

No. 10-2007

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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ROSETTA STONE LTD.,

Appellant,

v.

GOOGLE INC.,

Appellee.

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On Appeal from a Judgment of the  
United States District Court  
for the Eastern District of Virginia

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**BRIEF FOR PUBLIC CITIZEN  
AS AMICUS CURIAE URGING AFFIRMANCE**

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December 6, 2010

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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## INTEREST OF AMICUS CURIAE

Public Citizen is a Washington, DC-based consumer advocacy organization with about 160,000 members and supporters. Since its founding in 1971, Public Citizen has urged citizens to speak out about corporations, government agencies, and unions, and has advocated protections for the rights of consumers, citizens and employees to encourage them to voice their views. Public Citizen has brought and defended numerous cases involving the First Amendment right to participate in public debate.

The Internet provides a tremendous opportunity for ordinary people to express their views and to have them heard; it also enables consumers to obtain information that they may need to protect their economic and political interests. The legal rules governing use of the Internet must be crafted to provide a maximum opportunity for the free exchange of information between willing speakers and willing listeners.

Trademark law protects consumers' ability to distinguish the goods of companies whose quality they have learned to trust, but should not be used to prevent consumers from criticizing or learning about criticisms and competing products. Consequently, Public Citizen has litigated many cases addressing consumers' right to use trademarks to identify the subjects they are discussing. *E.g.*, *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005); *Smith v Wal-Mart Stores*, 537 F.Supp.2d 1302

(N.D. Ga. 2008).

Although its principal concern is to protect consumers who want to use the Internet to speak about corporations through non-commercial websites, Public Citizen has also worked to protect the speech rights of commercial entities. For example, Public Citizen has defended companies' right to use trademarks online to tell the truth about their commercial operations. *E.g.*, *Paccar v. Telescan Tech's*, 319 F.3d 243 (6th Cir. 2003). Indeed, it was Public Citizen that established that commercial speech is protected by the First Amendment. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

Public Citizen does not accept donations from governments or corporations, including foundations that maintain on-going relationships with the corporations that fund them. Public Citizen has never received money from any of the parties to this case, whether for this brief or otherwise, and indeed has both criticized Google and litigated against it. It received no funds from any person to support this brief. Undersigned counsel are the sole authors of this brief, which is filed with the consent of both parties.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

In this appeal, Rosetta Stone ("Rosetta") seeks to hold Google liable for infringement and dilution because Google allows its resellers, its competitors, and its

detractors to bid for the right to advertise to potential customers who display an interest in obtaining information relating in some way to Rosetta by using the registered trademark “Rosetta Stone” as a search term.

This brief explains why Rosetta’s arguments should be rejected. First, we explain what keyword advertising is and what social value it creates. We argue that, because both keyword advertising, and the “sale” of keywords, are commercial speech, the regulation of this practice must be consistent with the First Amendment. Next, we discuss trademark law’s basic principles and show that they are limited to protecting **consumers** against confusion about whether goods and services emanate from the trademark holder, and show that it is not Google’s function to deliver Internet users to a trademark holder’s official website. We further contend that those who compete with or criticize a trademark holder are entitled to call their own web content to the attention of those who have displayed interest in a trademarked term. Finally, we argue that, if any trademark confusion is at issue in this case, it is “initial interest confusion.” This Court has previously expressed skepticism about that doctrine; Rosetta cannot rely on that concept to hold Google liable here.

## **STATEMENT**

Search engines have three parts – a database of copied web pages, a system for identifying additional web pages to add to the database, and software that determines

what pages from its database should be identified in response to a given search request by an Internet user, in what order, and how those pages should be displayed. Each search engine uses a proprietary formula, or algorithm, to rank the “relevance” of web pages to the search terms selected by the search engine’s users. *See generally* Sullivan, *How Search Engines Work*, <http://searchenginewatch.com/webmasters/article.php/2168031>, and *How Search Engines Rank Web Pages*, <http://searchenginewatch.com/webmasters/article.php/2167961>. Search engines commonly compete for users by expanding the database that they search in response to requests (or, at least, optimizing the database that their target user audience wants to search), Sullivan, *Search Engine Sizes*, <http://searchenginewatch.com/reports/article.php/2156481>, and by refining their search and ranking algorithms and displays so that users get the search results that they want. In this regard, the critical objective is not just to give searchers the most complete results, but, even more important, to enable searchers to find information they seek most quickly, by placing it near the top of the list of search results. *See* Sullivan, *Search Engine Size Wars & Google’s Supplemental Results*, <http://searchenginewatch.com/searchday/article.php/3071371>; Sherman, *Google Gains in Popularity, But Will It Last?*, <http://searchenginewatch.com/searchday/article.php/3368371> (specialized search engines with smaller databases can compete with general search engines with large databases by offering

more effective search to certain users).

