INTERACTIVE PRODUCTS CORP. V. A2Z MOBILE OFFICE SOLUTIONS, INC.: THE SIXTH CIRCUIT FAILED TO CONDUCT A THOROUGH ANALYSIS IN DETERMINING WHETHER USING A TRADEMARK IN THE POST-DOMAIN PATH OF A URL IS TRADEMARK INFRINGEMENT

"The touchstone of liability for trademark infringement is whether the defendant's use of a disputed mark is likely to cause confusion among consumers regarding the origin of goods offered by the parties."¹

INTRODUCTION

The United States Supreme Court has stated a basic objective of trademark law is to prevent competitors from copying source-identifying marks.² By doing so, it reduces customer costs and purchasing decisions by assuring customers an item the trademark identifies is made by the same manufacturer as other items with that trademark.³ In addition, trademark law helps to assure a manufacturer that it will reap the benefits from the goodwill associated with a desirable product.⁴ Generally, the design of these trademark policies is to protect consumers from being misled as to the manufacturer of a product, to prevent impairment to the value of the company that owns the trademark, and to achieve these goals in an approach consistent with the objectives of free competition.⁵

Trademark infringement on the Internet is a relatively new area of trademark law.⁶ In the past, trademark infringement on the Internet was found when a competitor used the trademark owner's trademark in the domain name or metatags of its website to indicate the trademark owner was a source or sponsor of the website.⁷ Prior to the recent decision by the United States Court of Appeals for the Sixth Circuit in Interactive Products Corp. v. a2z Mobile Office Solutions, 8

¹ Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc., 326 F.3d 687, 694 (6th Cir. 2003), reh'g and suggestion for reh'g en banc denied (June 6, 2003).
³ Qualitex Co., 514 U.S. at 163-64.
⁴ Id. at 164.
⁶ Brookfield Communications, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1061 n.22 (9th Cir. 1999).
⁷ Brookfield, 174 F.3d at 1064.
In *Interactive*, the United States Court of Appeals for the Sixth Circuit, in a case of first impression, evaluated whether the use of a trademark in the post-domain path of a URL is trademark infringement. In *Interactive*, Interactive Products Corporation ("IPC") brought an action against a2z Mobile Office Solutions, Inc. ("a2z") and Mobile Office Solutions ("MOE") for trademark infringement when a2z used IPC's trademark LAP TRAVELER in the post-domain path of the URL in a2z's website. The district court found IPC had not presented sufficient evidence of the likelihood of consumer confusion and granted the defendants' motions for summary judgment. On appeal, the Sixth Circuit determined the presence of a trademark in the post-domain path of the URL does not indicate the source of a website and is not trademark infringement. In addition, the Sixth Circuit reasoned that because the presence of a trademark in the post-domain path of a URL does not indicate the source of a website, the court did not need to examine the factors traditionally used to determine whether there is a likelihood of consumer confusion from the defendants' use of the trademark.

This Note will first examine the facts and holding of the Sixth Circuit decision in *Interactive*. This Note will then review prior case law in which courts have interpreted trademark infringement on the Internet. This Note will then analyze the holding of *Interactive*. Specifically, this Note will examine the objectives and policies of trademark law. This Note will also illustrate that in *Interactive*, the Sixth Circuit correctly determined the post-domain path of a URL does not expressly signify source. This Note will also show the Sixth Circuit incorrectly determined the presence of a trademark in the

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8. 326 F.3d 697 (6th Cir. 2003).
10. *Interactive*, 326 F.3d at 687, 696.
13. *Interactive*, 326 F.3d at 687.
14. *Id*.
15. *See infra* notes 23-87 and accompanying text.
16. *See infra* notes 88-418 and accompanying text.
17. *See infra* notes 419-632 and accompanying text.
18. *See infra* notes 434-41 and accompanying text.
19. *See infra* notes 457-68 and accompanying text.
post-domain path of a URL can never signify sponsorship or endorsement of a website. Next, this Note will illustrate, in analyzing the likelihood of confusion of factors, there was a likelihood of consumer confusion as to the sponsor of a2z's website. Finally, this Note will show the Sixth Circuit failed to consider the possibility of initial interest consumer confusion that may result from the use of a trademark in the post-domain path of a URL.

FACTS AND HOLDING

Interactive Products Corporation ("IPC") is the owner of the federally registered trademark LAP TRAVELER. Mark Comeaux ("Comeaux") and Douglas Mayer ("Mayer") formed IPC in 1994, through which they created and sold the Lap Traveler, a portable computer stand. The Lap Traveler secures a laptop computer inside a vehicle, yet affords convenience of use to the driver.

In 1998, after a falling out with Mayer, Comeaux filed a petition in Ohio state court seeking to dissolve IPC and, in late 1998, Comeaux and Mayer entered into a settlement agreement resolving the petition. Pursuant to the terms of the settlement agreement, Comeaux purchased Mayer's stock in the corporation for $33,000. The agreement also provided the right to use the name and model designations for the Lap Traveler would remain the exclusive property of IPC. Both Mayer and Comeaux could claim joint inventorship of the Lap Traveler and shared the right to market, sell, or manufacture identical or similar products to the Lap Traveler, so long as Mayer did not use the name or model designations associated with the trademark LAP TRAVELER. Finally, Mayer and Comeaux could compete with

20. See infra notes 471-504 and accompanying text.
21. See infra notes 511-78 and accompanying text.
22. See infra notes 581-629 and accompanying text.
23. Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc., 326 F.3d 687, 692 (6th Cir. 2003), reh'g and suggestion for reh'g en banc denied (June 6, 2003).
24. Interactive, 326 F.3d at 692.
27. Id.
28. Id. Provision Six of the Settlement Agreement stated, "[t]he parties agree that the right to use the "Lap Traveler" name and model designations, and the names and model designations of all other IPC products marketed at any time prior to the execution of the agreement, is and shall remain the exclusive property of IPC. Mayer . . . shall have no right to use these product names or model designations." Id.
29. Interactive, 195 F. Supp. 2d at 1026. Provision Seven of the Settlement Agreement states, "Mayer, Comeaux, and IPC shall all have the right to manufacture, market and sell products similar to or identical to the Lap Traveler currently marketed by IPC, including but not limited to the Lap Traveler . . . . Mayer shall not be entitled to use the Lap Traveler name or model designations in connection with such
After leaving IPC, Mayer formed Mobile Office Enterprise, Inc. ("MOE"). MOE manufactured and sold a portable computer stand modified from the Lap Traveler, called the Mobile Desk. MOE owned the federally registered trademark for the MOBILE DESK.

a2z Mobile Office Solutions, Inc. ("a2z") marketed mobile computer accessories via an Internet website, "a2zsolutions.com." From 1996 to 1998, a2z sold the Lap Traveler on its website located at the Internet URL "a2zsolutions.com/desks/floor/laptraveler/dkfl-lt.htm." Camel ended IPC's relationship with a2z in 1998, after the relationship between Comeaux and a2z president Brian Lee ("Lee") became strained. In January 1999, Comeaux ordered a2z and Lee to remove the LAP TRAVELER and any references thereto from a2z's website. Subsequent to Comeaux's demand that a2z cease selling the Lap Traveler on its website, a2z replaced the Lap Traveler with the Mobile Desk. a2z advertised and sold the Mobile Desk on the same web page that formerly sold the Lap Traveler, which was accessible from a2z's website. Throughout 1999, a2z posted an announcement on its website indicating the Mobile Desk had replaced the Lap Traveler and the Lap Traveler was no longer available on a2z's website. Mayer provided Lee with a copy of the IPC settlement agreement, which Lee used to draft the announcement. a2z removed the announcement from its website in December 1999.
In August 1999, Comeaux searched the Internet using “LAP-TRAVELER” as the search term or keyword on multiple search engines. The results of the searches consistently showed the URL for a2z’s portable-computer-stand web page as a listed hit. The URL for the portable-computer-stand page is where the announcement was located. In addition, when Comeaux typed the URL http://www.a2z solutions.com/desks/floor/laptraveler into the browser’s location bar, a web page entitled “Index of desks/floors/laptraveler” appeared. The index listed the individual files within the directory, including the LAP TRAVELER file, which allowed users to link to the web page containing the announcement.

IPC sued Mayer, MOE, Lee, and a2z (the “Defendants”) for trademark infringement and false designation of origin in the United States District Court for the Southern District of Ohio. IPC sought a permanent injunction to enjoin the Defendants’ use of the LAP TRAVELER trademark, compensatory damages, and punitive damages. On December 15, 2000, Lee and a2z filed a motion for summary judgment, requesting the court dismiss IPC's claims. Lee and a2z argued the presence of the term “laptraveler” in the post-domain path of a2z’s website was non-infringing use of the LAP TRAVELER trademark as a matter of law. The court noted the post-domain path of a URL is the text that follows the domain name in the URL. Lee and a2z argued summary judgment was proper on the false desig-

44. Interactive, 195 F. Supp. 2d at 1027.
45. Id. The court noted the search results consistently listed http://www.a2zsolutions.com/desks/floor/laptraveler/dkfl-lt.htm as a hit. Id.
46. Interactive, 195 F. Supp. 2d at 1027. The term “URL” is the abbreviation for “universal resource locator” which is the address for a web page on the Internet. Id. at 1027 n.2.
47. Interactive, 195 F. Supp. 2d at 1027.
48. Id. The Lap Traveler file was titled dkfl-lt.html. Id. at 1027.
49. Interactive, 195 F. Supp. 2d at 1024, 1027. The court detailed IPC's eight complaints to include: trademark infringement under the Trademark Act, 15 U.S.C. § 1114(1); false designation of origin and false or misleading advertising under the Lanham Act, 15 U.S.C. § 1125; trademark dilution under the Lanham Act, 15 U.S.C. § 1125(c); trademark infringement and false designation of origin under the Ohio Deceptive Trade Practices Act, Ohio Revised Code section 4165.02 and the common law of Ohio; breach of the Comeaux/Mayer Settlement Agreement by Mayer; inducement by Lee, a2z, and MOE in Mayer’s breach of the Settlement Agreement by a2z’s use of the Lap Traveler trademark; and tortious interference with existing and prospective business relationships. Id.
50. Interactive, 195 F. Supp. 2d at 1028.
51. Id.
52. Id. at 1031.
53. Id. at 1030-31 (citing Patmont Motor Werks, Inc. v. Gateway Marine, Inc., 1997 WL 811770 (N.D. Cal. Dec. 18, 1997). The court further explained the post-domain path “merely shows how a website’s data is organized within the host computer’s files . . . .” Id.
nation of origin claim, because IPC did not proffer any evidence of actual consumer confusion in the market.\textsuperscript{54}

Mayer and MOE filed a separate motion for summary judgment on December 15, 2000.\textsuperscript{55} Mayer and MOE argued a2z’s use of the term LAP TRAVELER was non-infringing.\textsuperscript{56} Mayer and MOE also argued even if a2z’s use of the term LAP TRAVELER was trademark infringement, there was no evidence Mayer and MOE were agents of a2z, and they were not liable for a2z’s alleged trademark infringement.\textsuperscript{57}

The district court granted summary judgment for the Defendants, holding there was no genuine issue of material fact that consumer confusion was likely regarding the origin of the MOBILE DESK by a2z’s use of LAP TRAVELER in the post-domain path of its URL.\textsuperscript{58} District Judge Sandra Beckwith recognized liability for trademark infringement depends upon whether the use of a disputed trademark is likely to cause consumer confusion regarding the origin or source of the goods the parties offer.\textsuperscript{59} The court also noted in order to succeed on a claim for false designation of origin, the plaintiff must establish a likelihood of consumer confusion from the false designation.\textsuperscript{60} The court further stated the use of LAP TRAVELER at http://www.a2zsolutions.com/desks/floor/laptraveler (an index page that permits users to link to a2z’s web page containing the announcement) did not constitute use because the web page was not an actual page on the website, but was only generated after a user entered an incomplete URL in the user’s web browser.\textsuperscript{61} Thus, the court found there were no triable issues on IPC’s trademark infringement and false designation of origin claims.\textsuperscript{62}

In evaluating whether there was a likelihood of consumer confusion, the court weighed eight factors traditionally used to determine the likelihood of consumer confusion between marks.\textsuperscript{63} These factors are “(1) the strength of the senior mark; (2) relatedness of the goods and services; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the marketing channels used; (6) likely degree of purchaser

\textsuperscript{54} Interactive, 195 F. Supp. 2d at 1028. Lee and a2z also argued summary judgment was proper on the trademark dilution, breach of contract, and tortious interference with business relationships claims. Id. at 1026, 1028.

\textsuperscript{55} Interactive, 195 F. Supp. 2d at 1028.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 1024, 1032.

\textsuperscript{59} Id. at 1026, 1030.

\textsuperscript{60} Id. at 1030.

\textsuperscript{61} Id. at 1032.

\textsuperscript{62} Id. at 1033.

\textsuperscript{63} Id. at 1030 (citing Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Ctr., 109 F.3d 275, 279 (6th Cir. 1997).
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care; (7) the intent of the defendant in selecting the mark; and (8) the likelihood of expansion of the product lines." The court noted the parties presented no evidence as to the strength of the mark, likelihood of expansion of product lines, likely degree of purchaser care, and a2z's intent in selecting the LAP TRAVELER mark. The court determined the products a2z and IPC sold are essentially identical and sold through the same marketing channel, the Internet. Finally, the court stated there was no evidence of actual consumer confusion by a2z's use of LAP TRAVELER in its URL. The court explained the evidence superficially weighed in IPC’s favor, but was mindful the factors are not applied mathematically. Thus, the court concluded the absence of evidence under most of the factors weighed more heavily in a2z’s favor than the presence of the factors in IPC’s favor and granted summary judgment for the Defendants.

IPC appealed the district court’s decision to the United States Court of Appeals for the Sixth Circuit, arguing the district court erred in finding IPC failed to present sufficient evidence to create a genuine issue of material fact that the use of the LAP TRAVELER trademark on a2z’s website was likely to cause consumer confusion. IPC argued the district court did not properly apply or weight the eight factors in determining the likelihood of consumer confusion because the owner of a trademark does not need to show that all, or even most, of these factors are present to prevail. The Sixth Circuit affirmed the district court’s opinion, finding the presence of a trademark in the post-domain path of a URL does not signify the source of a website, and IPC presented no evidence there was a likelihood of consumer confusion regarding the source of the web page.

In addressing the trademark infringement and false designation of origin claims, Circuit Judge Julia Smith Gibbons, writing for a three judge panel of the Sixth Circuit, reasoned that in order to prevail, IPC had to prove the presence of the LAP TRAVELER trademark in the post-domain name path of a2z’s portable-computer-stand page was likely to cause consumer confusion as to the origin or source of the

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64. Id.
65. Id. at 1031.
66. Id.
67. Id.
68. Id. The court noted that the factors cannot be applied with mathematical precision, and that the ultimate question is whether there is a likelihood that consumers would find that the products are affiliated. Id. at 1030.
69. Interactive, 195 F. Supp. 2d at 1031, 1033.
70. Interactive, 326 F.3d at 687, 692, 694.
71. Brief for Appellant at 15, Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc., 326 F.3d 687 (6th Cir. 2003) (No. 01-3590).
72. Interactive, 326 F.3d at 687, 698.
products IPC and a2z offer. The court stated in the usual trademark case, a court should examine the eight factors traditionally weighed to determine the likelihood of consumer confusion because in the usual case, there is no question the defendant utilized the challenged mark to identify its product, which is similar to the plaintiff's trademark. The court reasoned this was not the usual trademark case because the defendants were selling the MOBILE DESK, a trademark not even remotely similar to the LAP TRAVELER trademark.

Because the MOBILE DESK trademark was dissimilar to the LAP TRAVELER trademark, the court stated the preliminary question in the case was whether the defendants were using the LAP TRAVELER trademark in a manner that identified the source of their product. The court noted if a2z was using the LAP TRAVELER trademark in a manner that did not identify the source of the MOBILE DESK, then the normal laws for trademark infringement and false designation of origin would not apply. In other words, the court stated the issue was whether the consumer was likely to notice the presence of LAP TRAVELER in the post-domain path and then determine the same company manufactured both the Lap Traveler and Mobile Desk.

