materials.¹⁶⁹

This short summary is meant to illustrate that the Establishment Clause scenario parallels the online infringement analysis in a number of ways. In both situations, courts determine whether online expression is permissible based on pertinent viewer responses.¹⁷⁰ If web-users would believe that a school is promoting or condemning religion—or if consumers would be confused as to the source, sponsorship, or affiliation of a product—the questionable web content is prohibited.¹⁷¹ While Establishment Clause jurisprudence defers to the "reasonable, objective, and informed" observer, as First Amendment law aims to protect this depiction of the "norm," trademark jurisprudence seems to cater only to the views of the confused minority (who may or may not be objective and informed).¹⁷²

In most cases, the Establishment Clause's "reasonable observer" is thus a more majority-friendly standard than trademark law's 15% Rule.¹⁷³ This is particularly apparent in the context of initial interest confusion where survey evidence demonstrating that a small minority of consumers was simply diverted to a competitor's website for several seconds could be

sufficient to compel an injunction.¹⁷⁴ By basing infringement determinations on the perceptions of a small minority, with little regard for majority viewpoints, trademark courts likely restrict web content beyond the bounds of what a "reasonable, objective, and informed" observer¹⁷⁵ would believe.

The authors wish to emphasize that trademark-linked web restrictions, just like Establishment Clause-based web restrictions, may impose limitations on free speech rights for *some* groups—specifically, the groups that desire to produce or benefit from the restricted content. These disserved groups tend to be much larger in the trademark context than in the Establishment Clause context, however, particularly when courts issue injunctions under the 15% Rule. Trademark-based content prohibition has the capacity to severely diminish consumers' First Amendment rights "to discuss, portray, comment, criticize, and make fun of companies and their products"¹⁷⁶ and may eliminate materials that contribute to informed decision-making and overall consumer autonomy. This is entirely inconsistent with the Lanham Act and core goals of trademark policy: to protect consumers and improve the quality of information in the marketplace. As discussed in greater detail in Part III, this Article does not advocate replacing trademark law's reliance on survey data with the Establishment Clause's "reasonable, objective, and informed" observer test. It does, however, suggest that courts evaluating survey evidence should

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Part I.

¹⁷⁵ See Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781 (2008), for consideration of trademark law's "reasonable consumer" through the lens of tort law's "reasonable person" standard.

¹⁷⁶ Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1696 (1999).

look deeper than the 15% confusion threshold. Specifically, when a large majority of survey respondents is not confused by a particular online practice, courts should thoroughly consider the perceptions of this majority—as many of these respondents may be “reasonable, objective, and informed” consumers whose opinions could lead to increased availability of quality information in the Internet marketplace.

2. Decreasing Competition in the Marketplace

The web offers an unparalleled platform for healthy market competition. It boasts the unique ability to level the playing field between mega-corporations and mom and pop retailers—due, in part, to the ease of online advertising. The Internet is the only forum where a small business owner can become an international entrepreneur overnight. However, by regulating trademarks to protect only a small minority, courts risk allowing global brands to flourish while the little guys flounder.¹⁷⁷

To illustrate this phenomenon, we return to the Starbucks discussion from Part I. Starbucks maintains a stronghold over its word mark and associated green mermaid symbol. The company has the resources to threaten litigation against any online activity that may confuse (or temporarily divert) coffee shoppers. For example, Starbucks may sue when new company, XYZ Coffee, purchases the search engine keyword “Starbucks” and advertises pictures of its product—and its accompanying green fish logo—in sponsored ads appearing directly above the organic search results. XYZ hopes that this keyword advertising will get the new XYZ name out to Internet coffee shoppers. But

even if XYZ ads do not mention the Starbucks word or character mark, Starbucks may be able to prove initial interest confusion if it can show that 15 percent of consumers were diverted to the XYZ website after entering the search term “Starbucks.” Even if the 15 percent merely *clicked* the XYZ link and returned to the search results page after several seconds, courts may find infringement. Further, even if many participants reported that they benefitted from XYZ’s sponsored ads because, for example, the ads helped them compare coffee products and prices, courts may enjoin XYZ’s practices without considering any verbatim feedback from the nonconfused majority.