The personnel and equipment needed to perform these functions are expensive, and search engines need to pay for their operations. Moreover, Google hosts several Internet services that allow members of the public to speak online; for example, YouTube carries video content, Gmail provides email accounts, and Blogspot carries personal and organizational blogs. Although one revenue model for such hosting would be to charge users for accessing the site, search engines, like many other Internet services, generally support themselves by selling advertising. Many third parties that host message boards where the public can post comments, or run blogs featuring their own non-commercial expression, are able to offer public access to their own websites free of charge because their expenses are covered by providing advertising space to Google.

Although some advertisers are willing to pay for exposure to general audiences, if advertisers can be assured that their messages will be targeted to Internet users who are likely to be interested in their services, they will pay more for ads. On the other hand, search engines also compete for advertisers by maximizing the number of persons who use their engines, which in turn requires them to optimize the accuracy of search returns.

Keyword advertising, the specific activity at issue in this case, is born of the

desire of many advertisers to target ads to audiences who may already be interested in products or services similar to what the advertisers are trying to sell. For example, if an advertiser wants to sell a language product, the advertiser may be willing to pay more for ads that can be directed to persons who are conducting searches either for language products generally, or for publishers of dictionaries, translation programs, and language-learning products that are similar to what the advertiser is trying to sell. One way to develop that target audience is by identifying persons who type in generic search terms, such as “language-learning” or “translating.” Another way to target advertising is to identify internet users whose search strings use particular brand names. The issue in this case is whether targeting messages (particularly commercial messages) to members of the public who have arguably expressed an interest in obtaining information about particular brands violates the trademark laws.

## **ARGUMENT**

### **A. In Applying Trademark Law to this Case, the Court Should Recognize Limits That the First Amendment Imposes on Regulation of the Speech Both of Search Engine Operators and of the Website Operators Whose Sites the Engines Identify.**

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers’ Corner in London’s Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to



all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997), “From a publisher’s standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.” The Internet is a traditional public forum, and full First Amendment protection applies to speech on the Internet. *Id.* And, because plaintiff seeks an injunction and an award of damages, the Court’s actions must comply with the mandates of the First Amendment. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

The World Wide Web provides enormous possibilities for persons who have information and opinions that they want others to consider. There is no limit to the content that may be communicated on the Web; it ranges from the Internet’s original purpose—providing a way for the producers of scientific, technical or other intellectual work to make their results freely available to others—to archives of historical or literary material, political opinions, and comments on government bodies, public officials, or corporations, unions and other influential institutions.

Most relevant to the issues before the Court, web content includes commercial information about goods or services that a website owner may have made, or that the owner may want to sell or promote; it also includes contrary or critical information about those same goods and services, and information about products sold by competitors of the website operator who also want to provide information about why their own products may be more desirable for reasons of quality, price, or convenience. All of this information co-exists in a single, huge public forum.

Even commercial aspects of the Internet enjoy some First Amendment protection. To be sure, the fullest measure of First Amendment protection is reserved for non-commercial speech, but “for [nearly 40 years], the Court has recognized that commercial speech does not fall outside the purview of the First Amendment.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001). “It is a matter of public interest that economic decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.” *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 366 (2002), quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976). “The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience,

not the government, assess the value of the information presented.” *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

Commercial speech receives less protection than non-commercial speech—commercial speech can be regulated even if it is misleading but not intentionally or recklessly false. *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (“[T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena”); *Smith v. United States*, 431 U.S. 291, 318 (1977) (“Although . . . misleading statements in a political oration cannot be censored, . . . misleading representations in a securities prospectus may surely be regulated.”). In trademark cases, unlike copyright cases where fair use is largely co-extensive with the First Amendment, *Harper & Row Publishers v. Nation Enters.*, 471 US 539, 560 (1985), First Amendment considerations routinely receive separate discussion, although they also inform statutory interpretation. Even if trademarks are used in a commercial context, courts construe the trademark laws narrowly to avoid impinging on First Amendment rights. *Cliffs Notes v. Bantam Doubleday*, 886 F.2d 490, 494 (2d Cir. 1989).