The court distinguished this case from cases involving domain names, concluding the post-domain path of the URL does not normally signify the source of a website, but merely indicates the manner in which information on the host computer's files is organized. The court stated consumers typically do not reach web pages containing a post-domain path by entering the complete URL into the web browser, but by linking from a website's homepage that does not contain a post-domain path. The court reasoned that because the post-domain path does not normally signify source, the presence of a trademark in the post-domain path of a URL is unlikely to ever violate trademark law. The court found for the purposes of this case, it was enough that IPC had not presented any evidence that the existence of the LAP TRAVELER trademark in the post-domain path of a2z's website was likely to cause consumer confusion as to the source of the Mobile Desk product. Furthermore, the court stated that because IPC could not
establish the presence of the LAP TRAVELER trademark in the post-domain path of a2z's website is likely to cause consumer confusion as to the source of the product, the court did not need to evaluate the eight factors traditionally examined in determining the likelihood of consumer confusion between two source-signifying marks.\textsuperscript{83}

IPC filed a petition for rehearing en banc with the United States Court of Appeals for the Sixth Circuit.\textsuperscript{84} IPC argued the panel failed to treat the inclusion of IPC's trademark in a2z's post-domain path of its URL as infringing use in conflict with controlling precedent.\textsuperscript{85} IPC also argued the panel erroneously failed to treat the simultaneous marketing on the Internet by the parties of related goods as establishing, by itself, a strong likelihood of consumer confusion in conflict with controlling precedent.\textsuperscript{86} On June 6, 2003, the Sixth Circuit denied IPC's petition concluding the Court's panel decision fully considered all issues raised in the petition.\textsuperscript{87}

BACKGROUND

A. THE INTERNET AND WORLD WIDE WEB

The Internet allows people around the world to communicate and share information through a global network of interconnected computers.\textsuperscript{88} The World Wide Web is a collection of information resources found in documents on individual computers and is the fastest growing part of the Internet.\textsuperscript{89} Multimedia web pages containing information such as pictures, sounds, video and audio recordings, text, and links to other web pages are prevalent on the web.\textsuperscript{90} Each individual web page has a matching domain address somewhat analogous to a street address or telephone number.\textsuperscript{91} Domain names consist of a term or series of terms called a second-level domain name followed by a top-level domain name.\textsuperscript{92} An example of a second-level domain name is westcoastvideo.\textsuperscript{93} Top-level domain names include .com, .net,
An individual wanting to obtain a domain name files an application with a recognized entity. Web pages must have unique names and these organizations determine whether a particular domain name is already assigned to another person or entity. The applicant has to choose a different name when the domain name requested is assigned to another.

An individual uses a web browser to navigate the web. Entering the domain name into the web browser is the easiest way to locate a website on the Internet. However, if a web user does not know the domain name for a particular website, the web user may attempt to guess the domain name or use an Internet search engine to locate the particular site. When an individual uses a search engine, the user enters a keyword and the search engine processes the word through an index of websites generating a list of sites related to the keyword. Search engines look for keywords in domain names, metatags, and text located on a web page. Metatags are hypertext markup language ("HTML") used to describe the contents of the website. The more prevalent a keyword is in the text and metatags of a particular site, the greater the chance the keyword will be hit by the search engine and recorded high on the list of returned sites. In addition to domain names and metatags, there is the post-domain path, which signifies how the host computer organizes data within its files. Every document available on the web has an address known as the uniform resource locator ("URL").

B. Determining The Likelihood Of Consumer Confusion

The basic test for finding trademark infringement is the likelihood of consumer confusion. In AMF, Inc. v. Sleekcraft Boats, Individual search engines have their own algorithms for determining where to search for keywords and how to place them on a list of generated hits. There are multiple types of metatags, but most prevalent are descriptive and keyword.

94. Id.
95. Id. Network Solutions is recognized as a company that can research and register domain names. Id. at 1044.
96. Brookfield, 174 F.3d at 1044.
97. Id.
98. Id.
99. Id.
100. Id. Yahoo, Altavista, and Lycos are examples of search engines. Id. at 1045.
102. Id. Individual search engines have their own algorithms for determining where to search for keywords and how to place them on a list of generated hits. Id.
103. Brookfield, 174 F.3d at 1045. There are multiple types of metatags, but most prevalent are descriptive and keyword. Id.
104. Brookfield, 174 F.3d at 1045.
the United States Court of Appeals for the Ninth Circuit set forth the
test to determine the likelihood of consumer confusion. In Sleek-
craft, AMF, Inc. ("AMF") sued Sleekcraft Boats ("Sleekcraft") in the
United States District Court for the Central District of California for
trademark infringement. AMF's predecessor utilized the name
Slickcraft Boat Company ("Slickcraft") prior to becoming a division of
AMF. AMF or its predecessor has used the federally registered
SLICKCRAFT trademark since April 1, 1969. AMF distributed
and advertised the Slickcraft boat nationally, expending approxi-
mately $200,000 annually on advertising. In 1968, Nescher, the
owner of Sleekcraft, organized a boat business and adopted the name
SLEEKCRAFT without knowledge of AMF's use of the SLICKCRAFT
mark. At some point AMF notified Nescher of the alleged infringe-
ment, and Nescher thereafter adopted a distinctive logo and the iden-
tifying phrase "Boats by Nescher." Nescher used this new logo and
phrase on plaques mounted on the boat and in much of the advertising
for Sleekcraft boats. Sleekcraft advertised its boats in magazines of
general circulation, and Nescher advertised Sleekcraft boats in boat
racing publications. AMF contended the boat lines were competi-
tive, because both boat lines were comprised of fiberglass boats used
for water skiing, and both boat lines were similar in size and price.
In defense, Nescher argued the Sleekcraft boats did not compete with
Slickcraft, because Sleekcraft boats were high performance boats in-
tended for racing enthusiasts.

The district court, in a memorandum opinion, found for Sleek-
craft, holding the products were not competitive and consumer confu-
sion was unlikely. The district court reasoned the products were
not competitive, stating that although there was some overlap in pur-
chasers of the product lines, the boats appealed to different sub-mar-
kets. In addition, the district court found there was no likelihood of

108. 599 F.2d 341 (9th Cir. 1979).
109. AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 341, 348 (9th Cir. 1979).
110. Sleekcraft, 599 F.2d at 345. AMF also alleged unfair competition and dilution.
Id. at 346 n.1.
111. Sleekcraft, 599 F.2d at 346.
112. Id.
113. Id.
114. Id. Prior to 1968, the appellee had a boat business called Nescher Boats which
failed in 1967. Id. at 346.
115. Sleekcraft, 599 F.2d at 346.
116. Id.
117. Id.
118. Id. at 348.
119. Id.
120. Id. at 341, 346, 347, 348.
121. Id. at 348.
consumer confusion because the marks were not similar, there was little evidence of actual confusion, trademarks are unimportant to the purchaser of a boat, and Nescher did not knowingly adopt a mark similar to Slickcraft.\textsuperscript{122}

AMF appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit.\textsuperscript{123} The Ninth Circuit affirmed the district court's finding the product lines did not compete with each other.\textsuperscript{124} However, the Ninth Circuit reversed the district court's holding there was no likelihood of consumer confusion between the two marks.\textsuperscript{125} Circuit Court Judge J. Blaine Anderson reasoned where an alleged infringer produces products that compete with those of a trademark owner, infringement is normally found if the marks are similar and there is a likelihood of consumer confusion.\textsuperscript{126} The court also indicated when products are related but do not compete with one another, courts must consider several other factors to determine whether there is a likelihood of consumer confusion.\textsuperscript{127} However, the court noted if the goods are unrelated, there is no trademark infringement because confusion is unlikely.\textsuperscript{128}

The court affirmed the district court's finding that the product lines did not compete with each other, reasoning the product lines were marketed at different groups of people.\textsuperscript{129} The court noted Slickcraft designed boats for a variety of family activities such as water skiing, sunbathing, and fishing.\textsuperscript{130} On the other hand, the court noted Sleekcraft did not design boats for families, but were low profile racing boats.\textsuperscript{131} Thus, the court affirmed the district court's findings despite the market overlap.\textsuperscript{132}

Although the court determined the product lines were not competitive, the court still had to consider the relevant factors for likelihood of consumer confusion.\textsuperscript{133} The court explained there were eight relevant factors the court must consider: similarity of the marks; marketing channels used; evidence of actual confusion; strength of the mark; degree of purchaser care; proximity of the goods; competitor's intent in

\begin{footnotes}
\item[122.] Id. at 350, 352, 353, 354.
\item[123.] Id. at 341, 345-46.
\item[124.] Id. at 341, 348-54.
\item[125.] Id. at 341, 354.
\item[126.] Id. at 345, 348.
\item[127.] Id. “Related goods are those products reasonably considered by the purchasing public to come from the same source if sold under the same mark.” Id. at 348 n.10 (quoting Standard Brands, Inc. v. Smidler, 151 F.2d 94, 37 (2d Cir. 1945).
\item[128.] Sleekcraft, 599 F.2d at 348.
\item[129.] Id. at 345, 348.
\item[130.] Id. at 345, 348.
\item[131.] Id.
\item[132.] Id.
\item[133.] Id.
\end{footnotes}
selecting the particular mark; and likelihood of expansion of the product lines. The court also stated this is not an exhaustive list and other variables must be considered depending upon the facts of a particular case.

Beginning with similarity of the marks, the court held the two marks were similar on three levels — sight, sound, and meaning. First, the court found AMF used the SLICKCRAFT mark in a more conspicuous manner than its AMF mark, and the SLICKCRAFT mark served to designate the source of origin to the general public. The court went on to state there is a negligible difference between the names Sleek and Slick to overcome the large visual similarity between the marks. Next, the court determined the slight difference in sound between the two marks indicated a similarity between the marks. Finally, the court stated the meaning of the words slick and sleek are nearly synonymous and indicate a similarity in the marks.

The Ninth Circuit then analyzed the marketing channels AMF and Nescher utilized. The court stated converging marketing channels increase the likelihood of consumer confusion. The court explained the marketing channels AMF and Nescher used were parallel, because each company sold their product through authorized retailers in many localities, each company used the same sales methods, the companies had almost identical price ranges, and each company advertised in national magazines. Thus, the court determined the companies used convergent marketing channels.

The court determined AMF had established evidence of actual confusion by consumers. The court stated evidence of use of the marks having already led to confusion is persuasive proof confusion is likely to occur in the future. However, the Ninth Circuit did note this factor is difficult to prove and the failure to prove instances of confusion is not dispositive. Thus, the court stated this factor weighed heavily only when evidence of past confusion or when circum-

134. Id. at 348-49.
135. Id. at 348 n.11.
136. Id. at 351, 352.
137. Id. at 351.
138. Id.
139. Id. at 351, 352.
140. Id. at 352.
141. Id. at 341, 353.
142. Id. at 353.
143. Id.
144. Id.
145. Id. at 352.
146. Id.
147. Id. at 341, 352, 353.
stances indicate that evidence of past confusion should have been available.\textsuperscript{148}

Next, the court examined the strength of AMF's mark.\textsuperscript{149} The court stated a trademark can be inherently distinctive, descriptive, or suggestive.\textsuperscript{150} The court explained a strong mark is inherently distinctive and is given the most trademark protection.\textsuperscript{151} The court stated a descriptive mark on the other hand tells something about the product and trademark protection is provided when secondary meaning is shown.\textsuperscript{152} Finally, the court explained a suggestive mark connotes something about a product, and falls somewhere between an inherently distinctive mark and a descriptive mark.\textsuperscript{153} The court held the Slickcraft mark was a suggestive mark, because there is more than one image a purchaser might imagine upon hearing the term Slickcraft; there was no evidence others desired to use the term Slickcraft to describe their product; and the public would understand AMF used the term Slickcraft as a trademark.\textsuperscript{154} The court then indicated that because the mark was suggestive, the mark was entitled to a restricted amount of protection.\textsuperscript{155}

The Ninth Circuit also analyzed the type of product and degree of purchaser care.\textsuperscript{156} The court stated the standard used for the degree of purchaser care is the typical buyer exercising ordinary caution.\textsuperscript{157} However, the court indicated a higher standard is appropriate when the purchaser has expertise in a particular field.\textsuperscript{158} In addition, the court explained when products are expensive, purchasers are expected to exercise a greater degree of care in making a purchase.\textsuperscript{159} In its discussion, the court indicated the quality of the product is also relevant, because the owner's trademark interest in preventing infringement is to protect the reputation of its own product.\textsuperscript{160} The court stated AMF could not control the quality of the Sleekcraft boat and that the features beneficial in a racing boat may not be beneficial to a purchaser of a general recreation boat.\textsuperscript{161} Thus, the court determined

\begin{itemize}
\item \textsuperscript{148} Id. at 353.
\item \textsuperscript{149} Id. at 349-50.
\item \textsuperscript{150} Id. at 349.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id. A suggestive mark requires no proof of secondary meaning. Id.
\item \textsuperscript{154} Sleekcraft, 599 F.2d at 349.
\item \textsuperscript{155} Id. at 349-50.
\item \textsuperscript{156} Id. at 341, 353-54.
\item \textsuperscript{157} Id. at 353.
\item \textsuperscript{158} Id. Although a higher standard is used, this does not preclude a finding of consumer confusion. Id. at 353.
\item \textsuperscript{159} Sleekcraft, 599 F.2d at 353.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id. at 354.
\end{itemize}
a confused consumer may choose not to purchase a Slickcraft boat after viewing a Sleekcraft boat, assuming the Slickcraft boat would not fit the consumer's needs.162

Another factor analyzed by the Ninth Circuit was the relatedness of the goods.163 The court stated when goods are related, there is a danger the public will assume, albeit mistakenly, the products are associated.164 The court explained the requirement of similarity between the marks is reduced when there is an increased chance consumers will think the products are associated.165 The court indicated Sleekcraft and Slickcraft were non-competing, but were very close in function and use.166 Thus, the court determined a reduced standard of similarity is used because the Sleekcraft and Slickcraft product lines were so closely related.167

The court also analyzed the intent of Sleekcraft in selecting its mark.168 The court stated when an alleged infringer adopts a mark knowing of another's similar mark, public deception is presumed.169 The Ninth Circuit agreed with the district court on this element and determined there was no evidence that Sleekcraft knowingly attempted to deceive the public by adopting a mark similar to the Slickcraft mark.170

The last factor the court examined was the likelihood of expansion of the product lines.171 The court stated when there is a strong possibility one of the parties may choose to expand their business to compete with the other, this factor will weigh heavily in favor of finding trademark infringement.172 Further, the court indicated when products are closely related, any expansion by a party will likely result in direct competition.173 The court determined the evidence indicated both AMF and Sleekcraft were diversifying and expanding their product lines, and there was a potential that the parties could enter each other's submarkets with a competing product.174

After analyzing all eight factors, the court held Nescher's SLEEKCRAFT mark infringed on AMF's SLICKCRAFT mark.175 The court

162. Id.
163. Id. at 341, 350.
164. Id. at 350.
165. Id.
166. Id. The court noted that their uses actually overlap. Id. at 350.
167. Sleekcraft, 599 F.2d at 350.
168. Id. at 354.
169. Id.
170. Id. at 341, 354.
171. Id. at 354.
172. Id. (citing Restatement of Torts § 731(b) & cmt. c).
173. Id. at 354.
174. Id. at 341, 354.
175. Id. at 346, 354.
remanded the case back to the district court with instructions to consider the interests of both parties in structuring a limited injunction. At a minimum, the Ninth Circuit instructed the district court to order Sleekcraft to put its logo in all advertisements, promotional materials, signs, and business forms Sleekcraft or its authorized retailers prepare.

C. INITIAL INTEREST CONFUSION BASED ON TRADEMARK INFRINGEMENT

Initial interest confusion may also be a basis for finding trademark infringement. In Checkpoint Systems, Inc. v. Check Point Software Technologies, the United States Court of Appeals for the Third Circuit analyzed and explained the concept of initial interest confusion. In Checkpoint, Checkpoint Systems, Inc. ("CSI") sued Check Point Software Technologies, Inc. ("CPST") in the United States District Court for the District of New Jersey for trademark infringement based on CPST's use of CSI's CHECKPOINT trademark. CSI had registered and used the CHECKPOINT mark continuously since 1967. CSI manufactured commercial electronic security systems designed to track the physical location of products, and CSI marketed the systems towards retailers to prevent theft of merchandise. CSI's principal products were electronic article surveillance systems which alerted retailers when products were removed from the area. CPST's computer programs managed and protected access to information from electronic intrusion over the Internet. CPST's computer programs are commonly known as "firewall" technology. CPST adopted the CHECKPOINT mark at CPST's inception because the company believed its firewall technology resembled military check points which prevent access to restricted areas.

