

04-0026(L)

04-0446(CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

.....♦♦♦♦.....

1-800 CONTACTS, INC.,

Plaintiff-Appellee,

—against—

WHENU.COM, INC. and VISION DIRECT, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION URGING REVERSAL

PROFESSOR ERIC GOLDMAN
MARQUETTE UNIVERSITY
LAW SCHOOL
Sensenbrenner Hall
P.O. Box 1881
Milwaukee, Wisconsin 53201-1881
(414) 288-5232

CINDY COHN
FRED VON LOHMANN
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, California 94110
(415) 436-9333 x123

*Attorneys for Amicus Curiae
Electronic Frontier Foundation*

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND
OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN
LITIGATION**

Pursuant to FRAP 26.1, amicus Electronic Frontier Foundation ("EFF"), a 501(c)(3) non-profit corporation incorporated in the State of Massachusetts makes the following disclosure:

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4. EFF is not a trade association.



Fred von Lohmann
Senior Intellectual Property Attorney
Electronic Frontier Foundation

February 18, 2004

I. STATEMENT OF INTEREST

The Electronic Frontier Foundation (EFF) is a nonprofit, membership-supported civil liberties organization working to protect consumer interests, innovation and free expression in the digital world. EFF and its 11,000 dues-paying members have a strong interest in assisting the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest. Because this case may call on this Court to address the proper scope of the initial interest confusion doctrine on the Internet, a doctrine of critical interest to consumers and technology innovators, EFF believes it may have a perspective to share that is not represented by the parties to this appeal, neither of whom directly represents the interests of consumers or the public interest generally.

EFF files the instant brief pursuant to Federal Rule of Appellate Procedure 29(a), together with a motion for leave to file.

II. INTRODUCTION

Cathy Consumer, who has SaveNow installed on her computer, is interested in purchasing a car. Cathy knows she wants a small vehicle with good gas mileage, but she does not know all of the different manufacturers' offerings. However, Cathy does know that her friend has a Honda that she likes. Therefore, to start off her search, she types "Honda" into her favorite search engine or into her browser bar.¹ When Cathy types, the software takes

¹ See Stephen W. Feingold, *Trademark Means to Avoid Confusion, or Property Rights? Two Pending Cases Outline Dilemma*, N.Y.L.J., July 26,

note. At or about the time when the search results or Honda's home page has loaded, the SaveNow software generates a separate, small ad for Toyota in the lower right hand corner of her browser window. Of course, the webpage currently displayed in Cathy's browser remains unaltered. However, she also has the choice of clicking on the ad to learn more about Toyota products.

What's the difference between this hypothetical scenario and shopping in the real world? Not much. When searching in the real world, Cathy would likely pass the Toyota dealer on the way to the Honda dealer, as car dealerships are ordinarily located near each other to take advantage of shoppers who are attracted initially by their competitors.

If Cathy was searching for a product in a grocery or drug store, the direct proximity of competing products would be even more likely, as companies selling competing products routinely pay for shelf space, and retailers display similar products together to help their customers shop more efficiently. Thus, if she went looking for the brand-name decongestant Sudafed, Cathy would find a range of similar cold relief products (including products with deliberately similar packaging and phonetically similar names, like "Wal-phed") in the immediate vicinity. *See Playboy Enters., Inc. v. Netscape Comm. Corp.*, 354 F.3d 1020, 1035 (9th Cir. 2004) (Berzon, J., concurring) (noting that Macy's is not liable for trademark infringement when it intentionally displays its own private-label brand so as to divert

1999, at S2 (discussing how some consumers select the keyword "Honda" to learn more about Japanese cars).

customers looking for Calvin Klein). In fact, actively “diverting” customers by using technology to present more choices may soon become a common occurrence in the “brick and mortar” environment:

One of the most high-tech options is a new wireless hand-held device from Symbol Technologies, Holtsville, N.Y. The Portable Shopping System device is issued to a consumer upon entering the store. It can scan the price of any product, giving the shopper a running total on purchases; the screen also points out discounts on nearby products and suggests complementary purchases based on the shopper's choices.