As the Starbucks example demonstrates, online trademark regulation that only protects the confused minority may help major brands to monopolize marks and associated aesthetics.¹⁷⁸ In addition to blocking lesser-known companies from breaking into the online marketplace, these judicial practices have the potential to hurt consumers.¹⁷⁹ In some cases, by allowing initial interest claims to succeed when a majority of consumers are not confused, courts may actually *increase* search costs for savvy Internet users, which runs counter to the consumer-protective focus of trademark law. By failing to thoroughly acknowledge the value in comparative shopping practices—which may be expressed in verbatim survey responses—courts risk contradicting the fundamental concept of “consumer sovereignty that underlies free market economy.”¹⁸⁰

3. Chilling Technological Innovation

In addition to limiting free speech and decreasing competition, courts risk chill-

¹⁷⁷Martineau, *supra* note 16, at 345.

¹⁷⁸*Id.* Though courts have been reluctant in some cases to stop the “little guy.” See *supra* note 37 and accompanying text.

¹⁷⁹Martineau, *supra* note 16, at 345.

¹⁸⁰*Id.* at 345-46 (quoting Professor Ross D. Petty of Babson College).

ing technological innovation by basing infringement determinations solely on statistical data.

Efficiency is a prime goal of trademark law; the Lanham Act attempts to facilitate transmission of useful information in the marketplace and to save consumer search time.¹⁸¹ The Internet is a valuable tool for fulfilling these goals because it enables consumers to research, compare, and purchase products and services with increasing speed and accuracy. As a society, presumably we all benefit from web innovation. In fact, would we not want consumers to expand and improve with it? Again, by catering to a confused minority, courts risk encouraging poor online shopping habits that are associated with irrational decisions and economic waste.

Companies regularly introduce new technologies that promote efficient consumption and enhance the speed and ease of surfing the Internet. However, issues arise when these technologies involve trademarked words or phrases without mark holders' approval. Again, we return to the concept of keyword advertising to illustrate these concerns, as the practice is highly litigated in the modern trademark arena. By tracking consumer responses and editing ads accordingly, keyword advertising allows companies to reach a large audience at all stages of the buying cycle¹⁸² and to optimize ad performance. Because keyword advertising enables users to "shop around" and compare products with ease, the practice also has the potential to increase efficiency for consumers. Verbatim survey responses from nonconfused survey participants may discuss these benefits—but courts are not likely to consider verbatim responses when

they have statistical evidence of confusion or diversion from at least 15 percent of respondents.¹⁸³ In these situations, some courts will simply enjoin the mark use based on the "magic" threshold percentage and in doing so, will eliminate the efficiency gains for the majority.

These paternalistic determinations could also impact technology developers. Fearing trademark infringement liability, developers may avoid future investment in innovative marketing technologies. An absence of new technologies results in stagnation of the web—which ultimately leads to stagnation of online consumers. Again, these results run counter to the underlying trademark policy goals of protecting consumers and improving the availability of useful information in the marketplace.

Overall, judicial reliance on statistics without consideration of efficiency assessments from *all* consumers may significantly hamper online practices that have the potential to improve consumer productivity. By deferring to the confused 15 percent without a comprehensive analysis of the strength of confusion and level of loss, courts may overlook the innovative attributes of allegedly infringing activity. Savvy consumers are in the best place to evaluate new technology and discuss its contributions to efficient shopping practices and informed decision-making. It is therefore a tremendous oversight for judges to ignore feedback from nonconfused consumers in the context of Internet confusion.

¹⁸¹ See Bonewitz, *supra* note 49, at 900. Explaining that "economists have justified trademark law on the grounds that it decreases consumer search costs."

¹⁸² Hung, *supra* note 29, at 647. "A consumer may search for a type of product for the first time after realizing that she has a need, she may engage in comparison shopping, or she may already know the specific brand that she intends to purchase."

¹⁸³ See *supra* Part I.C.

III. Going Forward: Recommendations for Future Evaluation of Survey Evidence in the Context of Online Confusion

A. Factoring In All Consumers

As Professor McCarthy opined rather aptly "[s]ometimes, the most illuminating and probative parts of a survey are not the numbers and percentages generated by the responses, but the verbatim accounts of the responses. The respondents' verbatim responses to the 'why' question may provide a window into consumer thought processes in a way that mere statistical data cannot."¹⁸⁴ In light of the difficulties associated with crafting surveys to measure online confusion,¹⁸⁵ the increasing sophistication of the average online consumer,¹⁸⁶ and the significant costs that may be associated with ignoring feedback from or about non confused users,¹⁸⁷ judges must look beyond topline statistics when considering evidence of confusion and whether to impose a remedy. This Article advances specific recommendations for future evaluation of survey data in both the traditional online confusion and initial interest confusion contexts. It advances these recommendations because they would actually lead to a much better and richer implementation of the central tenet of trademark law, namely protecting the interests of consumers, *all* consumers. Therefore, courts should balance the benefits of reduc-