176. Id. at 354, 355.
177. Id. at 341, 355.
179. 269 F.3d 270 (3d Cir. 2001).
181. Checkpoint, 269 F.3d at 270, 276. CSI also alleged unfair competition in violation of the Lanham Act. Id. at 276.
182. Checkpoint, 269 F.3d at 276.
183. Id.
184. Id. CSI also sells access control systems, radio frequency identification devices, and closed circuit television systems. Id.
185. Checkpoint, 269 F.3d at 277.
186. Id.
187. Id.
CSI attempted to register the domain name www.checkpoint.com in 1996, but discovered CPST had already registered the domain name.\textsuperscript{188} CSI requested CPST discontinue using the CHECKPOINT trademark, but CPST refused.\textsuperscript{189} CSI then filed suit alleging trademark infringement in violation of the Lanham Act.\textsuperscript{190} CSI sought to enjoin CPST from using the CHECKPOINT mark or any similar variation in the future.\textsuperscript{191}

The district court found CSI failed to establish the likelihood of consumer confusion as to the affiliation of the companies in connection with the sale of its goods and services, and/or a likelihood of consumer confusion as to the source of the products.\textsuperscript{192} The court reasoned in order to succeed on a claim of trademark infringement, CSI had to establish CSI had a valid trademark; CSI owned the mark; and CPST's use of the CHECKPOINT mark to identify its products was likely to cause consumer confusion.\textsuperscript{193} The court also noted CPST did not contest that CSI had established the first two requirements.\textsuperscript{194}

In the decision, District Judge Jerome Simandle stated in order to establish a likelihood of confusion, CSI had to prove consumers viewing the CHECKPOINT mark would, in all probability, assume the good or service represented is associated with the source of a different good or service a similar mark identifies.\textsuperscript{195} The court opined when the trademark owner and the alleged infringer are not direct competitors, the court uses a ten factor test to determine whether there is a likelihood of confusion.\textsuperscript{196} These factors are degree of similarity between marks; strength of the owner's mark; price of the product and other factors that may indicate the care and attention consumers are expected to use in making purchases; length of time the infringer used the mark without evidence of actual confusion; infringer's intent in selecting the mark; evidence of actual confusion; marketing channels used; extent to which parties target their products to the same consumers; relationship of the products in the minds of consumers due to functional similarity; and other facts indicating consumers expect the trademark owner to market products in the infringer's market.\textsuperscript{197}

\textsuperscript{188} Id. at 278. \\
\textsuperscript{189} Id. \\
\textsuperscript{190} Id. CSI also alleged unfair competition under the Lanham Act. Id. at 278. \\
\textsuperscript{191} Checkpoint Sys., Inc. v. Check Point Software Techs., Inc., 104 F. Supp. 2d 427, 430 (D. N.J. 2000). \\
\textsuperscript{192} Checkpoint, 104 F. Supp. 2d at 456, 467. \\
\textsuperscript{193} Id. at 430, 456. \\
\textsuperscript{194} Id. \\
\textsuperscript{195} Id. at 429, 430, 456. \\
\textsuperscript{196} Id. at 456-57. \\
\textsuperscript{197} Id. at 457.
The court noted no one factor is determinative and the court must balance and weigh each factor against the others.\textsuperscript{198}

After analyzing these factors, the court found CSI failed to meet its burden of establishing a likelihood of consumer confusion.\textsuperscript{199} The court reasoned CSI established a strong similarity between the marks which favored CSI, but CSI failed to establish the other factors.\textsuperscript{200} The district court found CSI and CPST operated in non-competing and different segments of the corporate security industry, and the level of care consumers exercise in making purchasing decisions weighed in CPST's favor.\textsuperscript{201} The court also determined CSI presented no evidence the two companies advertised in converging markets.\textsuperscript{202} In addition, the district court noted there was de minimis initial interest confusion.\textsuperscript{203} Thus, the court determined when balancing the relevant factors, consumer confusion was possible, but it was unlikely.\textsuperscript{204}

On appeal to the United States Court of Appeals for the Third Circuit, CSI argued the district court incorrectly evaluated the likelihood of confusion factors.\textsuperscript{205} Specifically, CSI argued the court incorrectly required evidence of actual confusion by consumers at the point of sale and ignored evidence of initial interest confusion.\textsuperscript{206} The Third Circuit affirmed the district court's decision, finding there was not a likelihood of consumer confusion between CSI's and CPST's marks.\textsuperscript{207} The court reasoned the similarity between the two marks was the most important factor in the likelihood of confusion analysis, but it was not outcome determinative.\textsuperscript{208} The court noted in a case such as this, where the competing marks are highly distinct and the products are marketed through separate channels, the evidence suggested it is unlikely the marks would confuse the relevant consumers.\textsuperscript{209} In addition, the court stated there was minimal evidence of actual initial interest confusion, which was insufficient to override the district court's conclusion that there was no likelihood of consumer confusion.\textsuperscript{210}

In addressing CSI's claims, Circuit Judge Anthony Scirica, writing for the court, explained in order to prove a likelihood of consumer confusion, the plaintiff must prove a consumer seeing the mark would

\begin{flushleft}
\textsuperscript{198} Id.
\textsuperscript{199} Id. at 430, 467.
\textsuperscript{200} Id. at 430, 467-68.
\textsuperscript{201} Checkpoint, 269 F.3d at 278.
\textsuperscript{202} Id.
\textsuperscript{203} Checkpoint, 104 F. Supp. 2d at 463.
\textsuperscript{204} Id. at 468.
\textsuperscript{205} Checkpoint, 269 F.3d at 270, 279.
\textsuperscript{206} Id. at 279.
\textsuperscript{207} Id. at 270, 276.
\textsuperscript{208} Id. at 300.
\textsuperscript{209} Id. at 300-301.
\textsuperscript{210} Id. at 300, 301.
\end{flushleft}
more than likely assume the product or service represented is associated with the source of another product or service a similar mark identifies. The court then noted ten relevant factors courts analyze to determine the likelihood of consumer confusion, and the district court applied the appropriate factors in its analysis.

In analyzing the ten factors, the court noted the marks were similar, but this similarity was not necessarily outcome determinative, especially when the marks were not in direct competition. The court then explained when the marks are in direct competition, the similarity factor may increase in importance. Next, the court agreed with the district court’s finding that while CSI’s mark was strong within the electronic article surveillance market, there was insufficient evidence to establish the mark had strength outside the particular market. The court explained because CSI’s mark was not strong in CPST’s network access security market, CSI’s mark was not entitled to heightened protection in that market. The court also accepted the district court’s finding there was no evidence that CPST chose its name with CSI’s name or products in mind. In addition, the court agreed with the district court’s finding there was not a strong likelihood that consumers of CSI’s and CPST’s products were likely to come across the same advertisements, and thus the companies did not target their products towards the same consumers. The court also stated there was minimal evidence of converging markets.

The court also analyzed the degree of purchaser care. The court noted where the relevant product is expensive, or the purchasing class consists of sophisticated purchasers, courts generally do not find a Lanham Act violation. The court stated the consumers of CSI’s and CPST’s products exercised a heightened degree of care in making their purchasing decisions and the similar marks would not likely confuse consumers.

211. Id. at 276, 280.
212. Id. at 280, 281 (citing Interspace Corp. v. Lapp, Inc., 721 F.2d 460, 463 (3d Cir. 1983)).
213. Id. at 281, 282.
214. Id. (citing A & H Sportsware Inc. v. Victoria’s Secret Stores, Inc., 237 F.3d 198, 214 (3d Cir. 2000)).
215. Id. at 284.
216. Id.
217. Id. at 270, 286.
218. Id. at 270, 289-90.
219. Id. at 290, 291.
220. Id. at 284.
221. Id. (citing Versa Prods. Co. v. Bifold Co., 50 F.3d 189, 204 (3d Cir. 1995)).
222. Id. at 285-86.
Next, the court examined the relationship in the minds of the consuming public due to the functional similarity of the product.\footnote{223} Under this factor, the court stated the test was whether the products are similar enough that a consumer would assume the same source offers both products.\footnote{224} The court determined the relatedness of the goods analysis is extremely factual, and the goods may fall under the same general category but operate in distinct sectors.\footnote{225} The court further explained when products operate within a distinct sector of a broad general category, the products can be sufficiently unrelated so that consumers are unlikely to presume the products emanate from the same mark.\footnote{226} The court then determined the products the parties offered served different functions with minimal overlap in product technology, and consumer confusion was unlikely.\footnote{227}

The court also addressed whether there was evidence of actual consumer confusion and the length of time CPST used the CHECKPOINT mark without actual confusion.\footnote{228} The court noted it is difficult to present evidence of actual confusion by consumers, thus evidence of actual confusion is highly probative.\footnote{229} The court recognized when a company sells a product for a substantial period of time without any evidence of actual consumer confusion, courts can infer that additional marketing will not lead to future confusion by consumers.\footnote{230} In determining there was no evidence of actual consumer confusion, the court stated CSI's and CPST's products were not related, they were sold in different markets to customers who exercised a higher standard of care in deciding whether to purchase a product, the sales markets did not converge, and there was no evidence that CPST intentionally adopted the mark in order to create consumer confusion.\footnote{231}

While conducting its analysis of actual confusion, the court addressed the issue of initial interest confusion.\footnote{232} The court stated confusion that creates an initial interest by the consumer is a basis for trademark infringement, even though there is no actual sale due to the confusion.\footnote{233} The court explained that because similar marks could in the end affect the plaintiff's goodwill with its customers, ini-
tial interest confusion under the Lanham Act is actionable. Quoting the United States Court of Appeals for the Fifth Circuit, the court noted even though the confusion dissipates, initial interest confusion benefits a defendant because it brings consumers in the door. The court further noted once the consumer is in the door, initial interest confusion has succeeded, because a consumer may stay, even though the consumer realizes that there is no relationship with the plaintiff. Following the United States Court of Appeals for the Seventh Circuit, the court also recognized the Lanham Act prohibits a competitor from luring possible consumers away from a producer by initially passing off its products as those of the producer's, even if the competitor dispels the consumer confusion regarding the source of the products by the time of the final sale.

The court ultimately held initial interest confusion is probative of trademark infringement because confining confusion to confusion present at the time of purchase undervalues the importance of goodwill a company has with its customers. In addition, the court determined a court must consider the product relatedness and the degree of purchaser care consumers exercise when determining initial interest confusion. The court noted when products are similar, a company is more likely to benefit from the goodwill of its competitor with an established mark. The court also recognized when consumers do not exercise a high level of care in making purchasing decisions, it is more likely that consumers' initial interest confusion will result in a benefit to the infringer from the use of the competitor's goodwill. The court noted that in the absence of these factors, some initial interest confusion by consumers will not likely result in free-riding of the goodwill or otherwise harm the trademark holder. Finally, the court stated in determining initial interest confusion, courts must analyze and balance the relevant factors for determining the likelihood of consumer confusion and determine whether in the totality of the circumstances, marketplace confusion is likely.

234. Id. at 293 (quoting Mobile Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 260 (2d Cir. 1987)).
235. Id. at 294 (quoting Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 204 (5th Cir. 1998)).
236. Id. at 294.
237. Id. (quoting Dorr-Oliver, Inc. v. Fluid Quip, Inc., 94 F.3d 376, 382 (7th Cir. 1996)).
238. Id. at 276, 294-95.
239. Id. at 296.
240. Id.
241. Id. at 296-97.
242. Id. at 297.
243. Id.
After explaining the concept of initial interest confusion, the Third Circuit agreed with the district court that CSI had not established actual consumer confusion or initial interest confusion. The court determined the evidence presented of initial interest confusion was de minimis when viewed in light of the amount of time CSI and CPST operated together without significant evidence of confusion. After analyzing all the factors, the court stated the district court did not err in applying the likelihood of confusion factors and affirmed the district court's holding that there was no likelihood of consumer confusion.

D. TRADEMARK INFRINGEMENT AND THE LIKELIHOOD OF CONSUMER CONFUSION IN CYBERSPACE

In *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, the United States Court of Appeals for the Ninth Circuit concluded that using a registered trademark in the domain name and metatags of a competitor's website is trademark infringement under the Lanham Act. In *Brookfield*, Brookfield Communications ("Brookfield") sued West Coast Entertainment ("West Coast") in the United States District Court for the Central District of California for trademark infringement based on West Coast’s use of Brookfield’s trademark MOVIEBUFF in West Coast’s domain name, metatags, and buried code. Brookfield offered a comprehensive searchable database and software applications to smaller film companies and individual consumers under the MOVIEBUFF mark through its websites. Brookfield sought to register the domain name moviebuff.com with Network Solutions, Inc. in 1996, but was informed West Coast already registered the name. Brookfield subsequently registered the domain names brookfieldcomm.com and moviebuffonline.com in late 1996 and began selling its products.

244. *Id.* at 270, 298, 300-301.
245. *Id.* at 270, 298-99.
246. *Id.* at 276, 301, 305.
247. 174 F.3d 1036 (9th Cir. 1999).
248. *Brookfield Communications, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1036, 1043, 1044-45, 1065, 1066 (9th Cir. 1999).
249. *Brookfield*, 174 F.3d at 1041, 1043. Specifically, Brookfield alleges that West Coast’s website MOVIEBUFF.com constituted unfair competition and trademark infringement in violation of the Lanham Act. *Id.* at 1043. Brookfield also filed a claim under 15 U.S.C. § 1125(c) for trademark dilution and trademark infringement and unfair competition under California state law. *Id.* at 1043 n.4.
250. *Brookfield*, 174 F.3d at 1041, 1042.
251. *Id.* at 1042. Network Solutions, Inc. was the exclusive registrar of domain names ending in .com at the relevant time period. *Id.* at 1042 n.2.
252. *Brookfield*, 174 F.3d at 1042.
Brookfield applied for the federal trademark for MOVIEBUFF as a trademark designating its goods and services in 1997.\textsuperscript{253} The Federal Trademark Office issued Brookfield the trademark in 1998.\textsuperscript{254} Brookfield later discovered West Coast intended to launch a similar searchable database called “moviebuff.com” and delivered a cease and desist letter to West Coast alleging that West Coast’s intended use of the moviebuff.com website would be in violation of Brookfield’s trademark rights.\textsuperscript{255} West Coast chose the name moviebuff.com for its website because the term “Movie Buff” is part of its registered trademark “The Movie Buff’s Movie Store.”\textsuperscript{256} In addition, West Coast used various phrases with the term “Movie Buff” since 1998 to promote its products.\textsuperscript{257} When West Coast issued a press release announcing the launch of its website, Brookfield filed suit.\textsuperscript{258} In an amended complaint, Brookfield sought a temporary restraining order to enjoin West Coast’s use of the trademark.\textsuperscript{259} West Coast filed a brief in opposition, arguing that West Coast was the senior user of the trademark, and in the alternative, West Coast had common law rights in the domain name since West Coast began using moviebuff.com before Brookfield began offering its searchable database.\textsuperscript{260} In addition to its claim of seniority, West Coast asserted its intended use of the website would not result in a likelihood of consumer confusion in violation of the Lanham Act.\textsuperscript{261}

The district court found for West Coast, concluding West Coast was the senior user of the MOVIEBUFF mark, and that West Coast’s use of the domain name moviebuff.com did not create a likelihood of consumer confusion.\textsuperscript{262} The court construed Brookfield’s application for a temporary restraining order as a motion for a preliminary injunction and concluded West Coast was the senior user of the trademark for the reasons West Coast set forth.\textsuperscript{263} Furthermore, the court determined Brookfield failed to establish a likelihood of consumer confusion.\textsuperscript{264}

\begin{itemize}
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Id.
\item \textsuperscript{256} Id. West Coast registered its trademark in 1991. Id. at 1042.
\item \textsuperscript{257} Brookfield, 174 F.3d at 1042.
\item \textsuperscript{258} Id. at 1042, 1043.
\item \textsuperscript{259} Id. at 1043.
\item \textsuperscript{260} Id.
\item \textsuperscript{261} Id.
\item \textsuperscript{262} Id.
\item \textsuperscript{263} Id. The court noted that West Coast had been using its registered trademark in promotions, advertisements, and letterhead in association with its retail services since 1986. Id. at 1043.
\item \textsuperscript{264} Brookfield, 174 F.3d at 1043.
\end{itemize}
Brookfield appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the district court's opinion, concluding West Coast's use of Brookfield's trademark in its domain name was likely to cause consumer confusion as to source in violation of trademark laws. The court also reversed the district court's decision permitting West Coast to use Brookfield's trademark in its metatags, holding West Coast's use of the MOVIEBUFF mark in West Coast's metatags and buried code would cause initial interest confusion.