Kate Fitzgerald, *Battling For Shoppers In The Aisles, Marketers Deploy Arsenal of New Promotional Devices*, ADVERTISING AGE (Feb. 9, 2004).²

All of these examples involve an effort to “divert” shoppers by presenting them with competing products. In each, the shopper begins by looking for one brand-name product, and then is presented with additional choices by those eager to sell competing or complementary products. In the “brick and mortar” world, none of this gives rise to trademark liability so long as the shopper is not misled about the origin of the alternatives offered or confused as to the source of the product ultimately chosen. Yet, by misapplying the “initial interest confusion” doctrine, the District Court here treated Internet shoppers differently from “brick and mortar” shoppers, effectively condemning an entire digital advertising medium (context-influenced pop-up ads) without any evidence regarding whether consumers were confused or misled by any *particular* ads.

² Available at <<http://www.adage.com/news.cms?newsId=39742>>.

This case will yield only the second appellate decision addressing the potential liability of *Internet search intermediaries* for “initial interest confusion.”³ Internet search intermediaries play a pivotal role in helping searchers to accomplish their search objectives, but invariably these intermediaries must use third-party trademarks to do so. An overly-expansive application of the “initial interest confusion” doctrine would chill innovation for a wide variety of Internet search intermediaries.

The District Court’s injunction below is particularly dangerous because it is premised on evidence that appears to attack an Internet *medium*—context-influenced pop-up ads—rather than the *content* of the advertising alleged to be confusing to consumers. It is as though a court were to have banned billboards at the dawn of the interstate era, rather than evaluating whether particular billboard advertisements were confusing to consumers. While many may have preferred a ban on road-side billboards, all must agree that such a decision is not properly the task for trademark law, much less the “initial interest confusion” doctrine.

The District Court’s injunction was premised on a misunderstanding and misapplication of the “initial interest confusion” doctrine and should be overturned by this Court.

III. SUMMARY OF THE ARGUMENTS

It is when trademark law loses sight of its Polaris—the “likelihood of

³ The only other reported appellate opinion of which Amicus is aware is *Playboy v. Netscape*, 354 F.3d 1020 (9th Cir. 2004).

confusion” as to a product’s source—that it goes most often awry. The District Court here admitted that “the evidence does not support a finding of actual source confusion.” *See 1-800 Contacts, Inc. v. WhenU.com*, No. 02-CIV- 8043(DAB), slip op. at 68, 2003 WL 22999270 at *25 (S.D.N.Y. Dec. 22, 2003). By substituting in its place an expansive notion of “likelihood of initial interest confusion,” the District Court has imperiled a wide variety of tools that will help consumers find information about competing products on the Internet.

This case concerns one such technology—the SaveNow software from WhenU. The District Court erred in granting the preliminary injunction below, applying an expansive notion of “initial interest confusion” without reference to any relevant evidence regarding any particular advertisements. This Court should reverse and take the opportunity to clarify the bounds of the initial interest confusion doctrine.

First, this Court should require that a plaintiff proceeding under an “initial interest” theory at a minimum demonstrate (1) that consumers are likely to mistake the mark-holder as the source of the allegedly diversionary advertisement; and (2) that consumers were actually diverted by it. This requires an evaluation of the *particular* advertisement in question, rather than evidence simply regarding consumer impressions of an advertising medium (such as pop-up ads) in general. The District Court here failed to identify any evidence that speaks to these issues.

Second, this Court should correct the District Court’s failure to

recognize that Internet users may have many reasons to visit a website or search for a particular trademark.⁴ With no basis in the record, the District Court here *assumed* that the *only* reason a consumer might search for or visit “1800contacts” would be to purchase contact lenses from 1-800 Contacts. But this presumption is unfounded—Internet users use trademarked terms for many purposes, including general information gathering and comparative shopping. Absent evidence in the record, courts should be cautious in jumping to conclusions about the information gathering habits of Internet users.

Third, the District Court erred by holding that evidence of “consumer sophistication” was *per se* irrelevant in “initial interest confusion” cases. Courts evaluating infringement claims against software products based on initial interest confusion should carefully consider whether an Internet user deliberately installed the accused software, and thereby chose to receive the allegedly diverting information. It is, after all, the *user’s* computer; trademark owners should not be entitled to seize effective control of the user’s computer, denying her the benefit of an innovative software product she chose, simply by stirring together “initial interest confusion” with a dash of evidence suggesting that a “least common denominator” Internet user

⁴ Traditionally there has been a technological and social distinction between domain names, such as 1800contacts.com, and search terms entered into a “search engine.” In this case, the domain name functioned both as a domain name (to retrieve the associated web page) and as a search term within the SaveNow system to retrieve content from SaveNow.

might be confused.