ing or eliminating a potentially confusing use for a small minority against the costs to the majority, weighing also the depth of the potential confusion and the nature of the costs to the others. Primarily, courts should urge litigants to collect more detailed survey responses that encompass potential efficiency gains associated with allegedly infringing online mark usage. Then, when evaluating these responses, courts should attempt to calibrate the evidence by considering the percentage of reported confusion *and* the quality and quantity of efficiency-related responses from nonconfused participants.

Because some judges may still lack complete familiarity with the Internet,¹⁸⁸ the judicial tendency to rely on numbers is perhaps understandable. This Article, written in 2014, will be read by lawyers and judges who use the Internet on a daily basis, including for activities such as shopping and banking. As this type of behavior gets more integrated into the commercial and societal fabric, it may be easier to convince courts to look beyond the topline numbers. In the context of online consumer confusion, mere numerical survey results rarely if ever provide a clear enough picture of the benefits and detriments of the allegedly infringing use. While some unauthorized trademark practices may confuse a majority of users and lead to easy decisions, others may lead to enhancements in consumer productivity and shopping practices. It is therefore vital that courts base infringement determinations on accurate assessments of these divergent practices.

Survey responses from savvy online

¹⁸⁴4 MCCARTHY, *supra* note 7, § 32, at 178.

¹⁸⁵See *supra* Part I.B.3.

¹⁸⁶See *supra* Part II.B.

¹⁸⁷See *supra* Part II.C.

¹⁸⁸Rothman, *supra* note 54, at 169. "Part of the reason some courts may have missed the mark in the Internet context is that few members of the bench grew up as part of a cyber-savvy generation. While many jurists have quickly gotten up to speed, others are not familiar enough with the technology to accurately assess what a reasonable Internet consumer would experience when surfing the Web. The lack of familiarity with Internet technology and e-commerce has led to some absurd conclusions about the Internet in the context of trademark infringement actions."

consumers can offer judges a window into the innovative value of a particular practice. As discussed in Part I.C.1., many surveys ask participants to indicate *why* they were or were not confused—and sometimes, to state what specific aspects of mark presentation guided their answers. Responding to these prompts, participants who were not confused may indicate that the use was not confusing because, for example, it was clearly labeled as an advertisement and appeared in the same place or format that many websites use for advertising purposes (i.e. search engine sidebars). Additionally, narrow *why* prompts may compel some nonconfused respondents to discuss the benefits associated with an allegedly infringing mark use (i.e. comparative shopping benefits associated with keyword advertising). By contrast, broadly phrased “why were you confused or not confused” questions normally fail to elicit efficiency data. Because efficiency data are important to the overall infringement analysis—as trademark law aims to save consumer search costs and improve the presence of quality information in the marketplace—courts should urge litigants to include more targeted questions in their surveys or be prepared to make negative inferences if they do not.

Specifically, surveys measuring traditional confusion and initial interest confusion on the Internet should include detailed, open-ended questions that ask 1) what visual, auditory, or interactive aspects of an allegedly infringing mark caused (or did not cause) consumer confusion; 2) whether the allegedly infringing mark compromised Internet research and/or the ability to locate the initially desired webpage or data—and if so, how and for how long; and 3) whether the allegedly infringing mark improved consumer research and/or the ability to find the initially desired webpage or data—and if so,

how. The last question in particular would illuminate the potential costs to nonconfused users (or even those initially confused) if the allegedly infringing use were enjoined.

While it may seem daunting to evaluate *all* verbatim replies, particularly when large numbers of participants are surveyed, judges may request summarized response reports from litigants. Reports should categorize verbatim responses according to whether or not participants were confused, then summarize the most common responses for each question. For example, when at least 10 percent of the confused or nonconfused group answers an open-ended question in the same (or a sufficiently similar) manner, the response—and accompanying percentage—should be listed on the report. In this way, courts can locate the prevailing responses with relative ease.