Circuit Judge Diarmuid O'Scanllain, writing for the court, reasoned West Coast's use of Brookfield's trademark in the domain name of its website was likely to cause consumer confusion as to the source of the website. The court began its analysis by determining who had senior use of the mark. The court indicated Brookfield's registration of the MOVIEBUFF mark with the Patent and Trademark Office was prima facie evidence the mark was valid and that Brookfield had the exclusive right to use the mark. The court explained Brookfield began using the mark in 1997 to market its goods and services and West Coast could only prevail if West Coast used its mark prior to 1997. The court determined that although West Coast registered its domain name in 1996, registration with Network Solutions did not in itself constitute use for acquiring trademark priority. The court noted that because West Coast did not announce the launch of its website for use in commerce until 1998, Brookfield had trademark priority. Thus, the court concluded Brookfield was the senior user, because Brookfield marketed its MOVIEBUFF products prior to West Coast's use of MovieBuff.com in commerce.

After establishing Brookfield had seniority over the use of the MOVIEBUFF mark, the court analyzed the likelihood of consumer confusion as to source or sponsorship of West Coast's website. Quoting the United States Supreme Court in *Qualitex Co. v. Jacobsen Prods. Co.*, the Ninth Circuit described the basic objectives of trade-

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265. *Id.* at 1036, 1043.
266. *Id.* at 1036, 1051-61, 1066.
267. *Id.* at 1061-65, 1066.
268. *Id.* at 1036, 1053, 1061.
269. *Id.* at 1047-53.
270. *Id.* at 1047.
271. *Id.* at 1051.
272. *Id.*
273. *Id.* at 1053.
274. *Id.*
275. *Id.* at 1053-61.
mark law. First, the court noted trademark law reduces customer costs for shopping and the making of purchasing decisions by preventing competitors from copying source-identifying marks, thereby assuring a consumer that items the consumer liked or disliked in the past are made by the same company as other items with the mark. The court also noted trademark law helps to assure the producer of a product that the producer and not the competitor will receive the rewards associated with the desired product. The court went on to state the core element of trademark infringement is whether consumer confusion, as to the source of goods due to the similarity in marks, is likely. In making its determination, the court examined the eight-factor test set forth in Sleekcraft: similarity of conflicting designations; proximity or relatedness of the products or services; strength of Brookfield's mark; marketing channels used; degree of care consumers are likely to exercise in purchasing goods; intent of West Coast in selecting its mark; evidence of confusion; and likelihood of expansion of product lines. The court also noted these factors are pliant and are not an exhaustive list.

The court began its analysis by comparing the similarity of the two marks. The court noted where the marks are dissimilar, there will be no likelihood of confusion. Furthermore, the court stated courts must analyze the marks in their entirety as they appear in the marketplace. In rejecting the district court's finding Brookfield's domain name was different from West Coast's, the court stated a comparison of domain names is irrelevant, because the Lanham Act required a comparison of West Coast's infringing mark to Brookfield's trademark. Thus, the court considered the similarity in sound and meaning of the two marks and determined West Coast's mark was identical to Brookfield's. The court explained like trademarks, a domain name communicates information as to the source of goods and is more than a mere address. Because domain names communicate information about the source of a website, the court determined Web

278. Id. at 1053.
279. Id.
280. Id. at 1053 (quoting Official Airline Guides, Inc. v. Goss, 6 F.3d 1358, 1391 (9th Cir. 1993)).
281. Id. at 1053-54 (citing Sleekcraft, 599 F.2d at 348-49).
282. Id. at 1054.
283. Id.
284. Id.
285. Id. at 1054 (quoting Goss, 6 F.3d at 1392).
286. Id. at 1055.
287. Id.
288. Id.
users are likely to associate the two marks and assume the same company operates both websites. Therefore, the court found the similarity factor weighed heavily in Brookfield's favor.

The court then analyzed the relatedness of the products and services the parties offer and the marketing channels used. The court stated in analyzing the relatedness of the products, the court should focus on whether a consumer is likely to associate the products the two companies offer with one another. Because both companies offer goods and services generally related to the entertainment industry, the court determined the companies' use their products for similar purposes. The court also indicated Brookfield and West Coast competed for the same customers which further evidenced the relatedness of the products. Thus, the court found the relatedness of the products weighed in Brookfield's favor because there was a likelihood of confusion as to the source of the products. The court also determined both Brookfield and West Coast used the Web as a marketing channel, a factor consistently recognized as aggravating the likelihood of confusion.

The court stated that because of the virtual identity of the domain names, the relatedness of the goods and services the similar marks offer, and the use of the same marketing channels, there was a likelihood of consumer confusion. The court explained it takes little effort to enter a website, thus confusion among web users about the owner of a website is more likely confusion among traditional consumers at a brick-and-mortar store. Further, the court indicated consumers may believe West Coast purchased Brookfield or that the two companies are related. In addition, the court stated other types of confusion are likely to occur. The court noted consumers may think Brookfield's database is no longer available and West Coast's database

289. Id. Other courts have often concluded in similar contexts that the marks are identical. Id. at 1055.
290. Brookfield, 174 F.3d at 1055.
291. Id. at 1055, 1057.
292. Id. at 1056.
293. Id.
294. Id.
295. Id. at 1053, 1056.
297. Brookfield, 174 F.3d at 1057. The court noted that consumers searching the Web may confuse the searchable database at MOVIEBUFF.com with Brookfield's trademark and assume that they have found Brookfield's site. Id. at 1057.
298. Brookfield, 174 F.3d at 1057.
299. Id.
300. Id.
replaced it, and thus the consumer must use West Coast’s services.\textsuperscript{301} The court also stated West Coast may gain the goodwill Brookfield developed from consumers who realize they are at West Coast’s site but are perfectly content with West Coast’s product.\textsuperscript{302}

Although the Ninth Circuit tentatively concluded Brookfield made a strong showing of the likelihood of consumer confusion, the court analyzed the remaining factors.\textsuperscript{303} The court determined Brookfield’s mark was suggestive and therefore a strong mark entitled to trademark protection, but also stated because the goods are closely related and the domain names are virtually identical, the strength of the mark was of diminished importance in its confusion analysis.\textsuperscript{304} Additionally, the court determined West Coast did not know of Brookfield’s mark when West Coat registered its domain name and the intent element was indeterminate.\textsuperscript{305}

Finally, the court stated the final three factors — evidence of actual consumer confusion, likelihood of expansion of the products, and degree of purchaser care — did not affect the ultimate outcome regarding consumer confusion.\textsuperscript{306} However, the court briefly examined the degree of purchaser care.\textsuperscript{307} The court stated the basis for determining the likelihood of consumer confusion is that of a “reasonably prudent consumer.”\textsuperscript{308} The court opined what courts expect of a reasonably prudent consumer is dependant on the circumstances, but the standard of care will be equal to that of the least sophisticated consumer.\textsuperscript{309} Ultimately, the court concluded Brookfield established a likelihood of consumer confusion and reversed the district court.\textsuperscript{310}

The Ninth Circuit was also asked to decide whether West Coast could use the mark MOVIEBUFF or moviebuff.com in its metatags.\textsuperscript{311} The Ninth Circuit reversed the district court, holding that using Brookfield’s mark in the metatags was likely to result in initial interest consumer confusion in violation of the Lanham Act.\textsuperscript{312} The court reasoned the eight likelihood of consumer confusion factors applied in

\textsuperscript{301} Id.
\textsuperscript{302} Id. This is likely to occur especially since West Coast offers its services free of charge. Id. at 1057.
\textsuperscript{303} Brookfield, 174 F.3d at 1036, 1058.
\textsuperscript{304} Id. at 1058-59.
\textsuperscript{305} Id. at 1059.
\textsuperscript{306} Id. at 1060.
\textsuperscript{307} Id.
\textsuperscript{308} Id. (citing Dreamwerks Prod. Group v. SKG Studio, 142 F.3d 1127, 1129 (9th Cir. 1998)).
\textsuperscript{309} Id. at 1060 (citing Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 283 (3d Cir. 1991)).
\textsuperscript{310} Id. at 1060-61, 1066.
\textsuperscript{311} Id. at 1036, 1061.
\textsuperscript{312} Id. at 1036, 1061, 1066.
this context as well, but the issue could not be resolved so readily. The court noted the likelihood of consumer confusion in the domain name resulted from the associational confusion between Brookfield's trademark and West Coast's domain name, but in the metatag context, the court must determine if West Coast's use of Brookfield's trademark was likely to cause initial interest confusion.

In its analysis, the court determined West Coast's use of the MOVIEBUFF mark in its metatags would not result in confusion as great as consumer confusion from West Coast's use of the mark in the moviebuff.com domain name. The court stated when a web user enters MOVIEBUFF into a search engine, the list provided would probably include both Brookfield's and West Coast's websites and the user scanning the list will probably be able to find the intended site. However, the court noted West Coast's use of Brookfield's trademark in the metatags would result in initial interest confusion because West Coast's searchable database is similar to Brookfield's and a consumer may choose to use West Coast's site instead. The court reasoned although there would be no consumer confusion as to source in the sense that consumers are aware they are using West Coast's site rather than Brookfield's, there is initial interest confusion, because by using the MOVIEBUFF trademark West Coast would improperly benefit from the goodwill Brookfield developed in its mark by diverting consumers from Brookfield's site. Because initial interest confusion would ultimately result, the court concluded West Coast's use of the MOVIEBUFF mark in its metatags was prohibited.

More recently, in PAACAR, Inc. v. TeleScan Technologies, L.L.C., the United States Court of Appeals for the Sixth Circuit concluded using a competitor's trademark in Internet domain names is likely to cause consumer confusion and is therefore trademark infringement. In PAACAR, TeleScan brought a declaratory judgment action against PAACAR requesting that the court determine TeleScan's use of the PETERBILT and KENWORTH trademarks in its metatags, domain names, and web pages was not trademark infringe-

313. Id. at 1062.
314. Id. at 1047, 1062.
315. Id. at 1062.
316. Id.
317. Id.
318. Id.
319. Id. at 1047, 1064.
320. 319 F.3d 243 (6th Cir. 2003).
PAACAR counterclaimed, alleging trademark infringement and sought an injunction to prevent TeleScan from using PAACAR’s trademarks on TeleScan’s websites.

PAACAR is a leading manufacturer of heavy trucks and owns several trademarks, including the PETERBILT and KENWORTH marks. PAACAR also has a website with a truck locator service, which permits consumers to search for used trucks KENWORTH and PETERBILT dealers sell. TeleScan, a web based truck locator service, has several websites listing new and used trucks for sale at participating dealers. These websites use the PETERBILT and KENWORTH marks in their domain names, wallpaper, and metatags. TeleScan’s websites contained a disclaimer stating TeleScan had no affiliation with the manufacturers of products contained on the site. PAACAR sent TeleScan a letter asserting its trademark rights and demanded that TeleScan relinquish ownership of the domain names containing the PETERBILT and KENWORTH marks. TeleScan replied to PAACAR’s letter acknowledging PAACAR’s ownership of the marks, but maintained TeleScan could continue to use the marks as permissible generic fair use.

PAACAR filed an action in the United States District Court for the Western District of Washington for trademark infringement under the Lanham Act, but dismissed the case for lack of personal jurisdiction over TeleScan. TeleScan then filed a declaratory judgment action in the United States District Court for the Eastern District of Michigan seeking an order that its activities did not infringe upon PAACAR’s trademarks. PAACAR counterclaimed alleging trade-

322. *PAACAR*, 319 F.3d at 248-49. TeleScan also claimed that PAACAR tortiously interfered with TeleScan’s website and Internet business relationships. *Id.* at 248.


324. *PAACAR*, 319 F.3d at 247.

325. *Id.* PAACAR’s website can be found at www.paacar.com. *Id.* at 247.


327. *PAACAR*, 319 F.3d at 247-48. The wallpaper used fonts distinctively similar to those used by PAACAR. *Id.* at 248.


329. *Id.* at 248.

330. *Id.*

331. *Id.*

332. *Id.*
mark infringement and sought a preliminary injunction to prevent TeleScan from using the trademarks on their website.333

The district court found for PAACAR, concluding PAACAR had demonstrated a strong likelihood of success on its trademark claims.334 District Judge Avern Cohn reasoned PAACAR had demonstrated TeleScan’s use of the PETERBILT and KENWORTH marks on TeleScan’s websites was likely to cause consumer confusion.335 After analyzing the eight likelihood of consumer confusion factors, the court determined TeleScan’s use of the names PETERBILT and KENWORTH in its domain names sent a message to consumers that the sites are associated with PAACAR or that PAACAR sponsors TeleScan’s websites.336

First, the court stated the domain names TeleScan chose were similar to PAACAR’s trademarks and adding characters to the name did not diminish the likelihood of consumer confusion.337 Second, the court noted TeleScan and PAACAR sold similar goods and services and TeleScan specifically designed its domain names to provide services relating to PAACAR’s products.338 Next, the court determined both PAACAR and TeleScan marketed their products on the Internet, which increased the likelihood of consumer confusion.339

In its analysis of the marketing channels used, the court found even though TeleScan had disclaimers on its websites, this did not remedy the likelihood of consumer confusion that would be caused by the use of the PETERBILT and KENWORTH trademarks in TeleScan’s domain names.340 The court stated initial interest confusion

333. Id. In order to succeed on a motion for preliminary injunction for trademark infringement, the court balances:

(1) whether the claimant has a strong likelihood of success on the merits;
(2) whether the claimant would suffer irreparable injury without an injunction;
(3) whether issuance of an injunction would cause substantial injury to others;
(4) whether the public interest is served by issuing an injunction.

Id. at 249.

334. PAACAR, 319 F.3d at 248.


336. PAACAR, 115 F. Supp. 2d at 774, 776-79, 779 (citing Patmont Motor Werks, Inc. v. Gateway Marine, Inc., 1997 WL 811770, at *4 n.6 (N.D. Cal. Dec. 18, 1997). The eight factors analyzed by the court are: (1) strength of the mark; (2) relatedness of goods and services; (3) evidence of actual confusion; (4) similarity of the marks; (5) marketing channels used; (6) defendant’s intent in selecting its mark; (7) likely degree of purchaser care; and (8) likelihood of expansion of product line. Id. at 776 (citing Frisch’s Rests., Inc. v. Elby’s Big Boy of Steubenville, Inc., 670 F.2d 642, 648 (6th Cir. 1982)).