IV. ARGUMENT

A. The Initial Interest Confusion Doctrine is Unintelligible and Needs to Be Re-Evaluated.

The initial interest confusion doctrine is a mess. Courts do not agree on its definition, how it relates to the *Polaroid* (or analogous) multi-factor test for likelihood of consumer confusion, or what harm the trademark owner suffers from a competitor's "diversion" of initial consumer interest. Without solid doctrinal underpinnings, the doctrine has become a catch-all justification for courts to find trademark infringement when a plaintiff cannot show consumer confusion or other cognizable harm.

This Court should either reject the initial interest confusion doctrine or carefully limit its scope. In evaluating the proper scope of the doctrine, the experiences of other circuits may be instructive.

The Ninth Circuit created a bit of a trademark frenzy in 1999 when it became the first appellate court to suggest that in certain circumstances initial interest confusion could be found without using the Circuit's multi-factor *Sleekcraft* likelihood of confusion test. *See Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1061 n.24 (9th Cir. 1999). Perhaps realizing the mistake of bypassing the *Sleekcraft* test in favor of an initial interest confusion doctrine unmoored from the traditional likelihood of confusion analysis, the Ninth Circuit seemingly reversed course in 2002 and made the doctrine subordinate to the

Sleekcraft test. See *Interstellar Starship Services, Ltd. v. Epix Inc.*, 304 F.3d 936, 942 (9th Cir. 2002). But in 2003, the Ninth Circuit appeared to reverse itself again when it found initial interest confusion without considering the *Sleekcraft* test at all. See *Horphag Research Ltd. v. Pellegrini*, 337 F.3d 1036, 1040 (9th Cir. 2003).⁵ Then, last month, the Ninth Circuit revisited initial interest confusion for the fourth time in four years and once again subordinated it to the *Sleekcraft* test. See *Playboy Enters., Inc. v. Netscape Comm. Corp.*, 354 F.3d at 1026.

Realizing the illogic of the Ninth Circuit's treatment of the initial interest confusion doctrine, especially as applied on the Internet, Judge Berzon's concurrence in *Playboy v. Netscape* called on the Ninth Circuit "to consider whether we want to continue to apply an insupportable rule" first articulated in *Brookfield. Id.* at 1036.

The Seventh Circuit, like the Ninth Circuit, has gone through multiple flip-flops. Initially, the Seventh Circuit said that initial interest confusion required bait-and-switch competitive passing off. See *Dorr-Oliver, Inc. v. Fluid-Quip, Inc.*, 94 F.3d 376, 382 (7th Cir. 1996). In August 2002, *Promatek v. Equitrac* appeared to remove any requirement of bait-and-switch passing off, but then (apparently *sua sponte*) the court amended that

⁵ The *Horphag* case dealt with metatags and did not specifically reference initial interest confusion. Based on the operation of metatags and the court's citation to *Brookfield*, however, it is impossible to read this case as discussing any doctrine other than initial interest confusion. See *Horphag*, 337 F.3d at 1040.

ruling to add a requirement that consumers had to have been deceived into thinking that the defendants were the plaintiffs. *See Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 814 (7th Cir. 2002) (“The problem here is not that Equitrac, which repairs Promatek products, used Promatek’s trademark in its metatag, but that it used that trademark in a way calculated to deceive consumers into thinking that Equitrac was Promatek.”). A subsequent ruling also hints that initial interest confusion requires some intent to pass off. *See AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 828 (7th Cir. 2002).

This Court has avoided such inconsistent rulings, in part because the court has not substantively revisited the initial interest confusion doctrine since *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254 (2d Cir. 1987). However, the confusion in the Seventh and Ninth Circuits suggests the difficulties inherent in a doctrine unmoored from the traditional “likelihood of confusion” test. This Court may want to take this opportunity to firmly subordinate “initial interest confusion” to the traditional *Polaroid* test.

Moreover, as Judge Berzon indicated in her concurrence in the *Playboy v. Netscape* opinion, it is time to re-evaluate the initial interest confusion doctrine generally, imposing sensible limits on its scope. *See Playboy v. Netscape*, 354 F.3d at 1036. Caution is particularly warranted in the Internet context, where new technologies are offering consumers many new sources of information about competing products. *See generally Name.Space, Inc v. Network Solutions, Inc.*, 202 F.3d 573, 584 (2d Cir.

2000) (counseling caution when apply legal doctrines to a fluid technology like the Internet).

B. The Court Should Require Evidence of Confusion Regarding the Source of the Ads, as Well as Evidence of Actual Diversion.