Moreover, First Amendment interests are weighed as a factor in deciding whether a trademark violation should be found. *Anheuser-Busch v. Balducci Pub ’ns*, 28 F.3d 769, 776 (8th Cir. 1994). Injunctions must be narrowly crafted to comply

with the general rule against prior restraints of speech. *Id.* at 778; *Consumers Union v. General Signal Corp.*, 724 F.2d 1044, 1053 (2d Cir. 1983); *Better Business Bureau v. Medical Directors*, 681 F.2d 397, 404-405 (5th Cir. 1982). “Restrictions imposed on deceptive commercial speech can be no broader than reasonably necessary to prevent the deception.” *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43-44 (D.C. Cir. 1985), *citing In re RMJ*, 455 U.S. 191, 203 (1982); *see also Castrol v. Pennzoil*, 987 F.2d 939, 949 (3d Cir. 1993).

**B. Nothing About Keyword Advertising Inherently Violates the Trademark Laws.**

**1. Consistent with the First Amendment, Trademark Law Is Limited to Protecting Against the Misuse of A Mark to Create Confusion About Whether Particular Goods and Services Emanate from the Trademark Holder.**

Trademark law is constitutional because it is confined to commercial speech and regulates that commercial speech by forbidding speech that is misleading. *Taubman Co. v. Webfeats*, 319 F.3d 770, 774-775 (6th Cir. 2003). The trademark laws do not forbid all uses of trademarks, but only deceptive ones: “When the mark is used in a way that does not deceive the public, we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo.” *Prestonettes v. Coty*, 264 U.S. 359, 368 (1924).

Trademark law does not create a general cause of action based on harms caused

by any form of misleading speech, but only misleading speech about the source of goods and services. “[T]he general concept underlying likelihood of confusion is that the public believe the ‘the mark’s owner sponsored or otherwise approved of the use of the trademark.’” *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir. 1988). Thus, trademark law does not protect against just any kind of confusion, only confusion about the source of goods and services in the marketplace. Courts have long followed this principle: “[T]he imitated feature must be regarded by prospective purchasers as identifying the source of the product. . . . It is **only when the feature in fact identifies source and the imitation is likely to deceive prospective purchasers who care about source** that the imitator is subject to liability.” *West Point Mfg. Co. v. Detroit Stamping Co.*, 222 F.2d 581, 590 (6th Cir. 1955) (emphasis added). Other courts agree: “All of the[] legitimate trademark purposes derive ultimately from the mark’s representation of a single fact: the product’s source. It is the source denoting function which trademark laws protect, and nothing more.” *Anti-Monopoly v. General Mills Fun Group*, 611 F.2d 296, 301 (9th Cir. 1979); *Smith v. Chanel*, 402 F.2d 562, 566-569 (9th Cir. 1968) (explaining how confining trademark law to this function best serves consumers’ and companies’ interests). “The limited purpose of trademark protections set forth in the [Lanham Act] is to avoid confusion in the marketplace by allowing a trademark owner to prevent others from duping

consumers into buying a product they mistakenly believe is sponsored by the trademark owner. Trademark law aims to protect trademark owners from a false perception that they are associated with or endorse a product.” *Mattel v. Walking Mt. Prod.*, 353 F.3d 792, 806 (9th Cir. 2003)(internal quotes and citations omitted). “The trademark laws exist not to ‘protect’ trademarks, but . . . to protect the consuming public from confusion, concomitantly protecting the trademark owner’s right to a non-confused public.” *James Burrough Ltd. v. Sign of Beefeater*, 540 F.2d 266, 276 (7th Cir. 1976). *Accord Communications Sat. Corp. v. Comcet*, 429 F.2d 1245, 1252 (4th Cir. 1970).

Accordingly, to the extent that Rosetta bases its arguments on evidence showing only that consumers were confused about what they were looking at in Google search results, that evidence is not probative of actionable confusion. Only evidence showing that Internet users thought they were buying goods from Rosetta, when in fact they were buying from another, matters under the Lanham Act.

**2. It Is Neither the Sole nor Even the Principal Function of Search Engines to Enable Members of the Public to Reach a Trademark Holder’s Official Website.**

The size of the public forum provided by the Internet is staggering. Recent estimates of the number of discrete webpages range from above 25 billion, [http://en.wikipedia.org/wiki/World\\_Wide\\_Web#Statistics](http://en.wikipedia.org/wiki/World_Wide_Web#Statistics), to one trillion.