337. PAACAR, 115 F. Supp. 2d at 777.

338. Id. at 777-78.

339. Id. at 778.

340. Id.
had already occurred when the consumer saw the disclaimer disavowing association with the trademark owner because the misdirected consumer is already at the infringer's website.\textsuperscript{341}

Next, the court indicated the relevant customer is the average Internet user rather than a sophisticated purchaser and as a result the likelihood of consumer confusion is high.\textsuperscript{342} The court then explained even if TeleScan did not adopt PAACAR's marks with the intent to deceive the public, TeleScan used the marks in its metatags, which makes it more likely an Internet search engine will "hit" the websites in response to searches using the marks.\textsuperscript{343} Finally, in dicta, the court indicated there is some authority suggesting the presence of trademarks in the post-domain path of a URL is acceptable.\textsuperscript{344} Thus, the court concluded TeleScan's use of PAACAR's trademarks was likely to cause consumer confusion and granted PAACAR a preliminary injunction.\textsuperscript{345}

TeleScan appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit, arguing the district court did not give adequate weight to the likelihood of consumer confusion factors and the record was insufficient to support a finding of likelihood of success on the merits.\textsuperscript{346} The Sixth Circuit affirmed the district court's grant of a preliminary injunction, because PAACAR had demonstrated a strong likelihood of success on the merits of its trademark infringement claim.\textsuperscript{347} Writing for a three judge panel, Circuit Judge Eugene Siler, Jr. analyzed the likelihood of consumer confusion factors and determined PAACAR had demonstrated a strong likelihood of consumer confusion.\textsuperscript{348} The court explained in analyzing these factors, the ultimate question remained whether consumers were likely to believe the goods or services the parties offered were associated in some way.\textsuperscript{349} The court declared PAACAR's PETERBILT and KENWORTH marks are strong, distinct marks entitled to trademark protection.\textsuperscript{350} In addition, the court stated the

\begin{itemize}
\item \textsuperscript{341} Id.
\item \textsuperscript{342} Id.
\item \textsuperscript{343} Id. at 774, 779.
\item \textsuperscript{344} Id. at 780.
\item \textsuperscript{345} Id. at 774, 779, 780.
\item \textsuperscript{346} PAACAR, 319 F.3d at 243, 249, 250, 251. TeleScan also argued that the district court improperly adopted a \textit{per se} rule that domain names are always source identifying. \textit{Id.} at 250. The Ninth Circuit disagreed and determined that the district court only stated what other courts had already stated, — that domain names communicate source identifying information as to the sponsor or source of a website. \textit{Id.} at 243, 250.
\item \textsuperscript{347} PAACAR, 319 F.3d at 243, 258.
\item \textsuperscript{348} Id. at 247, 249-50, 255.
\item \textsuperscript{349} Id. at 250 (quoting Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr., 109 F.3d 275, 280 (6th Cir. 1997)).
\item \textsuperscript{350} Id. at 247, 251.
\end{itemize}
products PAACAR and TeleScan offered were closely related, because PAACAR and TeleScan competed directly with one another in offering their goods and services. \(^{351}\) Next, the court determined the domain names TeleScan used were similar to PAACAR's trademarks, especially in the context of domain names because all domain names appear in the same font and in lowercase letters. \(^{352}\) The court explained when analyzing the similarity of the marks, the court must view the marks in their entirety and in the context of what occurs in the marketplace. \(^{353}\) They must also determine whether the mark will be confusing to the public when presented in the marketplace. \(^{354}\) The court also noted the absence of actual confusion is inconsequential. \(^{355}\)

The court also upheld the district court's finding PAACAR and TeleScan used the same marketing channel — the Internet. \(^{356}\) Additionally, the court stated initial interest confusion results because an infringing domain name can possibly misdirect purchasers. \(^{357}\) The court then explained a disclaimer in the website comes too late, because the misdirected consumer is already at the infringer's website. \(^{358}\) The court also noted that because of the nature of Internet use, a disclaimer cannot appropriately remedy the appropriation of another's trademark as a domain name. \(^{359}\) The court declared a domain name is an external label that on its face can cause consumer confusion. \(^{360}\)

Next, the Sixth Circuit noted the district court's finding the relevant consumer is the average Internet user was not clearly erroneous. \(^{361}\) The court opined that regardless of the standard, if the marks the competitors use are similar, as they were in this case, the amount of purchaser care would only slightly decrease the likelihood of consumer confusion. \(^{362}\) Additionally, in analyzing the intent behind TeleScan's decision to use PAACAR's marks in its websites, the court stated it could infer intent to deceive, because TeleScan knowingly used PAACAR's marks repeatedly in its domain names to attract deal-

\(^{351}\) Id. at 251.
^{352}\) Id. at 252.
^{353}\) Id.
^{354}\) Id.
^{355}\) Id.
^{356}\) Id. The court cited to *Brookfield* in explaining that the use of the Internet to market goods and services exacerbates the likelihood of consumer confusion. *Id.* at 252 (citing *Brookfield*, 174 F.3d at 1057).
^{357}\) Id. at 253.
^{358}\) Id.
^{359}\) Id. (quoting Green Prods. Co. v. Independence Corn By-Products Co., 992 F. Supp. 1070, 1077 (N.D. Iowa 1997)).
^{360}\) Id.
^{361}\) Id. at 243, 253, 254.
^{362}\) Id. at 254.
ers looking for PETERBILT and KENWORTH products. The court indicated the parties as well as the district court found the likelihood of expansion of the product lines irrelevant because PAACAR and TeleScan were already direct competitors. The court also explained the Ninth Circuit has held the three most important factors for determining a likelihood of consumer confusion in the Internet context are similarity of the marks, contemporaneous use of the Internet as a marketing channel, and the relatedness of the products. The Sixth Circuit agreed and concluded PAACAR demonstrated a likelihood of consumer confusion and a likelihood of success on the merits of its claim.

E. THE POST-DOMAIN PATH AND TRADEMARK LITIGATION

In Patmont Motor Werks, Inc. v. Gateway Marine, Inc. the United States District Court for the Northern District of California concluded that using a trademark in the post-domain path of a URL is a non-trademark use of a mark to which trademark laws do not apply. In Patmont, Patmont sued Anthony DeBartolo for trademark infringement, false designation of origin, and trademark dilution. In early 1996, Patmont, a manufacturer of motorized scooters under the trademark GO-PED, learned Anthony DeBartolo’s website was offering Go-Peds for sale. Patmont sent DeBartolo a cease and desist letter alleging DeBartolo’s website, its associated URL, and e-mail addresses infringed upon Patmont’s trademark. DeBartolo removed the pages from his website, and Patmont and DeBartolo subsequently entered into a non-exclusive licensing agreement that prohibited DeBartolo from using the GO-PED trademark in any keyword designations or e-mail address. Shortly thereafter, DeBartolo and Patmont had a falling out and DeBartolo began writing disparaging comments about Patmont and advertising Go-Peds on his website. Patmont cancelled the licensing agreement on June 27, 1996, but

363. Id. at 247, 254.
364. Id. at 254.
365. Id. at 254-55 (citing Brookfield, 174 F.3d at 1054 n.16).
366. Id. at 255.
370. Id. at *1.
371. Id.
372. Id. DeBartolo signed the agreement on behalf of Gateway although DeBartolo was not authorized to represent Gateway. Id. at *1 n.2.
DeBartolo continued to advertise and disparage Patmont on his website. DeBartolo brought suit against DeBartolo in July 1996.

In September 1997, DeBartolo filed a motion for summary judgment. DeBartolo argued there was no likelihood of consumer confusion about the source of origin of the Go-Ped scooters. The district court found for DeBartolo, holding DeBartolo’s use of the GO-PED trademark was fair use and not subject to trademark laws. The court declined to address the likelihood of consumer confusion, because it found the case involved a non-trademark use of Patmont’s trademark. The court reasoned the nominative fair use defense applied and there was no trademark infringement. First, the court stated Go-Ped’s are not readily identifiable without the word “GO-PED,” and DeBartolo could not conduct his business without using the name to advertise inventory. Second, the court stated the website only referred to the GO-PED trademark as a descriptive term to convey information about the particular products for sale. Third, the court stated it could not construe the website to indicate Patmont’s endorsement or sponsorship of DeBartolo’s website.

In discussing endorsement or sponsorship of DeBartolo’s website, in dicta, the court found the use of a trademark in the post-domain path does not suggest endorsement or sponsorship of a website because the trademark does not appear in the domain name. The court noted a domain name is assigned to computers connected to the Internet, which signifies source of origin. The court determined the

374. Id.
375. Id. Patmont asserted both federal and state trademark claims, as well as claims for libel and breach of contract. Id. at *1.
377. Id. at *3.
378. Id. at *1, *3, *4.
379. Id. at *3.
380. Id. at *3, *4 n.7. The court noted that the nominative fair use defense has three requirement:
(1) the product in service must be one not readily identifiable without the use of the trademark; (2) only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and (3) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.
Id. at *3-4 (citing New Kids on the Block v. News Am. Publ’g, 971 F.2d 302, 308 (9th Cir. 1991)).
382. Id.
383. Id. The court noted that it would be difficult to find that consumers would think Patmont endorsed the website considering the website disparaged GO-PEDs as unsafe and that Patmont’s management was criminally anticompetitive. Id.
385. Id. The court noted that the domain name is an important signal to users trying to locate web resources. Id.
text following the domain name does not signify source, but shows how the sponsoring computer organizes data within its files.\textsuperscript{386} Thus, the court reasoned because a trademark in the post-domain path does not signify source of origin, the presence of the GO-PED mark in the post-domain path did not affect the court’s conclusion that the GO-PED trademark in DeBartolo’s website did not imply endorsement or sponsorship by Patmont.\textsuperscript{387} However, the court also stated even if the court were not to make such a broad holding regarding trademarks in the post-domain path, Patmont failed to establish a genuine issue of material fact regarding whether DeBartolo’s use of Patmont’s trademark in its URL suggested endorsement or sponsorship.\textsuperscript{388}

After discussing the fair use defense, the court found DeBartolo’s use of the GO-PED trademark in his website was fair use and not trademark infringement.\textsuperscript{389} Thus, the court granted DeBartolo’s motion for summary judgment with respect to Patmont’s trademark infringement claims.\textsuperscript{390} The court also granted DeBartolo’s motion for summary judgment on Patmont’s breach of contract claim, because the licensing agreement did not prohibit DeBartolo from using the GO-PED mark in the URL.\textsuperscript{391}

However, in \textit{Playboy Enterprises, Inc. v. Universal Tel-A-Talk, Inc.},\textsuperscript{392} the United States District Court for the Eastern District of Pennsylvania enjoined Universal from using Playboy’s trademarks in the directories of Universal’s website, finding Universal intentionally adopted Playboy’s trademarks in an attempt to capitalize on Playboy’s established reputation.\textsuperscript{393} In \textit{Playboy}, Playboy Enterprises, Inc. (“Playboy”) sued Universal Tel-A-Talk, Inc. (“Universal”) in the United States District Court for the Eastern District of Pennsylvania for trademark infringement.\textsuperscript{394} Playboy owns numerous trademark registrations for the PLAYBOY mark and sells merchandise containing the PLAYBOY trademark.\textsuperscript{395} Playboy spent a substantial amount of money and time promoting the PLAYBOY mark around the

\textsuperscript{386} \textit{Patmont}, 1997 WL 811770, at *4 n.6.
\textsuperscript{387} \textit{Id.}
\textsuperscript{388} \textit{Id.}
\textsuperscript{389} \textit{Id.} at *1, *3, *4.
\textsuperscript{390} \textit{Id.} at *3, *6.
\textsuperscript{391} \textit{Id.} at *1, *4. The court dismissed the libel claim without prejudice, concluding that it should not exercise supplemental jurisdiction over a state law claim entirely independent from the federal trademark claims. \textit{Id.} at *5.
\textsuperscript{394} \textit{Playboy}, 1998 U.S. Dist. LEXIS 17282, at *1. Playboy later amended the complaint to include a claim for counterfeiting. \textit{Id.} at *1.
In addition, Playboy uses the RABBIT HEAD and BUNNY trademarks in connection with the PLAYBOY trademark to advertise its products. Playboy operates www.playboy.com and www.cyber.playboy.com to promote Playboy magazine and associated merchandise. Playboy's magazine and websites display erotic pictures of Playboy Playmates and other merchandise. Universal has a website that offers a subscription service called "Playboy's Private Collection" featuring hard core pornographic photographs located at www.adult-sex.com/playboy/members/pictures. Universal prominently featured Playboy's trademarks throughout its website. Playboy trademarks are found on Universal's website's home page, navigational bar, e-mail address, directories and subdirectories. At no time did Universal seek nor did Playboy grant Universal the right to use Playboy's marks in Universal's website.

The district court found for Playboy, holding Universal's use of the Playboy marks was trademark infringement and granted a permanent injunction preventing Universal from using the PLAYBOY marks in its website. District Court Judge Joseph McGlynn, Jr. reasoned Universal had intentionally used the PLAYBOY trademarks in an effort to capitalize on Playboy's established reputation in the marks and Universal's use of Playboy's trademarks was likely to lead consumers to believe that Universal's website was associated with Playboy.

Prior to its application of trademark law to the facts of the case, the court discussed the components of a Uniform Resource Locator ("URL"). The court stated each user of the Internet has an address commonly referred to as a domain name. The court explained the domain name is only one component of the URL and that a URL can also contain root directories and subdirectories. The court explained these directories and subdirectories are a guide to the contents of a particular website.
TRADEMARK INFRINGEMENT

In making its determination, the court opined the design of trademark policies is to protect consumers from manufacturers who mislead consumers about the manufacturer of goods or services; prevent impairment of the value of a company which owns the trademark; and achieve these ends in an approach consistent with the objectives of free competition.\textsuperscript{410} The court also stated the test for trademark infringement is whether there is a likelihood of consumer confusion.\textsuperscript{411} The district court stated in determining whether there is a likelihood of consumer confusion, the court may consider the following: similarity of the marks; strength of the trademark owner's mark; price of the product and other factors that may indicate the degree of attention and care expected of consumers when making a purchase; length of time the infringing party used the other party's mark without evidence of actual confusion; intent of the infringing party in adopting the mark; evidence of actual confusion; marketing channels used; extent to which the parties target the same consumers; relationship of the products in the minds of the public due to similarity in function; and any other facts suggesting consumers might expect the prior owner to produce a product in the infringing party's market.\textsuperscript{412} In applying these principles to the facts of the case, the court determined Universal's use of Playboy's trademarks "PLAYBOY" and "BUNNY" in Universal's directories was trademark infringement because Playboy's marks were very strong and entitled to trademark protection without proof of secondary meaning.\textsuperscript{413} However, the court explained even if Playboy had to establish a secondary meaning, Playboy had established its marks had become famous and acquired secondary meaning.\textsuperscript{414}

The court then issued an injunction enjoining Universal from using the Playboy trademarks in Universal's website in any way.\textsuperscript{415} The court's injunction specifically precluded Universal from using Playboy's trademarks in its domain name, directories, and computer address as the name of Universal's website.\textsuperscript{416} The court also enjoined Universal from using the Playboy marks in connection with Universal's products in such a way that is likely to cause consumers to believe Playboy authorized, endorsed, or licensed its products to Universal, or Universal was associated with Playboy in some way.\textsuperscript{417}

\textsuperscript{410} Id. at *20-21.  
\textsuperscript{411} Id. at *12.  
\textsuperscript{412} Id. at *13-14 (quoting Scott Paper Co. v. Scott's Liquid Gold, 589 F.2d 1225, 1229 (3d Cir. 1978)).  
\textsuperscript{413} Id. at *1, *14, *21.  
\textsuperscript{414} Id. at *14-15.  
\textsuperscript{415} Id. at *1, *22-23.  
\textsuperscript{416} Id. at *1, *23.  
\textsuperscript{417} Id. at *1, *22, *23.
Universal filed a motion for reconsideration with the United States District Court for the Eastern District of Pennsylvania, which denied the motion on April 26, 1999.418

ANALYSIS

In Interactive Products Corp., v. a2z Mobile Office Solutions, Inc.,419 the United States Court of Appeals for the Sixth Circuit found using a competitor's trademark in the post-domain path of a URL is not trademark infringement because it does not signify the source of the trademark.420 In particular, the Sixth Circuit stated it is unnecessary to analyze the traditional consumer confusion factors when a trademark is present in the post-domain path of a URL, finding the post-domain path merely shows how the host computer organizes data within its files and is unlikely to cause consumer confusion.421 In its analysis, the court first examined the purposes and policies behind trademark law.422 The court then determined the presence of a trademark in the post-domain path of a URL does not signify the source of a website, and thus does not violate trademark law.423 While the court correctly determined the post-domain path does not signify the source of a website, the court failed to address whether a trademark in the post-domain path of a URL signifies sponsorship of a website.424 Moreover, because the Sixth Circuit did not analyze whether the presence of a trademark in the post-domain path of a URL may cause consumer confusion as to sponsorship, the court failed to determine whether there was a likelihood of consumer confusion.425 Additionally, the court did not address the issue of initial interest confusion when a competitor uses a trademark owner's mark in the post-domain path of a URL.426

Although the Sixth Circuit attempted to resolve whether the presence of a trademark in the post-domain path of a URL is trademark infringement, the court's analysis fell short and the decisions precedential value is questionable.427 This Analysis will first examine the

419. 326 F.3d 687 (6th Cir. 2003).
420. Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc., 326 F.3d 687, 687, 698 (6th Cir. 2003).
421. Interactive, 326 F.3d at 687, 698.
422. Id. at 698.
423. Id.
424. See infra notes 457-504 and accompanying text.
425. See infra notes 511-78 and accompanying text.
426. See infra notes 581-629 and accompanying text.
427. See infra notes 419-632 and accompanying text.
objectives and policies behind trademark law. This Analysis will also examine the significance of source and sponsorship in determining trademark infringement in the post-domain path of a URL. Upon additional review, this Analysis will illustrate that in Interactive, the Sixth Circuit correctly determined the post-domain path of a URL does not expressly signify source. In addition, this Analysis will show the Sixth Circuit erred in failing to address whether the presence of a trademark in the post-domain path of a URL is likely to cause consumer confusion as to the sponsorship of a website. Furthermore, this Analysis will reveal that in failing to determine the likelihood of consumer confusion as to sponsorship, the court failed to analyze the likelihood of consumer confusion factors. Finally, this Analysis will demonstrate the Sixth Circuit's failure to analyze the possibility of initial interest confusion left open the question as to whether the use of another's trademark in the post-domain path of a URL may initially confuse consumers as to the source or sponsorship of a website, an actionable form of trademark infringement.