B. Using A Methodical Approach To Assess Confusion

This Article’s main point—that a likelihood of confusion should not automatically trigger an injunction once the 15% threshold (of likelihood of confusion) has been crossed without considering the interests of the rest of consumers—focuses on the potentially much greater role of verbatim survey responses. The Article suggests that when balancing the two sets of interests (confused % v. not confused %), a court should also consider the strength of the confusion case itself. A small likelihood of confusion of 15% balanced against a significant potential loss for the 85% is a different pattern than a strong likelihood that 15% of relevant consumers will be misled accompanied by no significant loss for the majority.

There are thus two factors to consider even before getting to what a sur-

vey says about nonconfused consumers, namely how many consumers are likely to be confused (the percentage) and the strength of the likelihood. This can be expressed as weighing (balancing) $C \times SC$ on the one hand and $NC \times LL$, on the other hand, where:

- C is the percentage of confused consumers;
- SC is the strength of the Plaintiff's confusion case within the universe of potentially confused consumers—that is, the qualitative strength of harm to the Plaintiff as well as confused consumers in the absence of an injunction;
- NC is the percentage of nonconfused consumers (may well be $100-C$ but there may also be a percentage of respondents who fit neither in C not NC);
- and LL is the level (importance) of the loss, that is the interests of nonconfused consumers affected by a possible injunction.
- SC and LL are assessed on a 0-10 scale.
- While SC may theoretically be assessed at 0, the LL should never be assessed < 1 because of unidentifiable losses. This means that (even) without explicit evidence of losses adduced by the defendant, courts should attribute a minimum weight of $1 \times NC$ to the defendant's case, thereby requiring the plaintiff to make a significant case for SC if her C is low, that is, near or below the 15% threshold).

In simple terms, this Article's suggestion is that when $(C \times SC) > (NC \times LL)$ an injunction should in principle issue. Conversely, when $(C \times SC) < (NC \times LL)$, the court should approach the matter with utmost caution and err towards refusing to enjoin the use.¹⁸⁹

This first equation in part replicates current judicial behavior, as courts routinely evaluate the strength of the plaintiff's case in determining whether to grant injunctive relief. Our proposed method incorporates the current multifactor test applicable in the circuit in which the case is heard. For example, courts judging the strength of the plaintiff's case on a scale of 1-10 may consider the strength of the plaintiff's mark and the proximity of the goods. The first novel element introduced by the approach of this Article is the suggestion that SC should *also* depend in an online infringement scenario on several factors including temporal ones (as in initial interest confusion) and the novelty of the allegedly confusing "technique" used by the defendant. A plaintiff only alleging or trying to establish initial interest confusion would have a very low SC (range of 1-2), for example. This strikes the Authors as both logical and defensible, yet we find little if any evidence of this reasoning in court opinions.

A second novel element is more fundamental. It is weighing the interests of all relevant consumers. This means attributing a relative weight (1-10) to the loss of nonconfused consumers. In Part II, the Article discusses factors to be taken into account when assessing LL in the online context. Because in most cases there is no independent advocate for consumer interests, this case can be made by the defendant, though as the Article discusses below, inferences can also be drawn from the plaintiff's verbatim survey data, both from what

¹⁸⁹The equation as formulated is meant to capture the multifactor test(s), but not factors such as the defendant's bad faith.

¹⁹⁰In close cases, courts could consider appointing a master or other expert to provide a more thorough analysis of the interests of all relevant consumers. This is a matter well beyond the scope of this Article, however. For a discussion see Michael

it shows and what it fails to show.¹⁹⁰

C. Application Of Suggested Approach Using Verbatim Responses

This approach could be described as nothing more than the *full version* of a balancing test that adequately reflects the normative basis of trademark law, considering the interests of all relevant consumer. The approach is consonant with the hard look that courts often take at other aspects of survey evidence.¹⁹¹ It also seems fully compatible with the approach taken by the Supreme Court of the United States in *eBay*, in part because it brought the “public interest” (which presumably overlaps significantly with the interests of consumers) into focus as a valid equitable consideration in a court’s decision to issue an injunction.¹⁹²

To better ensure that trademark determinations do not pose undue restrictions on free speech, decrease healthy market competition, or hamper technological innovation, courts must consider verbatim responses before ruling on infringement. Specifically, all courts evaluating traditional online confusion and initial interest confusion—regardless of the statistical breakdown—should at least review summarized response reports. Courts should then modify the weight that they accord to the survey by consulting the following guidelines:¹⁹³

- In cases where confusion levels are far above the threshold percentage (i.e. a high “C” in the equation proposed above) when, say, **at least 40-50 percent** of respondents are confused, courts are justified in relying on methodologically sound statistical data regardless of whether participants acknowledge efficiency benefits in their verbatim responses. Trademark law is supposed to be consumer-protective, and 40-50 percent confusion rates suggest that an injunction may be warranted because a significant portion of the population is harmed by the use.