<http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html>.

In these circumstances, it can be hard for an individual publisher of information to bring that information to the attention of those who may be interested in it; it is a similarly staggering task for the Internet user to search the vast sea of information for the specific sites that have information relevant to his interests. Nor is there any official index that a user can consult to find particular content. It is as if the entire contents of the Library of Congress (or hundreds of times those contents) were stored in one huge building, with neither a card catalogue, nor a Dewey Decimal System, nor any other orderly means to enable patrons to find what they are trying to locate. Search engines provide an invaluable function, both by providing Internet viewers with a means of locating information in which they may be interested and by giving publishers a way to bring their information to the attention of their target audiences. Because of the crucial role played by search engines, it is vitally important that they neither suppress certain sites because they are disfavored, nor give undue prominence to other sites by returning confusing search results.

The fundamental flaw in Rosetta's submission is its apparent assumption that any member of the public who uses a search engine to conduct a search using the term "Rosetta Stone" must necessarily be searching for Rosetta's official site, and only for that site, and hence is likely to experience confusion about whether all of the ensuing

search results are linked to Rosetta's own site. The underlying assumption is wrong. To the contrary, it is common knowledge that an Internet user who employs a search engine and uses a search term that is in common use is likely to receive a listing of hundreds or even thousands of websites relating to their search terms. A Google search for "Rosetta Stone" conducted while this brief was being written result (attached as an Addendum to this brief) returned "about 5,310,000" results. No rational user could possibly think that all of these results identify Rosetta's own website, and no Internet user with even a minium degree of experience would use a search engine in the expectation of finding **only** the official site of a company in which they are interested.

To be sure, some searches are performed with the objective of finding a particular company's official website. Professor Milton Mueller, one of the nation's leading experts on the domain-name system, has argued that, although at one time members of the public commonly used "name-guessing" to locate the official websites of companies and other entities (by typing their names plus the "dot-com" domain into a browser window), for a variety of reasons, search engines have replaced name guessing as the most common way for the public to find the websites of companies in which they are interested. [http://www.citizen.org/documents/Mueller\\_Final\\_Report2.pdf](http://www.citizen.org/documents/Mueller_Final_Report2.pdf) at 4-6. Hence, one common use for search engines today



is to find the official websites of even the most well-known companies.

But the mere fact that the user is looking for information that has some bearing on a trademarked word, such as “Rosetta Stone,” does not necessarily mean that the user wants to know only who owns the trademark and what the owner wants to convey. First, where, as here, the term has an original meaning that the trademark plays on, the user might simply be looking for information about the ancient Egyptian stele or its non-commercial analogues. Even assuming that the searcher had plaintiff’s product in mind, he may be looking for information about the trademark, or about the trademark holder. He may be looking for historical information, or for impartial reviews. The user might have a grievance about plaintiff’s product, and want information about other similar grievances. Or the user might want to find archives of information about disputes in which the trademark holder has been engaged.

The user might also be trying to buy either the trademarked item or some other item similar to the trademarked item, but be seeking a comprehensive list of retailers who sell that item, to use the Internet for comparison shopping. And perhaps, instead of looking for dealers who sell only the goods of the trademarked brand, the user could be looking for dealers who sell multiple brands, on the theory that it is more efficient to engage in comparison shopping on the premises (or website) of retailers

who sell several similar products.

In crafting rules for the use of trademarks on the Internet, courts should bear in mind all these potential objectives of Internet users, so that in trying to prevent customer confusion about the source, courts do not impair the ability of Internet users to find information about the trademarked item, or the ability of search engine operators to accommodate these differing objectives. In this regard, it is useful to draw an analogy with ways of finding information in a library. If, for example, somebody wrote an unauthorized history of Rosetta, he could put Rosetta's name in the title without violating plaintiff's trademark. *See Rogers v. Grimaldi*, 875 F.2d 994, 1000 (2d Cir. 1989). And if the author were allowed to prepare the relevant entries for the card catalog, he could surely include "Rosetta Stone" in the title and subject cards. The author card would be different—only Rosetta could hold itself out as the author or sponsor of a book. Similarly, the rules governing the use of trademarks on the Internet must allow for these multiple uses of a single word as a target of searches for author, title and subject of each website.