A. POLICIES AND OBJECTIVES OF TRADEMARK LAW

The United States Supreme Court has described a basic objective of trademark law as preventing competitors from copying source-identifying marks. This objective reduces customer costs and purchasing decisions by assuring customers that all products a trademark identifies are made by the same producer. The Supreme Court has also stated at the same time, trademark law helps to assure a manufacturer it will reap the benefits from the goodwill associated with a desirable product. Generally, trademark policies prevent manufacturers from misleading consumers about the manufacturer of a product, prevent impairment to the value of the company that owns the trademark, and achieve these goals in an approach consistent with the objectives of free competition.

In order to succeed on a claim for trademark infringement, the plaintiff must prove the plaintiff had a valid and legally protectible trademark, the plaintiff owned the trademark, and the defendant's

428. See infra notes 434-41 and accompanying text.
429. See infra notes 457-504 and accompanying text.
430. See infra notes 457-68 and accompanying text.
431. See infra notes 471-504 and accompanying text.
432. See infra notes 511-78 and accompanying text.
433. See infra notes 581-629 and accompanying text.
435. Id. at 159, 164.
use of the trademark to identify its products was likely to cause consumer confusion as to the source or sponsor of the product.\textsuperscript{438} The basic test for trademark infringement is the likelihood of consumer confusion, which requires a determination of whether the similarity of the disputed marks is likely to confuse consumers as to the source or sponsorship of a product.\textsuperscript{439} However, where the use of a trademark does not identify the goods and services of the party using the trademark, but identifies the goods and services of the trademark owner, there is fair use and trademark laws do not apply as long as there is not a likelihood of consumer confusion.\textsuperscript{440} This type of fair use does not implicate the source-identifying function trademark law protects, and such use does not promote or imply endorsement or sponsorship by the trademark holder.\textsuperscript{441}

B. THE SIGNIFICANCE OF “SOURCE” OR “SPONSORSHIP” IN THE POST-DOMAIN PATH OF A URL

While trademark law has been around for a long time, it is a relatively recent phenomenon in the area of Internet law.\textsuperscript{442} Until 1999, no United States Circuit Court of Appeals had addressed trademark infringement in the domain name context on the Internet.\textsuperscript{443} Furthermore, few courts had addressed whether trademark use in metatags was trademark infringement.\textsuperscript{444} The test for trademark infringement in the domain name and metatags context is the likelihood of confusion as to the source or sponsorship of a product.\textsuperscript{445} However, fair use may apply, thus trademark infringement laws will not apply, when the presence of a trademark does not signify source or sponsorship of a product, but is merely present to describe or promote someone else’s product.\textsuperscript{446} The presence of a trademark in the post-domain path of a URL is a novel issue in the area of trademark litigation, and the likelihood of consumer confusion test as to source or sponsorship of a product applies.\textsuperscript{447}

The test for trademark infringement is whether there is a likelihood of consumer confusion as to the source of origin or sponsorship of

\textsuperscript{439} J. THOMAS MCCARTHY, 3 MCCARTHY ON TRADEMARKS & UNFAIR COMP. § 24:6 (4th ed. 2003).
\textsuperscript{440} MCCARTHY, supra note 439, at § 23:11.
\textsuperscript{441} Id. (citing New Kids on the Block v. News Am. Publ’g Inc., 971 F.2d 302, 308 (9th Cir. 1992)).
\textsuperscript{442} See infra notes 443-47 and accompanying text.
\textsuperscript{443} Interactive, 174 F.3d at 1064.
\textsuperscript{444} Id. at 1041, 1053.
\textsuperscript{445} Patmont, 1997 WL 811770, at *4, *4 n.4.
\textsuperscript{446} Interactive, 326 F.3d at 690, 694.
\textsuperscript{447} Interactive, 174 F.3d at 1061 n.22.
a product. Consumer confusion as to the source of goods is confusion that leads the consuming public to attribute to the trademark owner a different product from that which the owner of the trademark offers. A trademark does not have to denote a precise source of origin. Rather, a trademark serves as a means of communication between an otherwise anonymous or unknown manufacturer and its prospective customers. Consumer confusion as to the sponsorship of goods is confusion that leads the consuming public to believe that a product the consumer knows did not originate from the trademark holder is affiliated with the trademark holder in some manner. Accordingly, consumer confusion as to source is different from consumer confusion as to sponsorship, and courts should conduct independent analyses of the two types of consumer confusion. Thus, while the Sixth Circuit properly determined nothing in the post-domain path of a URL signifies source of origin, the court failed in its analysis by not analyzing consumer confusion as to the sponsorship of the website.

1. The Sixth Circuit Properly Determined Nothing In The Post-Domain Path Of A URL Indicates A Website's Source Of Origin.

In Interactive, the Sixth Circuit properly determined the text following the domain name in a URL shows how the host computer organizes the data within its files and is not likely to ever signify the source of origin of a website. Consumer confusion as to the source of goods is confusion that leads the consuming public to attribute to the trademark owner a different product from that which the owner of

453. Callmann, supra note 449, at § 21:3. See also Restatement (Third) of Unfair Competition, § 20 cmt. d (1995) (stating that consumer confusion as to sponsorship is a false belief that a user of a trademark has the approval of the owner in marketing or manufacturing goods using the trademark).
454. See infra notes 457-504 and accompanying text.
455. Id.
456. See infra notes 457-68 and accompanying text.
the trademark offers. Normally, a link on the homepage of a website is used to reach the post-domain path. The consumer typically must access the home page of a website before linking to a page containing the post-domain path. Thus, the presence of a trademark in the post-domain path is unlikely to ever signify source and is not trademark infringement.

In *Patmont Motor Werks, Inc. v. Gateway Marine, Inc.*, the United States District Court for the Northern District of California, in dicta, stated nothing in the post-domain path or a URL indicates a website's source of origin. The court stated the path of a URL only shows the organization of the website's data within the host computer's files. Thus, the court determined using a trademark in the post-domain path of a website is not a basis for trademark violation. In addition to *Patmont*, the district court in *PAACAR, Inc. v. TeleScan Technologies, L.L.C.*, cited *Patmont* without any further analysis and stated there is some authority suggesting the use of trademarks in the post-domain path of a URL is acceptable.

Like the courts in *Patmont* and *PAACAR*, in *Interactive*, the United States Court of Appeals for the Sixth Circuit determined the defendant's use of the plaintiff's trademark in the post-domain path of its URL did not indicate source of origin of the website. The Sixth Circuit followed *Patmont* and determined the post-domain path merely shows how the host computer organizes data within its files and does not normally signify the source of a website. As such, the court correctly reasoned that because an Internet user normally must

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458. Interactive, 326 F.3d at 697.
459. Id.
460. See infra notes 461-68 and accompanying text.
464. Id.
467. Compare *Patmont*, 1997 WL 811770, at *4 n.6 (noting that the presence of a trademark in the post-domain path of a URL does not signify source of origin), and *PAACAR*, 115 F. Supp. 2d at 780 (stating some authority suggests that the use of a trademark in the post-domain path of a URL is acceptable), with *Interactive*, 326 F.3d at 687, 698 (determining that the presence of a trademark in the post-domain path of a URL is not likely to signify source and is unlikely to ever be trademark infringement).
468. Compare *Patmont*, 1997 WL 811770, at *4 n.6 (determining that the post-domain path shows how data is organized within the host computer's files), with *Interactive*, 326 F.3d at 687, 696-97 (noting that the post-domain path merely shows how data is organized within the host computer's files).
access a website's home page before linking to the page containing the post-domain path, the presence of the trademark in the post-domain path does not indicate the source of origin of the website. 469

2. The Sixth Circuit Erred In Failing To Examine Whether The Presence Of A Trademark In The Post-Domain Path Of A URL Is Likely To Cause Consumer Confusion As To The Endorsement Or Sponsorship Of A Website

Although the Sixth Circuit correctly determined a trademark in the post-domain path of a URL does not signify source, it failed to analyze whether the presence of a trademark in the post-domain path of a URL is likely to cause consumer confusion as to the endorsement or sponsorship of a website. 470 Consumer confusion as to sponsorship is different from consumer confusion as to source. 471 With sponsorship or endorsement of a product, the consumer does not have to believe the goods originated from the alleged infringer, only that the trademark holder may be affiliated with the alleged infringer in some manner. 472 The Interactive court failed to recognize that in determining consumer confusion as to the sponsorship of a website, it is not necessary for a trademark owner to prove a competitor intentionally misled consumers, but that the use of the owner’s trademark in the post-domain path could cause consumer confusion. 473 If competitors mislead consumers into believing a website is affiliated in some way with the trademark owner, the court must determine if there is a likelihood of consumer confusion as to the endorsement or sponsorship of a website by the trademark owner. 474

The presence of a trademark in the post-domain path of a URL may be sufficient to indicate sponsorship of a website. 475 When goods are related, there is a danger the public will assume, albeit mistak-
enly, that the products are associated.\textsuperscript{476} The relationship between a trademark holder's product and that of a competitor may be such that an inference of common source is unlikely, yet the confusion resides in the fact the competitor deceived the consuming public into believing that in dealing with the competitor the consumer is dealing with the trademark holder in some way.\textsuperscript{477} The requirement of similarity between the marks is reduced when there is a greater chance consumers will think products are associated.\textsuperscript{478}

In \textit{Interactive}, the Sixth Circuit's conclusion that the presence of a trademark in the post-domain path of the URL is unlikely to ever cause consumer confusion is wanting.\textsuperscript{479} While there are conflicting cases as to whether the presence of a trademark in the post-domain path may cause a likelihood of consumer confusion as to sponsorship of a product, the \textit{Interactive} court should have determined whether there was a likelihood of consumer consumers by the presence of the LAP TRAVELER mark on a2z's website.\textsuperscript{480} In \textit{Playboy Enterprises, Inc. v. Universal Tel-A-Talk},\textsuperscript{481} the United States District Court for the Eastern District of Pennsylvania found the use of a trademark in the directories and subdirectories of a URL can confuse consumers as to sponsorship of a website and constitute trademark infringement.\textsuperscript{482} After analyzing whether there was a likelihood of consumer confusion, the court reasoned because Universal used Playboy's registered trademarks in its identifying directories, Playboy had a strong mark, and Playboy and Universal used the same marketing channel (the In-

\textsuperscript{476} AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 350 (9th Cir. 1979). \textit{See} \textit{Playboy}, 1998 U.S. Dist. LEXIS 17282, at *15-16 (consumers are likely to believe Playboy is related to Universal's website because of the presence of the PLAYBOY mark in Universal's directories).


\textsuperscript{478} \textit{Sleekcraft}, 599 F.2d at 350.

\textsuperscript{479} \textit{See infra} notes 480-504 and accompanying text.

\textsuperscript{480} \textit{See infra} notes 481-504 and accompanying text. \textit{See} \textit{Playboy}, 1998 U.S. Dist. LEXIS 17282, at *15-16 (indicating consumers are likely to believe Playboy is related to Universal's website because of the presence of the PLAYBOY mark in Universal's directories), \textit{and Patmont}, 1997 WL 811770, at *4 n.6 (stating that the plaintiff had presented insufficient evidence to create genuine issue of fact whether the use of a trademark in the path suggested source or sponsorship), \textit{and Interactive}, 326 F.3d at 687 (where the court failed to analyze whether consumers were likely to believe that IPC and a2z were related).


In addition, like Universal's use of the PLAYBOY mark in its directories, which the district court described as a guide to the contents of a particular website, a2z used the LAP TRAVELER mark in its post-domain path, which the Sixth Circuit described as showing how a sponsoring computer organizes data in its files. Furthermore, like Universal's use of Playboy's PLAYBOY trademark, a2z used IPC's LAP TRAVELER trademark. Thus, while IPC's mark is not as strong as Playboy's mark, IPC still presented evidence of a likelihood of consumer confusion as to the sponsorship of its website.

In contrast to Playboy, the United States District Court for the Northern District of California in Patmont Motor Werks, Inc. v. Gateway Marine, Inc., in dicta, found the use of a trademark in the post-domain path does not indicate endorsement or sponsorship of a website. The court determined the data in the post-domain path only shows how the host computer organizes data in its files and does not imply endorsement or sponsorship. In addition, the Patmont court stated even if the court were not to make such a broad holding, the plaintiff had presented insufficient evidence the use of the mark in the post-domain path suggested endorsement or sponsorship of a website. Unlike the trademark owner in Patmont who failed to present sufficient evidence of sponsorship confusion, IPC presented sufficient
evidence to indicate a likelihood of consumer confusion as to sponsorship.\textsuperscript{492} First, a2z used the LAP TRAVELER mark.\textsuperscript{493} While this alone is not determinative, it weighs heavily in IPC's favor.\textsuperscript{494} Next, IPC and a2z used the same marketing channels — the Internet.\textsuperscript{495} Furthermore, IPC and MOE marketed identical products.\textsuperscript{496} Additionally, the average Internet user is not a sophisticated user but a purchaser using ordinary caution; thus, consumer confusion by purchasers using ordinary caution may result.\textsuperscript{497} On balance, IPC presented sufficient evidence of a likelihood of consumer confusion as to sponsorship.\textsuperscript{498}

The court in Interactive was wrong in relying upon Patmont for the proposition the use of a trademark in the post-domain path does not indicate sponsorship or endorsement of a website.\textsuperscript{499} The court in Patmont, in dicta, stated the presence of a trademark in the post-domain path does not indicate sponsorship of a website because the text in the post-domain path only shows how the host computer organizes data within its files.\textsuperscript{500} Obviously, the use of a trademark in the post-domain path can cause sponsorship confusion as shown by the Playboy case.\textsuperscript{501} In Playboy, one of the factors the court reasoned weighed in Playboy's favor in finding trademark infringement was Universal's use of the PLAYBOY mark in Universal's directories and subdirectories.\textsuperscript{502} These directories and subdirectories serve as a guide to the