At a minimum, a plaintiff alleging initial interest confusion on the Internet should be required to show that consumers, when presented with a choice that may potentially divert them, (1) are likely to mistake the mark holder as the source of the alternative choice; and (2) have actually been diverted. This evaluation must be made on a choice-by-choice (in this case, an ad-by-ad) basis because consumers will respond to each ad differently depending on the contents of the ad.

With respect to the former requirement, this is exactly the conclusion that Judge Berzon recently arrived at after reexamining the *Brookfield* case, *see Playboy v. Netscape*, 354 F.3d at 1034-36 (Berzon, J., concurring), and simply recapitulates this Court's requirement that there have been a misleading "credibility transfer" to the defendant, *see Mobil Oil v. Pegasus*, 818 F.2d at 259 (defendant gained "crucial credibility during the initial phases of a deal" by using confusingly similar mark).⁶

⁶ The example given in *Brookfield* underscores this distinction, suggesting that there would be initial interest confusion where a Blockbuster competitor posts a sign on the highway *falsely* promising a Blockbuster video store off the next exit. *See Brookfield*, 174 F.3d at 1064. Presumably the result would be different if the same competitor posted a sign advising motorists that a video rental store *just as good as Blockbuster* could be found off the next exit. *See Playboy Enters., Inc. v. Netscape Comm. Corp.*, 55 F.Supp.2d

The second requirement cabins the initial interest confusion doctrine, already unmoored from the traditional question of *product* source confusion (as opposed to *advertisement* source confusion), to situations where empirical evidence of harm is presented. In this situation, “diversion” is being used as a proxy for harm caused by a likelihood of confusion. Thus, as a proxy, the “diversion” requirement needs some rigorous proof if traditional standards are to be discarded. After all, in the absence of evidence that any shopper has actually been diverted, trademark law should not lightly rush in to regulate market behavior.

Because the District Court failed to point to any evidence below on either of these points, its injunction must be overturned.

Here, the District Court failed to point to *any* evidence that SaveNow users who visit the 1-800 Contacts website are confused about the source of any resulting competitive pop-up ad. This question necessarily requires an *ad-by-ad analysis*—while some ads may illegitimately rely on misdirection, *see, e.g., Playboy v. Netscape*, 354 F.3d at 1026 (Playboy offered evidence suggesting that consumers were confused by unlabeled ads), others may not, *see, e.g., Playboy v. Netscape*, 55 F.Supp.2d at 1075 (no initial interest confusion were a defendant to put up “Better Burgers: 1 block further” billboards beside a competitor’s signs).

1070, 1075 (C.D. Cal. 1999), *rev’d on other grounds*, 354 F.3d 1020 (Ninth Cir. 2004) (no initial interest confusion were a defendant to put up “Better Burgers: 1 block further” billboards beside a competitor’s signs).

Without evidence addressing a particular advertisement, a Plaintiff ought not be able to move forward with an initial interest confusion claim. *See Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F.Supp.2d 734, 766 (E.D. Mich. 2003) (“The Court finds that, at a minimum, survey respondents should have been shown the item that is said to be infringing or confusing.”). The District Court here failed to point to any evidence that addressed confusion arising from any particular SaveNow pop-up ad, noting that 1-800 Contacts’ survey expert never tested the Vision Direct ads or any particular SaveNow ads at all. *See 1-800 Contacts v. WhenU*, slip op. at 65-66, 2003 WL 22999270 at *24. While the survey addressed pop-up ads as an advertising medium in general, this sheds no light on initial interest confusion with respect to the specific SaveNow ads generated when shoppers visited the 1-800 Contacts website, any more than a survey about billboards as a medium tells a fact-finder anything about whether a particular billboard advertisement misleads consumers. *Accord Wells Fargo v. WhenU*, 293 F.Supp.2d at 766 (“Given the many kinds of Internet ads, and the many different entities who generate them, the Court cannot conclude that the kind of people who use plaintiffs’ websites are confused about the origin of WhenU's ads without evidence of how those individuals perceive WhenU ads.”).

The District Court also failed to point to any proof establishing that any confused users were actually “diverted.” This would require a showing that confused users actually clicked on the ad, the decision to click on the ad

was based on some factor other than the user's pro-competitive decision to compare alternatives, and that the confused users actually intended to complete a transaction with 1-800 Contacts (as opposed to looking for non-transactional information). This proof also requires an ad-by-ad analysis. Instead, the District Court here acknowledged that 1-800 Contacts's survey did not show "that a SaveNow user who receives a Vision Direct pop-up advertisement is likely to click on it, []or that a consumer who is diverted from the 1-800 Contacts website is likely to purchase products from the Vision Direct website." *1-800 Contacts v. WhenU*, slip op. at 68, 2003 WL 22999270 at *25.