Similarly, just as trademark law must accommodate the various objectives that Internet users may have in resorting to a search engine, the operators of search engines are entitled to take into account the various objectives of their potential customers, including their advertisers. As it happens, pages from Rosetta's official

websites provide the first few non-paid listings in a Google search using its name as a search term, although on those search result pages that place some paid listings at the top of the page, they are not the first listings on the page. However, search engine operators are not required either to limit search results that are returned in response to search terms that embody trademarks to the official websites of the trademark holders, or even to give primacy of ranking to a trademark holder's official website.

In *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005), this Court embraced the majority rule that even domain names containing trademarks can represent the website's subject rather than its source. The same principle applies to trademarks when used to identify searches in response to which certain ads will appear, or when used in the text of such ads.

**3. A Trademark Holder's Competitors or Critics Are Entitled to Call Their Sites to the Attention of Persons Who May Be Primarily Interested in the Trademark Holder's Products.**

Just as consumers have a legitimate interest in obtaining information about a full range of competitors, and not just about Rosetta, and from critics and impartial reviewers before they buy language-learning products, so too do Rosetta's commercial rivals have every right to call their competing products to the attention of potential customers, even those customers who may have otherwise focused their principal attention on Rosetta as a potential vendor. Similarly, Rosetta's critics or

authors of impartial reviews are entitled to call their opinions to the attention of those who are interested in Rosetta. And the competitors, critics and reviewers are entitled to use Rosetta's name in seeking the attention of potential Rosetta customers. For example, a Rosetta competitor could legitimately place an advertisement in the *New York Times* bearing a large headline, "If you think Rosetta Stone provides good language-learning at a reasonable cost, consider our products instead."

But Rosetta's competitors are not limited to advertising to the general public. They are also entitled to advertise in locations where consumers already interested in language-learning products generally are likely to see their ads. If competitors seek to compete with Rosetta specifically, they are entitled to seek out advertising venues where their ads can be seen by people who are thinking about whether to buy Rosetta products, or seeking information about Rosetta itself.

For example, if the *New York Times* ran a series of news stories about Rosetta, Berlitz could properly buy advertising on the adjoining pages of the newspaper. This surely would not violate Rosetta's trademark, even if the *Times* placed Rosetta's name in the news index and readers' attention was drawn to the news stories by the knowledge that information about Rosetta could be found there. Similarly, if Berlitz were to pay a large enough sum of money to the person who owns the plot of land next to Rosetta's headquarters in Arlington, Virginia, Berlitz could erect a large

billboard offering its own products to draw the attention of customers who had come to Arlington to visit Rosetta. The neighboring landowner would not violate the trademark laws by holding an auction among language-learning providers for the placement of such a billboard.

If a customer came to a shopping mall, an airport, or a software store, looking for the kiosk where Rosetta sells its products, the facility's owner would not violate the trademark laws by hanging a large advertisement for Berlitz right next to the Rosetta kiosk, or by directing the personnel at the information desk to tell customers that they might be better off visiting the Berlitz booth. By the same token, Berlitz might pay store owners for the right to show Berlitz products close to where customers enter the store even if Berlitz knows that they are coming to find Rosetta products. It might pay mall owners to provide it with mailing lists of people who had come to the information desk to ask about the location of the Rosetta kiosk. This latter transaction might implicate considerations of customer privacy, but, like the other examples discussed above, it would not violate the trademark laws. In each case, Berlitz would be delivering its message to people who had been drawn by Rosetta's trademark to a location where they could be identified as prospective targets for competitors' advertising.

Google is analogous to the *New York Times*, the landowner in Arlington, and

the mall, store or airport owner. Without implicating customer privacy, Google can provide potential advertisers with access to people who have communicated a specific interest in obtaining information about Rosetta. At the same time that the search engines are providing their customers the precise information that those customers desire—an impartial listing of websites that contains information relevant to the search term “Rosetta Stone”—the search engines are also able to provide access for Rosetta’s competitors or critics on adjacent property, a portion of the web page adjacent to the normal search results. There is nothing inherently abhorrent to the trademark laws in the engines’ sale to competitors or critics of such adjacent space on the engines’ listing of search results. *See* Goldman, *Brand Spillovers*, 22 Harv. J.L. Tech. 382 (2009) (comparing legal treatment of online and brick-and-mortar retailing practices).