A. Johnson, *The Waning Consumer Protection Rationale Of Trademark Law: Overprotective Courts And The Path To Stifling Post-Sale Consumer Use*, 101 TRADEMARK REP. 1320, 1324 (2011) (“The parties to trademark litigation are of little help in this regard. They typically advocate for consumer interests only to the extent that it is beneficial to their own position, and their definition of consumer interests may be more rhetorical volleys than empirically demonstrable assertions. Therefore, I propose the addition of a third party to trademark litigation—a guardian ad litem of sorts—who would conduct surveys, advocate for consumers more generally, and advise the court of relevant consumer interests and how to shape consumer expectations in a way that will protect those interests.”) A proposal to that effect had also been made earlier by Professor David Lange of Duke University School of Law.

¹⁹¹For example, in putting an apparent end to Starbucks’ 12 years of efforts to stop the use of CHARBUCKS by a café/roastery in New Hampshire, the Second Circuit noted that “the District Court was within its rights to conclude that the [Plaintiff’s] survey had limited probative value because the defendant’s marks were not presented to survey respondents as they are actually ‘presented and packaged’ in commerce.” *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 2013 WL 6037227 at *9. For a more complete history of the case, see *supra* note 36.

¹⁹²*eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (The Court stated that a factor to consider is whether “the public interest would not be disserved by a permanent injunction.”) The Eleventh Circuit has suggested that this would also extend to preliminary injunctions. See *North Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1228 (11th Cir.2008). While *eBay* dealt with patent law, it was interpreted as applying to trademark law. See *Voice of the Arab World, Inc. v. MDTV Medical News Now, Inc.* 645 F.3d 26,33 (1st Cir.2011) (“Although eBay dealt with the Patent Act, in the context of a request for permanent injunctive relief, we see no principled reason why it should not apply in the present case.”) The case concerned a preliminary injunction issued to stop trademark infringement. See also *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1137-38 (9th Cir.2006).

¹⁹³This paper provides a basic framework for determining when statistical evidence should and should not be accorded significant weight. It does not purport to cover every possible confusion scenario. If survey results in a particular online infringement case do not fall within one of the enumerated guidelines - i.e. a confusion level of 30 percent and only 25 percent of nonconfused participants report efficiency gains - then judges should exercise discretion based on the quality of the efficiency responses, the facts of the case, the overall goals of trademark law, and the costs associated with ignoring majority viewpoints.

- With a lower C (**20-39 percent** of participants expressed potential confusion), verbatim survey responses should hold more clout—as long as they contain pertinent efficiency data. They can then be used to evaluate SC. Specifically, if NC is relatively high (a significant number of nonconfused participants of, say, more than 50 percent) suggests that an allegedly infringing use is 1) making the Internet easier, clearer, or quicker to navigate, or 2) providing important consumer information that leads to informed online decision making, statistical data is insufficient to justify an infringement determination on its own. These results indicate that more than half of consumers are not confused *and* that more than half of the majority group has acknowledged benefits that align with the ultimate goals of trademark law. In light of the facts of in a particular case, courts should: 1) decline to find infringement because the readily apparent consumer benefits significantly outweigh the relatively low confusion level, 2) consider the survey in light of other pertinent factors¹⁹⁴ to evaluate SC (and possibly LL) because the consumer benefits only slightly outweigh the confusion level or the confusion level only slightly outweighs the consumer benefits, or 3) place controlling weight on other pertinent factors¹⁹⁵ to evaluate LL because consumer benefits and confusion levels are equally persuasive and, therefore, the survey does not favor the plaintiff or defendant. In cases involving initial interest confusion, courts should be especially cognizant of the level of consumer harm as compared to the asserted consumer benefits. In situations where the harm identified by the 20-39 percent is relatively small—i.e. seconds of easily-remedied diversion—and the benefits involve significant consumer efficiency gains, courts should lean heavily toward a finding of non-infringement.
- Finally—and most importantly—in cases where C is low (**fewer than 20 percent** of respondents) and pertinent efficiency-related survey responses are present, verbatim responses used to evaluate SC and LL should hold controlling weight or the overall survey results should be eliminated from the infringement analysis. Specifically, when NC is very high (for example, 80 percent of respondents are not confused) LL should be evaluated by determining using verbatim answers whether an allegedly infringing use is 1) making the Internet easier, clearer, or quicker to navigate, or 2) providing important consumer information that leads to informed online decision making—statistical confusion rates hold no persuasive weight. These survey results indicate that the vast majority of participants are not confused, and that many of them have identified important efficiency benefits associated with the allegedly infringing mark. NC X LL should thus outweigh C X SC. Depending on the particular facts of a case, courts should ultimately 1) find non-infringement in light of the countervailing efficiency gains, or 2) if the efficiency gains are not sufficiently persuasive to direct a finding of non-infringement, abandon reliance on the survey entirely and shift the focus of the infringement analysis to other pertinent factors to evaluate SC and especially LL.¹⁹⁶ Additionally, when initial interest survey evidence reflects diversion rates of less than 20 percent *and* courts are presented