C. The District Court Was Wrong About Searchers' Objectives and Responses to the SaveNow-Delivered Ads.

The District Court says "consumers who have typed Plaintiff's 1800contacts.com URL into the browser bar are clearly searching for contact lens products, and expect to complete a transaction with Plaintiff in a short span of time, with little effort or transaction costs." *1-800 Contacts, Inc. v. WhenU.com*, slip op. at 71-72, 2003 WL 22999270 at *27. The District Court did not support this statement with any citations or empirical evidence, nor did it address the very real differences in intention that are possible when an Internet user inputs a trademarked term into her browser location bar or a search engine. Unfortunately, without any empirical evidence to validate it, this statement is unquestionably false on both fronts. We cannot definitively determine an Internet user's ultimate objectives when

she typed “1800contacts.com,” yet the Court enjoined WhenU on this basis.⁷

It is reasonable to assume that some SaveNow users may visit “1800contacts.com” or search for it for purposes other than solely to purchase contact lenses from 1-800 Contacts:

- Individuals may use the phrase as a proxy in a more general effort to find general or specific information about contact lenses, eye care or alternative corrective sight solutions.
- Customers who already purchased from 1800 Contacts may want post-sales support (such as order status, warranty coverage or help using the products).
- Job seekers may be interested in learning more about jobs at 1-800 Contacts.
- Investors or potential investors may be looking for financial or corporate information.
- Users may have made a typographical error and stumbled on 1-800 Contacts inadvertently.

A context-less Internet search or webpage visit gives us nothing to decide which meaning the searcher intended. Thus, the entry of “1800contacts” into a search engine or browser location bar simply does not communicate enough information to tell us a user’s end objectives with certainty. The

⁷ We know the user’s most immediate objective was to view the web page located at 1800contacts.com, and it is undisputed that SaveNow users achieved that objective.

District Court, however, failed to buttress its assumption about SaveNow users' motivations with any evidence apart from the bald entry of "1800contacts" into a search engine or browser location bar.

Even assuming that a narrow group of users did enter the term into the browser bar intending to transact with 1-800 Contacts, moreover, we still cannot conclude that 1-800 Contacts suffered harm from the display of competitive ads to those users. The District Court pointed to no evidence suggesting that SaveNow users intending to transact with 1-800 Contacts are easily distracted from that objective. Searchers tend to be fairly purposeful in their efforts, ignoring content they deem irrelevant. *See* Jakob Nielsen, *How Users Read on the Web*, ALERTBOX, Oct. 16, 1997.⁸ Thus, in the absence of evidence demonstrating that SaveNow pop-up ads distracted transaction-oriented SaveNow users, there is no reason to assume that consumers would be easily distracted if indeed their purpose was a simple purchase of contact lenses.

And even assuming further that some users were distracted, trademark infringement requires us to understand why those users changed directions. The user clicks on an ad only after seeing its contents, and that content can inform the user what to expect if they click. *See Playboy v. Netscape*, 354 F.3d at 1035 (Berzon, J., concurring) (suggesting that there is no trademark infringement when a website "distract[s] a potential customer with another

⁸ Available at <<http://www.useit.com/alertbox/9710a.html>>.

choice, when it is clear that it is a choice.”).

Therefore, we need to know why the content of a *particular* ad content caused the user to click. Was it because, as the District Court intuited, the user operated under the misapprehension that the ad was provided by 1-800 Contacts? See *1-800 Contacts, Inc. v. WhenU.com*, slip op. at 67 & 73, 2003 WL 22999270 at *25 & *28. Or was it because the ad content caused the user to realize that clicking on the ad could lead to other relevant content? If the later, such pro-consumer “diversion” ought not be forbidden by trademark laws.

By failing to evaluate the content of the particular Vision Direct ads presented to SaveNow users when they visited 1800contacts.com, the District Court’s conclusions regarding user intentions cannot be supported on the record. The District Court erred to the extent it relied on a survey about an Internet advertising *medium* to substantiate claims about the allegedly misleading nature of *particular ads*.