Rosetta’s official website appears at or near the top of every search engine result list (*see, e.g.*, the addendum to this brief). Thus, this is not a case in which Rosetta is trying to prevent its website from being concealed from potential viewers; it is rather a case in which Rosetta is trying to suppress competitors’ advertising to its potential customers. Trademark law does not authorize such suppression, and Rosetta’s repeated incantation of the “likelihood of confusion” allegation cannot conceal the fact that the trademark theory on which its case is predicated is not

actionable.

**C. Rosetta’s Arguments Based on a Likelihood of Initial Interest Confusion Are Ill-Suited to Deciding Whether the Practice of Keyword Advertising Is Permissible.**

Rosetta’s argument rests heavily on its analysis of this Court’s multi-factor test for likelihood of confusion. Br. 21-45; *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522 (4th Cir. 1984). That test was developed to enable courts to analyze whether one company’s trademark designating the source of its goods or services is likely to cause consumer confusion about whether it, or a different company, is the source of similar or competing goods and service. We question whether the test is well-suited to deciding whether the use of a mark to identify a subject of discussion or to identify Internet users to whom advertising is to be displayed is likely to cause confusion. The Court should hold here that the *Pizzeria Uno* factors are simply irrelevant to testing the likelihood of confusion in keyword advertising cases. And to the extent that the Court decides to address **any** of the *Pizzeria Uno* factors, the district court’s discussion of those factors was sensible, and we are in general agreement with Google’s arguments about those factors.<sup>1</sup>

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<sup>1</sup>We do not address whether particular keyword ads were confusing about source, because the evidence is under seal. Although Rosetta does not suffer from the same impediment, its arguments about likely confusion are remarkably theoretical: Rosetta’s brief does not quote or reproduce a single keyword ad that implies, misleadingly, that it leads to Rosetta’s own web site.

Public Citizen is particularly concerned, however, because Rosetta’s appeal essentially rests on “initial interest confusion” (“IIC”). Because all the evidence is under seal, we cannot say for sure what form of “actual” confusion Rosetta is relying on; but a close reading of Rosetta’s brief, compared with Google’s response, suggests that only IIC may have been found, and not confusion about whether particular goods and services offered for sale are from Rosetta. Consistent with this Court’s longstanding reluctance to adopt trendy but expansive new theories of statutory liability, this Court has expressed considerable skepticism about IIC as a basis for Lanham Act liability. *Lamparello v. Falwell*, 420 F.3d 309, 312 (2005). It should not adopt that doctrine here.

Although the IIC concept has its roots in occasional pre-internet decisions in the Second Circuit, the doctrine reached its full flowering in Internet-related cases beginning with *Brookfield Communications v. West Coast Entertainment*, 174 F.3d 1036, 1062 (9th Cir. 1999). That court said that IIC occurs when a consumer looking for a trademark holder is drawn by use of the mark in a domain name or meta tags to a website that, once viewed, is not confusing about source. Nonetheless, the consumer may decide that he is interested in the goods or services marketed there, and thus stay and look further despite the lack of confusion.

The *Brookfield* court drew a powerful but ultimately misleading analogy



between the information highway and a real highway, comparing the misuse of a trademark to “confuse” a search engine or domain name guesser to a misleading highway sign that encourages a consumer looking for the markholder to leave the highway to enter the competitor’s store, instead of continuing down the road to the next exit, where the markholder has its store. By the time the hypothetical user realizes he has been misled, it is just too complicated to get back on the highway and drive further in the hope of finding the store belonging to the trademark holder. In the information highway context, the hypothetical user decides not to continue to look for the markholder, not because of any illusions about who sponsors the website he or she is viewing, but because the website provides other attractive inducements. For example, the consumer may perceive that the current website offers good comparative information, or cheaper prices for functionally equivalent goods, or higher quality goods.

Although several courts subsequently adopted IIC as a valid concept, several other courts, including the First and Eight Circuits, have, like this Court, refused to hop onto the IIC bandwagon. *Sensient Techs. Corp. v. SensoryEffects Flavor Co.*, 613 F.3d 754, 766 (8th Cir. 2010); *Hasbro v. Clue Computing*, 232 F.3d 1, 2 (1st Cir. 2000). This reluctance is wise, for several reasons.