\textsuperscript{492} See infra notes 493-97 and accompanying text.
\textsuperscript{493} Interactive, 326 F.3d at 693.
\textsuperscript{494} Compare Checkpoint Sys., Inc. v. Check Point Software Techs., Inc., 269 F.3d 270, 280 (3rd Cir. 2001) (stating that the similarity of the mark weighs heavily, but is not outcome determinative), with Interactive, 195 F. Supp. 2d at 1031 (stating that the marks Lap Traveler and lap traveler are identical).
\textsuperscript{495} Compare Interactive, 195 F. Supp. 2d at 1031 (stating that the products are sold using the same marketing channel — the Internet), with Patmont, 1997 WL 811770, at *1 (note for lack of discussion of marketing channels used).
\textsuperscript{496} Compare Interactive, 195 F. Supp. 2d at 1031 (stating that the products sold are basically identical), with Patmont, 1997 WL 811770, at *1 (noting that DeBartolo sold Patmont's products).
\textsuperscript{497} Compare PAACAR, 115 F. Supp. 2d at 778 (noting the typical consumer is a purchaser using ordinary caution), with Interactive, 326 F.3d at 687 (note for lack of discussion on the degree of purchaser care).
\textsuperscript{498} See supra notes 489-97 and accompanying text.
\textsuperscript{499} Compare Patmont, 1997 WL 811770, at *4 n.6 (finding that the use of a trademark in the post-domain path does not indicate sponsorship or endorsement), with Interactive, 326 F.3d at 697 (citing Patmont, 1997 WL 811770, at *4 n.6 for the proposition that the presence of a trademark in the post-domain path does not indicate sponsorship or endorsement).
\textsuperscript{500} Patmont, 1997 WL 811770, at *4 n.6.
\textsuperscript{501} Compare Playboy, 1998 U.S. Dist. LEXIS 17282, at *15-16 (finding that the presence of a trademark in the directories of a website is likely to cause sponsorship confusion), with Patmont, 1997 WL 811770, at *4 n.6 (finding that the use of a trademark in the post-domain path does not indicate sponsorship or endorsement).
contents of a website.\textsuperscript{503} Thus, \textit{Patmont} erred in concluding the use of a trademark in the post-domain path does not indicate sponsorship or endorsement and the court in \textit{Interactive} was wrong for relying upon \textit{Patmont}.\textsuperscript{504}

The Sixth Circuit was correct when it concluded the presence of a trademark in the post-domain path of a URL does not signify the source of a website.\textsuperscript{505} However, the court failed to analyze whether there was a likelihood of consumer confusion as to the sponsor of a website.\textsuperscript{506} Source and sponsorship are distinct from one another, thus courts need to conduct independent analyses of source and sponsorship.\textsuperscript{507} The court's failure to examine both the likelihood of consumer confusion as to source and as to sponsorship set a bad precedent.\textsuperscript{508} Other courts relying on the Sixth Circuit's decision may find the likelihood of consumer confusion unlikely without ever determining whether there is a likelihood of consumer confusion as to endorsement or sponsorship of the website.\textsuperscript{509} Thus, the Sixth Circuit should have conducted a thorough analysis and determined whether the presence of a trademark in the post-domain path of a URL could signify either source or sponsorship of the website.\textsuperscript{510}

\textbf{C. THE IMPORTANCE OF DETERMINING THE LIKELIKHOOD OF CONSUMER CONFUSION AND THE SIXTH CIRCUIT'S FAILURE TO ANALYZE THE LIKELIKHOOD OF CONFUSION FACTORS}

The Lanham Act provides that any person who uses a registered trademark without the consent of the registrant in connection with the offering for sale, advertising, or distribution of goods or service where such use is likely to cause confusion shall be liable to the registrant for trademark infringement.\textsuperscript{511} The test for trademark infringement is whether there is a likelihood of consumer confusion as to the source of origin or sponsorship of a product.\textsuperscript{512} When determining

\begin{itemize}
\item \textsuperscript{503} \textit{Id.}
\item \textsuperscript{504} \textit{Compare Playboy,} 1998 U.S. Dist. LEXIS 17282, at *15-16 (finding that the presence of a trademark in the directories of a website is likely to cause sponsorship confusion), \textit{with Patmont,} 1997 WL 811770, at *4 n.6 (finding that the use of a trademark in the post-domain path does not indicate sponsorship or endorsement), \textit{and Interactive,} 326 F.3d at 697 (citing \textit{Patmont,} 1997 WL 811770, at *4 n.6 for the proposition that the presence of a trademark in the post-domain path does not indicate sponsorship or endorsement).
\item \textsuperscript{505} \textit{See supra} notes 457-68 and accompanying text.
\item \textsuperscript{506} \textit{See supra} notes 471-504 and accompanying text.
\item \textsuperscript{507} \textit{See supra} notes 457-504 and accompanying text.
\item \textsuperscript{508} \textit{See supra} notes 471-504 and accompanying text.
\item \textsuperscript{509} \textit{See supra} notes 457-504 and accompanying text.
\item \textsuperscript{510} \textit{Id.}
\item \textsuperscript{511} 15 U.S.C. § 1114 (1)(a) (2000).
\item \textsuperscript{512} \textit{McCarthy, supra} note 439, at § 23:1.
\end{itemize}
whether there is a likelihood of confusion as to source or sponsorship of a good or product, courts traditionally consider certain factors.\textsuperscript{513} These factors are known as the likelihood of confusion factors.\textsuperscript{514} The factors include: similarity of the marks; relatedness of the goods; strength of the plaintiff's mark; marketing channels used; degree of purchaser care; defendant's intent in selecting the mark; evidence of actual consumer confusion; and likelihood of expansion of the product lines.\textsuperscript{515} These factors are important because they help to answer the ultimate question of whether relevant consumers are likely to believe the products or services the parties offer are affiliated in some way.\textsuperscript{516} While these factors are important, they are flexible and some factors are more important than others depending on the facts of a given case.\textsuperscript{517} Each case will present its own set of facts and not all of the factors will be helpful in a particular case.\textsuperscript{518} However, courts must engage in a thorough treatment of the factors.\textsuperscript{519} Furthermore, courts must view the use of one's trademark by another in its entirety and in the context of what may occur in the marketplace to determine if there will be confusion when presented to the public.\textsuperscript{520} If a consumer is likely to believe the products may be related in some way, then consumer confusion has resulted.\textsuperscript{521}

The Federal Courts of Appeals have recognized the importance of the consumer confusion factors in determining the likelihood of consumer confusion.\textsuperscript{522} In \textit{Brookfield}, the Ninth Circuit recognized con-

514. Id. at § 23:19. See also \textit{Brookfield}, 174 F.3d at 159 (stating likelihood of consumer confusion factors); \textit{Sleekraft}, 599 F.2d at 348 (noting courts analyze certain factors to determine the likelihood of confusion); \textit{Playboy}, 1998 U.S. Dist. LEXIS 17282, at *13 (recognizing likelihood of confusion factors); \textit{PAACAR}, 319 F.3d at 249 (stating courts must analyze certain factors to determine the likelihood of confusion).
515. Compare \textit{Brookfield}, 174 F.3d at 153 (recognizing that courts look at certain factors in determining the likelihood of consumer confusion), with \textit{Sleekraft}, 599 F.2d at 348-49 (noting that courts analyze certain factors in determining the likelihood of consumer confusion), and \textit{Playboy}, 1998 U.S. Dist. LEXIS 17282, at *13-14 (noting the list of factors courts analyze in determining the likelihood of consumer confusion), and \textit{PAACAR}, 319 F.3d at 249-50 (noting courts must analyze certain factors in determining the likelihood of consumer confusion).
516. Interactive, 195 F. Supp. 2d at 1030 (citing Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr., 109 F.3d 275, 280 (6th Cir. 1997)).
517. \textit{Brookfield}, 174 F.3d at 154.
518. Id.
520. \textit{PAACAR}, 319 F.3d at 252.
521. Id. at 249, 250.
522. Compare \textit{Brookfield}, 174 F.3d at 153 (noting that court looks at the similarity of the disputed designations; relatedness or proximity of the companies' products or services; strength of the plaintiff's mark; marketing channels the companies used; degree of purchaser care; defendant's intent in selecting the mark; evidence of actual consumer confusion; and likelihood of expansion of product lines), and \textit{Sleekraft}, 599 F.2d at 348-49 (noting that in determining the likelihood of consumer confusion, the following fac-}
sumer confusion is the core element of trademark infringement and required an examination of the likelihood of consumer confusion factors or a subset of them.\footnote{523} Likewise, in PAACAR, the Sixth Circuit opined courts should weigh each factor to determine if the use of a disputed mark is likely to cause consumer confusion.\footnote{524} Furthermore, the United States District Court for the Eastern District of Pennsylvania in Playboy, determined an analysis of these factors is permissible when determining the likelihood of consumer confusion.\footnote{525}

In Interactive, the district court correctly determined IPC did not present sufficient evidence that would weigh heavily in finding a likelihood of consumer confusion as to the source of origin of the LAP TRAVELER mark.\footnote{526} The court found the evidence actually showed a2z was attempting to notify consumers the MOBILE DESK had replaced the LAP TRAVELER which was no longer available on a2z's website.\footnote{527} However, the Sixth Circuit in Interactive improperly determined that because the presence of the LAP TRAVELER mark did not signify source, a consideration of the consumer confusion factors

\footnotesize{\begin{itemize}
\item \footnote{523} Brookfield, 174 F.3d at 1036, 1053-54.
\item \footnote{524} PAACAR, 319 F.3d at 243, 249-50.
\item \footnote{525} Playboy, 1998 U.S. Dist. LEXIS 17282, at *1, *13-14.
\item \footnote{526} Compare Interactive, 195 F. Supp. 2d at 1024, 1030 (stating the touchstone for trademark infringement is whether the use of mark in dispute is likely to cause consumer confusion and court should examine and weigh the likelihood of consumer confusion factors), with Interactive, 326 F.3d at 698 (determining that there is no evidence that the presence of a trademark in the post-domain path signifies source and it was unnecessary to examine the factors traditionally used to determine the likelihood of consumer confusion).
\item \footnote{527} Interactive, 195 F. Supp. 2d at 1027, 1032. The District Court in its analysis determined there was insufficient evidence in the record as to the strength of IPC's mark, the likely degree of purchaser care, actual consumer confusion, or a likelihood of product line expansion. Id. at 1024, 1031. The court did determine that the marks "Lap Traveler" and "lap traveler" were similar, IPC and a2z utilized the same marketing channels, and the products marketed were identical. Id. at 1031.
\end{itemize}}
was unnecessary.\textsuperscript{528} There was sufficient evidence to indicate sponsorship confusion, thus the court erred in failing to analyze the likelihood of confusion factors.\textsuperscript{529}

An analysis of the likelihood of consumer confusion factors indicates there was sufficient evidence to indicate a likelihood of consumer confusion as to sponsorship.\textsuperscript{530} While there is no mathematical precision to applying these factors, on balance the strongest factors weighed in IPC's favor.\textsuperscript{531} First, in analyzing the similarity of the marks, a2z used IPC's LAP TRAVELER mark.\textsuperscript{532} Because the marks were identical, there is no doubt the marks were similar.\textsuperscript{533} Courts recognize that while the similarity between the infringing mark and the owner's trademark is only one factor in the likelihood of consumer confusion analysis, when products are in direct competition, the similarity of the mark might be the most important factor.\textsuperscript{534} Thus, while this factor alone was not determinative, it weighed heavily in IPC's favor.\textsuperscript{535}

In addition, the relatedness of the goods IPC and a2z sold weighed in IPC's favor.\textsuperscript{536} When goods are related, there is a danger the public will assume, albeit mistakenly, the products are associated.\textsuperscript{537} Both the Lap Traveler and Mobile Desk are portable computer stands used to secure laptop computers inside a vehicle, yet afford the driver easy access.\textsuperscript{538} There was further evidence of the relatedness of the products due to the fact that IPC and a2z compete for the same custom-

\textsuperscript{528} Compare Interactive, 326 F.3d at 698 (determining that there is no evidence that the presence of a trademark in the post-domain path signifies source and it was unnecessary to examine the factors traditionally used to determine the likelihood of consumer confusion), with Interactive, 195 F. Supp. 2d at 1024, 1030 (stating the touchstone for trademark infringement is whether the use of mark in dispute is likely to cause consumer confusion and court should examine and weigh the likelihood of consumer confusion factors).

\textsuperscript{529} See supra notes 511-28 and accompanying text.

\textsuperscript{530} See infra notes 531-62 and accompanying text.

\textsuperscript{531} See infra notes 532-62 and accompanying text. See also Brookfield, 174 F.3d at 1054 (stating while these factors are important, they are flexible and some factors are more important than others depending on the facts of a given case).

\textsuperscript{532} Id.

\textsuperscript{533} Id. The court stated the “lap traveler” and “Lap Traveler” marks are identical. Interactive, 195 F. Supp. 2d at 1031.

\textsuperscript{534} Checkpoint, 269 F.3d at 281.

\textsuperscript{535} See supra notes 532-34 and accompanying text. Compare Checkpoint, 269 F.3d at 282 (stating that the similarity of the mark weighs heavily, but is not outcome determinative), with Interactive, 195 F. Supp. 2d at 1031 (stating that the marks Lap Traveler and lap traveler are identical).

\textsuperscript{536} Interactive, 195 F. Supp. 2d at 1031. The court stated that the products sold by a2z and IPC are essentially identical. Id. at 1031.

\textsuperscript{537} Sleekcraft, 599 F.2d at 350.

\textsuperscript{538} Interactive, 195 F. Supp. 2d 1024, 1026 n.1.
Thus, the relatedness of the goods weighed heavily in IPC's favor.540

In analyzing the marketing channels used, the convergence of marketing channels increases the likelihood of consumer confusion.541 IPC and a2z used the same marketing channels — the Internet.542 Thus, this factor also weighed heavily in IPC's favor.543

Furthermore, in analyzing the degree of purchaser care, the test is the average Internet purchaser using ordinary caution.544 Courts expect a purchaser using ordinary caution to be more judicious when purchasing expensive items.545 However, when purchasing inexpensive items, consumers are likely to exercise less care, thus consumer confusion is more likely.546 Applying this standard, the use of the LAP TRAVELER trademark, even considered in the light most favorable to a2z, is likely to confuse the ordinary purchaser as to the sponsor of a2z's website and this factor weighed in IPC's favor.547

IPC presented no evidence of actual consumer confusion.548 Evidence of actual confusion is difficult to prove, thus evidence of actual confusion is highly probative.549 However, the absence of evidence of actual consumer confusion is not dispositive.550 Nonetheless, because IPC did not present any evidence of actual confusion, this factor weighed in a2z's favor.551

539. Compare Interactive, 195 F. Supp. 2d at 1031 (stating that the products sold by a2z and IPC are essentially identical), with Brookfield, 174 F.3d at 1056 (noting both companies offer goods and services generally related to the entertainment industry, the court determined the companies' products are used for similar purposes and are marketed toward the same customers).

540. See supra notes 536-39 and accompanying text.

541. Sleekcraft, 599 F.2d at 353.

542. Compare Interactive, 195 F. Supp. 2d at 1031 (stating that the products are sold using the same marketing channel — the Internet), with Brookfield, 174 F.3d at 1053, 1057 (stating both parties used the same marketing channel in analyzing the likelihood of confusion factors), and PAACAR, 115 F. Supp. 2d at 778 (noting an increased likelihood of consumer confusion due to both PAACAR and TeleScan marketing their products on the Internet), and Playboy, 1998 U.S. Dist. LEXIS 17282, at *15-16 (finding that Playboy and Universal sell their products through the same marketing channel — the Internet).

543. See supra notes 541-42 and accompanying text.

544. Compare PAACAR, 115 F. Supp. 2d at 778 (noting the typical consumer is a purchaser using ordinary caution), with Brookfield, 174 F.3d at 1060 (opining that what is expected of the reasonably prudent consumer depends on the circumstances, but the standard of care will be equal to the least sophisticated consumer).