¹⁹⁴For example: the strength of the plaintiff's mark, the type of goods and degree of care likely to be exercised by the purchaser, and the labeling and appearance of the advertisements and the surrounding context on the screen displaying the results page. See *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137 (9th Cir. 2011).

¹⁹⁵*Id.*

¹⁹⁶See *Id.*

evidence of efficiency gains from at least 40 percent of non-diverted participants, courts should decline to find infringement—as the harm is likely negligible and the efficiency gains are readily apparent.

The proposed approach would allow for flexible application of the law in response to rapidly evolving Internet technology. The approach is malleable and should only serve as a reference point for courts evaluating traditional confusion and initial interest confusion in the online marketplace. The guidelines are meant to implement what this Article considers as the necessary balancing test that looks beyond even a shallow likelihood of confusion of 15% (or even less) of consumers. It considers both the interests of nonconfused users (and the losses that enjoining a specific online use might entail) and the depth of the likelihood of confusion. By abandoning reliance on mere statistical summaries of survey data and considering these guidelines, courts would thus render infringement decisions that better comport with the overarching goals of trademark law: protecting *all* consumers and ensuring the presence of high quality information in the marketplace.

Conclusion

Trademark law is grounded in consumer interests and, at its core, aims to promote efficiency and safe shopping practices for all members of the consuming public. Yet courts often enjoin a defendant's use of a plaintiff's mark upon a showing that only 15 percent of consumers are likely to be confused. By relying heavily on threshold statistical evidence of likelihood of confusion, courts often fail to account for the interests of a majority of relevant consumers. The practice is therefore at odds with the underlying focus of trademark law—that is, to protect all consumers, not just the confused minority.

We contend that survey evidence show-

ing a 15 percent likelihood of confusion should no longer automatically trigger an injunction. Rather, we propose that courts utilize consumer survey data (both qualitative and quantitative) to engage in a balancing test that encompasses the interests of *all* relevant consumers. Under our proposed test, the percentage of confused consumers (C) and the strength of the likelihood of confusion (SC) are weighed against the percentage of nonconfused consumers (NC) and the level of loss if an injunction issues (LL). If $(C \times SC) > (NC \times LL)$, an injunction may be warranted. If, however, $(C \times SC) < (NC \times LL)$, courts should err against enjoining the defendant's use. Under these guidelines, infringement determinations will better comport with the consumer-protective and efficiency-promoting goals of trademark law.

The benefits of our proposed balancing test are perhaps most apparent in the context of online trademark infringement, as trademark regulation on the Internet can impose heavy limitations on speech, decrease competition in the marketplace, and hinder technological advancement. Because savvy online consumers have the ability to recognize and promote beneficial, innovative web practices, their interests should be fully incorporated into the infringement analysis. By prompting courts to examine SC and LL *in addition to* the percentage of likely confusion, our proposed balancing test provides a panoramic view of the costs and benefits associated with enjoining an online trademark use for *all* relevant online consumers. This holistic analysis will help ensure that online infringement determinations adhere to the underlying goals of trademark law while keeping in step with the rapidly evolving Internet and its rapidly evolving users.