D. The District Court Erred by Ignoring Evidence of Consumer Sophistication.

The District Court erred in holding that, apparently as a matter of law, “the sophistication of consumers does not mitigate the likelihood of initial interest confusion.” *1-800 Contacts v. WhenU*, slip op. at 72, 2003 WL 22999270 at *27. The District Court went on to draw a number of conclusions based on unsubstantiated assumptions about how a “typical” Internet user would react to pop-up advertising. *Id.*, slip op. at 71-73, at *27.

When a computer user chooses to install a software program on her own computer, this fact must be entitled to considerable weight in the *Polaroid* test. After all, a computer user is less likely to be confused by information they *expected* to receive, courtesy of the software *they* chose to install.⁹ Unlike billboards, which confront all drivers regardless of their sophistication, SaveNow pop-up ads are only presented to those *who have installed the software on their own computers*.

By ignoring this dimension of “consumer sophistication,” the District Court’s analysis creates the possibility that consumers could be denied the benefit of useful programs based on paternalistic concerns for a hypothetical “least common denominator” Internet user. Imagine, for example, a “price comparator” program that automatically shows consumers prices from a variety of online book vendors whenever she looks up a book on Amazon’s website. It is hard to imagine such a user being “confused” as to the source of these alternate prices, even if a “typical” Internet user who had not chosen to install the software might have been confused.

Where a computer program is concerned, the user’s understanding and intention when installing the program, as well as subsequent experience with the program, tells us a great deal about the likelihood of initial interest

⁹ Here, there is some question regarding whether SaveNow users knew that they had installed the software. *See 1-800 Contacts v. WhenU*, slip op. at 20-21, 2003 WL 22999270 at *7. The District Court, however, failed to address the factual record, if any, on this issue, opting instead for the *per se* rule that consumer sophistication can never mitigate initial interest confusion.

confusion. Failing to consider these facts, in contrast, threatens to limit the information discovery tools available to sophisticated Internet users to those deemed suitable for the unsophisticated user. The District Court erred by excluding these facts from its analysis of the “consumer sophistication” prong of the *Polaroid* test.

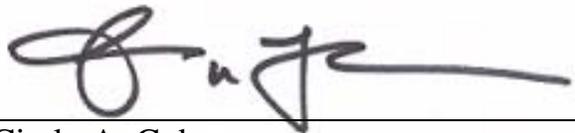
V. CONCLUSION

For the reasons discussed above, Amici urge this Court to clarify and limit the legal principles guiding the application of the initial interest confusion doctrine on the Internet, reversing the District Court’s misconceived preliminary injunction ruling below.

DATED: February 18, 2004

Professor Eric Goldman
MARQUETTE UNIVERSITY
LAW SCHOOL¹⁰
Sensenbrenner Hall
P.O. Box 1881
Milwaukee, Wisconsin 53201
Telephone: (414) 288-5232
Facsimile: (414) 288-6403

By



Cindy A. Cohn
Fred von Lohmann
ELECTRONIC FRONTIER
FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x123
Facsimile: (415) 436-9993

Attorneys for Amicus Curiae
ELECTRONIC FRONTIER FOUNDATION

¹⁰ Affiliation noted for identification purposes only.

CERTIFICATE OF COMPLIANCE

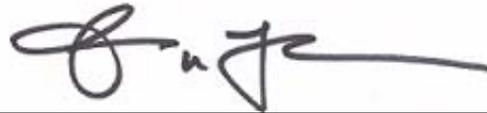
1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4267 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 version 9 in Times New Roman, 14-point font.

DATED: February 18, 2004

Professor Eric Goldman
MARQUETTE UNIVERSITY
LAW SCHOOL
Sensenbrenner Hall
P.O. Box 1881
Milwaukee, Wisconsin 53201
Telephone: (414) 288-5232
Facsimile: (414) 288-6403

By



Cindy A. Cohn
Fred von Lohmann
ELECTRONIC FRONTIER
FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x123
Facsimile: (415) 436-9993

Attorneys for Amicus Curiae
ELECTRONIC FRONTIER
FOUNDATION

CERTIFICATE OF SERVICE

I certify that, on this 18th day of February, 2004, a true and correct copy of Brief of Amicus Curiae Electronic Frontier Foundation was served via Federal Express, Overnight Delivery, upon the following:

Terence Ross
Gibson Dunn & Crutcher, LLP
1050 Connecticut Avenue N.W.
Washington, D.C 20036
(202) 955-8500
tross@gibsondunn.com

Marshall King
Gibson Dunn & Crutcher, LLP
200 Park Avenue
47th Floor
New York, NY 10166-0193
ming@gibsondunn.com