First, IIC contradicts one of the fundamental tenets of trademark law—that

trademark law does not cater to the careless or inattentive by avoiding merely temporary or possible confusion.<sup>2</sup> Unlike some other jurisdictions, American trademark law does not use a “moron in a hurry” as the proper reference point. *Newsweek v. BBC*, [1979] RPC 441, at 447. Indeed, trademark law recognizes that it is impossible to eliminate all possibility of confusion. *August Storck K.G. v. Nabisco*, 59 F.3d 616, 618-619 (7th Cir. 1995). Some confusion must be tolerated when required to serve other values.<sup>3</sup>

Second, as several commentators have observed, IIC represents a hopeless hodgepodge of theories that are not applied consistently by the courts. Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 Emory L. J. 507, 559-575 (2005). The concept is “predicated on multiple mistaken and empirically unsupportable assumptions about searcher behavior.” *Id.* at 565. Indeed, the highway sign analogy, and every other aspect of the analysis of Internet use and

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<sup>2</sup>*Therma-Scan v. Thermoscan*, 295 F.3d 623, 636 (6th Cir. 2002); *Duluth News-Tribune v. Mesabi Pub. Co.*, 84 F.3d 1093, 1098-1099 (8th Cir. 1996); *Woodsmith Pub. Co. v. Meredith Corp.*, 904 F.2d 1244, 1246 n3 (8th Cir. 1990); *Scandia Down Corp. v. Euroquilt*, 772 F.2d 1423, 1429 n1(7th Cir. 1985); *Astra Pharmaceutical Products v. Beckman Instruments*, 718 F.2d 1201, 1207 (1st Cir. 1983).

<sup>3</sup>*Id.* (promotion of comparative advertising); *Thrifty Rent-a-Car v. Thrift Cars*, 831 F.2d 1177, 1184 (1st Cir. 1987) (allowing pre-existing business to continue). *Accord KP Permanent Make-Up v. Lasting Impression I*, 543 U.S. 111,121-123 (2004) (fair use).

initial interest confusion that appears in *Brookfield*, was devoid of any support in the record or the briefs of that case. The main issue litigated by the parties was which of them had priority for use of the term “movie buff” to describe its own product; they adduced no evidence and presented no discussion of either Internet technology or how consumers interact with it.

Third, developments in both law and technology call into question the applicability of initial interest confusion to websites that accurately use domain names to denote websites’ subjects. Early cases spoke with assurance of the supposed lack of sophistication of Internet viewers and the absence of a reliable index of websites. *E.g.*, *Panavison v. Toeppen*, 141 F.3d 1316, 1327 (9th Cir. 1998); *Jews for Jesus v. Brodsky*, 993 F.Supp. 282, 303 (D.N.J. 1998), *aff’d mem.*, 159 F.3d 1351 (3d Cir. 1998). Courts assumed that a customer who got to the wrong website would just give up “due to anger, frustration or the assumption that plaintiff’s homepage does not exist.” *Id.* at 307. On this theory, when a customer was confused into visiting another person’s website by a misleading domain name or meta tag, even though confusion was dispelled as soon as the customer reached the rival site, the customer would find it too hard to find the site that he was really seeking. In this context, the doctrine of IIC protected the consumer against unduly high search costs that would have been incurred because of the temporarily confusing use of the mark.

This analysis has become outdated through both changes in the sophistication of Internet viewers and developments in search technology (and as judges became more familiar with Internet technology). Although it issued *Brookfield*, the Ninth Circuit later repudiated the view that Internet viewers are naive or unsophisticated. *Entrepreneur Media v. Smith*, 279 F.3d 1135, 1147 (9th Cir. 2002). In *Interstellar Starship Serv. v. Epix*, 304 F.3d 936, 942 (9th Cir. 2002), that court retreated from the suggestion that IIC was an independent violation that could be found without reference to other factors. And numerous courts have recognized that search engines now **do** provide an excellent index for the World Wide Web, or at least large portions of it, and have acknowledged the diminution of the consequences of landing at the “wrong” website as a result of IIC. *E.g.*, *Strick Corp. v. Strickland*, 162 F.Supp.2d 372 (E.D.Pa. 2001); *Bihari v. Gross*, 119 F.Supp.2d 309, 320 n15 (S.D.N.Y. 2000).

As *Strick* stated:

[A]ny initial confusion that arises from Defendant’s use of his strick.com domain site, specifically, that consumers will realize that they are at the wrong site and will go to an Internet search engine to find the right one, is not enough to be legally significant. . . . It is clear that Internet surfers are inured to the false starts and excursions awaiting them and are unlikely to be dissuaded, or unnerved, when, after taking a stab at what they think is the most likely domain name for particular web site [they] guess wrong and bring up another’s webpage.

162 F.Supp.2d at 377.<sup>4</sup>

And as Judge Kozinksi said in *Toyota Motor Sales v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010):

[I]n the age of FIOS, cable modems, DSL and T1 lines, reasonable, prudent and experienced internet consumers are accustomed to such exploration by trial and error. . . . They skip from site to site, ready to hit the back button whenever they're not satisfied with a site's contents. They fully expect to find some sites that aren't what they imagine based on a glance at the domain name or search engine summary.

Given these substantially lower costs of consumers who experience IIC when viewing a list of search engine results, and given the impact of a rule that holds search engine operators liable when advertisers' copy creates IIC on the part of a small minority of search engine users, application of trademark law to suppress that speech does not serve a government interest of sufficient magnitude to warrant the suppression of otherwise truthful commercial speech.

This case presents an especially poor vehicle for this Court to embrace IIC for the first time, for two reasons. First, when a product is expensive, and hence is likely to be purchased only after careful consideration, IIC cannot form a basis for Lanham Act liability. *E.g.*, *Sensient Techs.*, *supra*, 613 F.3d at 766. The district court noted

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<sup>4</sup>David Bernstein, a prominent trademark lawyer and co-author of INTA's amicus brief supporting Rosetta here, stated that "99 times out of 100, consumers are able to find the site they are looking for." Loomis, *Domain Name Disputes Decline as Internet Matures*, <http://www.law.com/jsp/article.jsp?id=1044059430652>.

that Rosetta’s product costs several hundred dollars, and cited evidence suggesting that Rosetta’s target market is “well-educated consumers willing to invest money and energy in the time-intensive task of learning a language.” JA 634. Rather than address this evidence directly, Rosetta responds (Br. 41-42) by pointing to evidence that it says shows that even “sophisticated” consumers can experience IIC. But such evidence, even if it shows what Rosetta contends, does not show that IIC leads to actual confusion and hence supports infringement liability.

Second, Rosetta’s arguments about “actual” confusion seem to suggest that, in response to 100,000,000 instances of ads triggered by the use of term “Rosetta Stone” on Google, several users experienced IIC, JA 629; its survey expert found that seventeen percent of users experienced IIC in that they were confused about whether specific paid links were sponsored by Rosetta. Rosetta Br. 32. These numbers are problematic for two reasons.

First, this Court has already held that, even if IIC were a valid concept, initial confusion cannot be judged in a vacuum; it must be considered in conjunction with the underlying web site. *Lamparello*, 420 F.3d at 316, 318. By limiting his analysis to what Internet users thought when they saw the paid links, without testing reactions after they followed the paid links to the underlying websites, Rosetta’s survey expert simply disqualified his survey evidence from being legally relevant in this circuit.

Second, courts sometimes say that when there are several examples of actual confusion, or when properly executed consumer surveys show that as many as 10% of consumers are confused about whether the senior mark holder is the source of goods marketed under a challenged trademark, that can be sufficient to warrant a finding of actual confusion and hence likely confusion. *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 n.15 (4th Cir. 1996). Where the consequence is only that the junior markholder has to find another name under which to market its product, there is little cost to the public from requiring the junior user to make the change, and that may be a cost worth accepting from the broader public perspective.

However, even assuming that 17% of Internet users do not understand what keyword advertising represents when it appears on a list of search engine results when they enter “Rosetta Stone” as a search string, their confusion should not outweigh the experience of the substantial majority of Internet users who understand that the paid results are (or even may be) advertisements from other companies that are reselling Rosetta’s goods, competing with Rosetta, or criticizing Rosetta. The value that society obtains from comparative advertising, and the truthful expression of keyword advertisers who buy access to Internet users who have evinced interest in learning more about “Rosetta Stone,” should not be sacrificed to accommodate the lack of sophistication of a small minority.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Paul Alan Levy

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December 6, 2010



## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the foregoing brief was prepared in Word Perfect X3 using Times New Roman fourteen point font, and that Word Perfect counted 6993 words in the brief.

December 6, 2010

/s/ Paul Alan Levy

Paul Alan Levy

# **ADDENDUM**



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## **CERTIFICATE OF SERVICE**

I certify that on this 6th day of December, 2010, I am filing this brief through the Court's ECF system, which will serve copies of the brief on counsel for both appellant and appellee.

/s/ Paul Alan Levy  
Paul Alan Levy