545. Brookfield, 174 F.3d at 1060.

546. Id.

547. See supra notes 544-46 and accompanying text.

548. Interactive, 195 F. Supp. 2d at 1031.

549. Checkpoint, 269 F.3d at 291.

550. Sleekcraft, 599 F.2d at 341, 352, 353.

551. See supra notes 548-50 and accompanying text.
In addition, IPC did not present evidence regarding the strength of the LAP TRAVELER mark.\textsuperscript{552} However, because the products IPC and a2z sell are closely related and a2z used IPC's LAP TRAVELER mark, the strength of the LAP TRAVELER mark is of diminished importance.\textsuperscript{553} Thus, although this factor weighed in a2z's favor, it was of diminished importance and did not carry significant weight.\textsuperscript{554}

Moreover, there was no evidence a2z knowingly attempted to deceive the public by failing to alter the post-domain path of its URL.\textsuperscript{555} The district court did note it seemed likely a2z just did not change its URL after a2z and IPC ended their relationship.\textsuperscript{556} Evidence of defendant's intent can represent strong evidence of consumer confusion.\textsuperscript{557} However, the opposite is not true and the defendant's lack of intent is largely irrelevant in finding a likelihood of consumer confusion.\textsuperscript{558} Thus, when the defendant's intent in selecting the mark was considered, this factor carried little weight in a2z's favor.\textsuperscript{559}

Finally, IPC did not present any evidence of expansion of the product lines.\textsuperscript{560} Evidence of expansion of product lines is somewhat unimportant when two companies compete to a major extent.\textsuperscript{561} Thus, because a2z and IPC are already in direct competition, evidence of expansion of the product lines carries little weight in the analysis.\textsuperscript{562} Nonetheless, this factor did weigh in a2z's favor.\textsuperscript{563}

On balance, IPC presented sufficient evidence of a likelihood of consumer confusion.\textsuperscript{564} First, a2z used the LAP TRAVELER mark.\textsuperscript{565} While this alone was not outcome determinative, this factor weighed heavily in IPC's favor.\textsuperscript{566} Next, IPC and a2z both marketed their

\textsuperscript{552} Interactive, 195 F. Supp. 2d at 1031.
\textsuperscript{553} Compare Interactive, 195 F. Supp. 2d at 1031 (stating IPC presented no evidence of the strength of the LAP TRAVELER trademark), with Brookfield, 174 F.3d at 1058-59 (noting that because the products were closely related and West Coast's domain name was almost identical to Brookfield's mark, the strength of Brookfield's mark was of diminished importance).
\textsuperscript{554} See supra notes 552-53 and accompanying text.
\textsuperscript{555} Interactive, 195 F. Supp. 2d at 1031.
\textsuperscript{556} Id.
\textsuperscript{557} Daddy's Junky Music, 109 F.3d at 287.
\textsuperscript{558} Id.
\textsuperscript{559} See supra notes 555-58 and accompanying text. Compare Interactive, 195 F. Supp. 2d at 1031 (noting there was no evidence of the defendant's intent in selecting the mark), with Brookfield, 174 F.3d at 1060 (stating that there was no evidence that West Coast used Brookfield's mark with the intent of deceiving consumers, thus the factor appeared indeterminate).
\textsuperscript{560} Interactive, 195 F. Supp. 2d at 1031.
\textsuperscript{561} Brookfield, 174 F.3d at 1060.
\textsuperscript{562} See supra note 561 and accompanying text.
\textsuperscript{563} See supra notes 560-61 and accompanying text.
\textsuperscript{564} See supra notes 532-62 and accompanying text.
\textsuperscript{565} See supra notes 532-34 and accompanying text.
\textsuperscript{566} Id.
products via the Internet. Furthermore, IPC and MOE marketed identical products. Additionally, the average Internet user is not a sophisticated user but a purchaser using ordinary caution; thus, confusion among consumers using ordinary caution is likely. Although, the evidence of actual confusion, strength of the mark, defendant's intent in selecting the mark, and likelihood of expansion lines weigh in a2z's favor, these factors carry insufficient weight to overcome the likelihood of consumer confusion IPC established. Thus, IPC presented sufficient evidence of a likelihood of consumer confusion as to sponsorship and the Sixth Circuit erred in failing to conduct an analysis of the likelihood of consumer confusion factors.

Trademark law prevents consumer confusion not only to the source of a product, but also as to who endorses or sponsors a product. The test for determining trademark infringement is the likelihood of confusion as to the source of origin or sponsorship of the challenged mark. The court failed to consider whether the presence of the LAP TRAVELER mark in a2z’s website was likely to cause consumer confusion as to whether IPC sponsored or endorsed the use of the LAP TRAVELER mark. When goods are related, there is a greater chance consumers will think products are associated and there is a greater risk for consumer confusion. IPC and a2z used the same marketing channel, the Internet, and consumers may believe IPC was connected with a2z's website. The products were also similar and marketed against one another. Moreover, there was a pre-

567. See supra notes 541-42 and accompanying text.
568. See supra notes 536-39 and accompanying text.
569. See supra notes 544-46 and accompanying text.
570. See supra notes 548-62 and accompanying text.
571. See supra notes 532-62 and accompanying text.
572. Sleekcraft, 599 F.2d at 350.
573. Compare Playboy, 1998 U.S. Dist. LEXIS 17282, at *7 (reasoning, after analyzing the likelihood of consumer confusion factors, the defendant had intentionally used the plaintiff's trademarks in its directories and subdirectories in an effort to capitalize on the plaintiff's established reputation in the marks), with Interactive, 326 F.3d at 698 (stating the likelihood of consumer confusion factors do not need to be analyzed, because the presence of a trademark in the post-domain path of a URL does not signify source of origin).
574. Sleekcraft, 599 F.2d at 350.
575. Compare Playboy, 1998 U.S. Dist. LEXIS 17282, at *1, *15-16 (stating that because Playboy and Universal both market their services on the internet, consumers will believe they are connected), with Patmont, 1997 WL 811770, at *4 n.6 (stating that the plaintiff had presented insufficient evidence to create genuine issue of fact whether the use of a trademark in the path suggested source or sponsorship), with Interactive, 326 F.3d at 687 (note for lack of discussion whether consumers were likely to believe that the IPC and a2z were related).
vious connection between the owners of IPC and MOE.\textsuperscript{578} Thus, consumers may believe the Mobile Desk is a replacement for the Lap Traveler, and the court erred in failing to analyze the likelihood of consumer confusion factors and determine whether there was a likelihood of consumer confusion as to who sponsored or endorsed the products on a2z's website.\textsuperscript{579}

D. THE SIXTH CIRCUIT FAILED TO TAKE INTO ACCOUNT THE POSSIBILITY OF INITIAL INTEREST CONFUSION

In \textit{Interactive}, while there might not be consumer confusion as to source in the sense that consumers are aware they are using a2z's site rather than IPC's, there was initial interest confusion because by using the LAP TRAVELER trademark, a2z improperly benefited from the goodwill IPC developed in its mark by diverting consumers from IPC's site.\textsuperscript{580} The Lanham Act prohibits a competitor from luring possible consumers away from a producer by initially passing off its products as those of the producer's, even if the competitor dispels the consumer confusion regarding the source of the products by the time of the final sale.\textsuperscript{581} A consumer looking for a product such as the Lap Traveler, but not knowing the difference between the Lap Traveler and the Mobile Desk may decide to purchase the Mobile Desk without attempting to locate IPC's website.\textsuperscript{582} Although a2z had a disclaimer on its website indicating a2z was no longer affiliated with IPC, a2z may have benefited from the goodwill associated with the LAP TRAVELER name.\textsuperscript{583} Thus, the Sixth Circuit failed to recognize the possibility of initial interest confusion in making its trademark infringement determination in \textit{Interactive}.\textsuperscript{584}

Initial interest confusion results when a competitor lures a consumer looking for a particular trademark holder's product to the competitor's own product by its use of the same or a similar mark as that of the trademark holder.\textsuperscript{585} Although a consumer may realize at some point the product is not the one the consumer originally sought, the consumer may decide to remain with the competitor anyway.\textsuperscript{586} The

\begin{itemize}
\item \textsuperscript{578} \textit{Interactive}, 326 F.3d at 692. The court noted that one of the co-founders of IPC was the founder of MOE. \textit{Id.} at 693.
\item \textsuperscript{579} \textit{See supra} notes 511-78 and accompanying text.
\item \textsuperscript{580} \textit{See infra} notes 581-629 and accompanying text.
\item \textsuperscript{581} \textit{Checkpoint}, 269 F.3d at 294 (quoting Dorr-Oliver, Inc. v. Fluid Quip, Inc., 94 F.3d 376, 382 (7th Cir. 1996)).
\item \textsuperscript{582} \textit{See infra} notes 585-629 and accompanying text.
\item \textsuperscript{583} \textit{Id.}
\item \textsuperscript{584} \textit{Id.}
\item \textsuperscript{585} Deborah F. Buckman, Annotation, Initial Interest Confusion Doctrine Under Lanham Trademark Act, 183 A.L.R. Fed. 553, 553 (2003).
\item \textsuperscript{586} \textit{Id.} at 572.
\end{itemize}
competitor has thus captured the trademark owner’s potential consumers.\textsuperscript{587} Thus, even if no actual sale occurs or the consumer becomes aware of the identity of the source of the product, there has been damage to the trademark owner’s mark.\textsuperscript{588} This damage from a consumer’s initial interest confusion can reveal itself in three ways: (1) competitor’s divert the prospective customer’s interest in the beginning; (2) the wrong impression that the sources of the two products may be associated affects the consumer’s eventual decision whether to buy the product; and (3) the consumer giving some credibility to the competitor’s product that otherwise might not be warranted and may be built upon the goodwill, reputation, and strength of the trademark owner’s mark.\textsuperscript{589} The test for determining initial interest confusion is a likelihood of consumer confusion and requires an analysis of the likelihood of confusion factors.\textsuperscript{590}

When analyzing initial interest confusion on the Internet, initial interest confusion results when there is no confusion as to the source of a website, in the sense that consumers are aware they are using a particular website, but the defendant improperly benefits from the goodwill the plaintiff developed by diverting consumers from plaintiff’s website to its website.\textsuperscript{591} Furthermore, initial interest confusion has already occurred by the time a consumer sees a disclaimer disavowing association with a trademark owner because the consumer is already misdirected to the infringer’s website.\textsuperscript{592} An Internet user would have to read through all or part of a website before seeing the disclaimer and realizing the user has reached the wrong site, long after the initial interest confusion has resulted.\textsuperscript{593}

In Interactive, while there may be no consumer confusion as to source in the sense that consumers are aware they are using a2z’s site rather than IPC’s, there was initial interest confusion because by using the LAP TRAVELER trademark, a2z improperly benefited from the goodwill IPC developed in its mark by diverting consumers from IPC’s site.\textsuperscript{594} First, consumers generally use search engines when they are looking for a product but do not know the name of the web-

\textsuperscript{587} Id.
\textsuperscript{588} Id.
\textsuperscript{589} Id. at 572-73.
\textsuperscript{590} Id. at 572.
\textsuperscript{591} Brookfield, 174 F.3d at 1062.
\textsuperscript{592} PAACAR, 115 F. Supp. 2d at 778.
\textsuperscript{593} Buckman, supra note 585, at 573.
\textsuperscript{594} Compare Checkpoint, 269 F.3d at 295 (holding initial interest confusion is probative of trademark infringement, because confining confusion to confusion present at the time of purchase undervalues the importance of goodwill a company has with its customers), and Brookfield, 174 F.3d at 1062 (stating initial interest confusion resulted when West Coast used MOVIEBUFF or MOVIEBUFF.com and improperly benefited from Brookfield’s goodwill by diverting consumers to its website), with Interactive, 326
Initially, these search engines count the number of times metatags are used on a website, but modern search engines use various algorithms and criteria when generating a list of hits. When entering LAP TRAVELER as a search term on a search engine, a2z's website appears on the list of hits. While the court in Interactive stated the presence of a trademark in the post-domain path does not bias a search engine such as the presence trademarks in the metatags would, the presence of the LAP TRAVELER trademark in the post-domain path somehow appears in the title of the page search engines generate, thus search engines are picking up the trademark. The web page generated when the Internet user clicks on the link to a2z's website contains the post-domain path desks/floor/laptraveler, while the web page contains photos and advertises the Mobile Desk product instead of the Lap Traveler. It takes little effort to link from a search engine to a website on the list of hits — usually just a click of a button. Because the Mobile Desk is similar to the Lap Traveler, the consumer may choose to use a2z's website instead of IPC's despite a disclaimer. Thus, a2z will have benefited from misdirecting consumers to its website and initial interest confusion has resulted.

F.3d at 687 (note for lack of recognition of the possibility of initial consumer confusion in its analysis).
596. Id. at 25-155 n.4.
597. Interactive, 326 F.3d at 698 n.7.
598. Compare Brookfield, 174 F.3d at 1062 (stating that consumers looking for a Brookfield's searchable database are taken by a search engine to West Coast's similar database and the consumer may decide to use West Coast's website instead), with Interactive, 326 F.3d at 698 & n.7 (stating the post-domain path does not bias a search engine, while recognizing that entering the LAP TRAVELER mark into a search engine generates a web page on a2z's website), with Interactive, 195 F. Supp. 2d at 1032 (stating that search engines are influenced by metatags).
599. Interactive, 326 F.3d at 693.
600. Brookfield, 174 F.3d at 1057.
601. Compare PAACAR, 115 F. Supp. 2d at 778 (stating initial interest confusion has already occurred when the consumer sees the disclaimer disavowing association with the trademark owner because the consumer has already been misdirected to the infringer's website), with Interactive, 326 F.3d at 687 (note for lack of discussion that the consumer had already been brought to a2z's website before reading the disclaimer that the LAP TRAVELER was no longer offered on a2z's website).
602. Compare Brookfield, 174 F.3d at 1062 (stating initial interest confusion resulted from the use of metatags and the infringer benefited from the trademark owner's established goodwill), and Checkpoint, 269 F.3d at 294-95 (holding initial interest confusion is probative of trademark infringement, because confining confusion to confusion present at the time of purchase undervalues the importance of goodwill a company has with its customers), and PAACAR, 115 F. Supp. 2d at 778 (stating initial interest confusion had already occurred when the consumer saw the disclaimer disavowing association with the trademark owner because the consumer had already been misdirected to the infringer's website).
In *Checkpoint Systems, Inc. v. Check Point Software Technologies, Inc.*, the United States Court of Appeals for the Third Circuit announced trademark infringement may be based upon confusion that creates an initial interest by the consumer, even though the consumer does not complete a purchase due to the confusion. Quoting the United States Circuit Court of Appeals for the Fifth Circuit, the *Checkpoint* court noted even though the confusion dissipates, initial interest confusion benefits a defendant because it brings consumers in the door. The court further noted once the consumer is in the door, initial interest confusion has succeeded because a consumer may stay, even though the consumer realizes there is no relationship with the plaintiff. Following the United States Circuit Court of Appeals for the Seventh Circuit, the *Checkpoint* court also recognized the Lanham Act prohibits a competitor from luring possible consumers away from a producer by initially passing off its products as those of the producer's, even if by the time of the final sale the competitor dispels consumer confusion regarding the source of the products.

The court in *Checkpoint* ultimately held initial interest confusion is probative of trademark infringement because confining confusion to confusion present at the time of purchase undervalues the importance of goodwill a company has with its customers. In addition, the court recognized a determination of initial interest confusion must consider product relatedness and the degree of purchaser care consumers exercise. The court noted when products are similar, a company is more likely to benefit from the goodwill of its competitor with an established mark. The court also recognized when consumers do not exercise a high level of care in making purchasing decisions, it is more likely the consumer's initial interest confusion will result in a benefit to the infringer from the use of the competitor's goodwill. The court noted in the absence of these factors, some initial interest confusion by consumers will not likely result in free-riding off the goodwill or otherwise harm the trademark holder. Finally, the court stated in determining initial interest confusion, courts must analyze and balance the relevant factors for determining the likelihood

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603. 269 F.3d 270 (3d Cir. 2001).
605. *Id.* at 270, 294 (quoting Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 204 (5th Cir. 1998)).
606. *Id.*
607. *Id.* (quoting Dorr-Oliver, 94 F.3d at 382).
608. *Id.* at 294-95.
609. *Id.* at 296.
610. *Id.*
611. *Id.* at 296-97.
612. *Id.* at 297.
of consumer confusion and determine whether in the totality of the circumstances, marketplace confusion is likely.613

Similarly, in Interactive, a2z's use of the LAP TRAVELER mark brought consumers in the door, and the consumers may have chosen to stay at a2z's website even though they realized IPC had no relationship with a2z and the Mobile Desk product.614 The two products are similar and when consumers do not exercise a high degree of care in deciding which products to purchase, a2z benefits from the goodwill IPC has established.615 Thus, because a2z benefited from IPC's goodwill when a2z brought consumers looking for IPC's Lap Traveler product in the door, initial interest confusion resulted.616

In Brookfield, the court noted West Coast's use of Brookfield's trademark in the metatags would result in initial interest confusion because West Coast's searchable database is similar to Brookfield's and a consumer may choose to use West Coast's site instead.617 The court reasoned although there would be no consumer confusion as to source in the sense that consumers are aware they are using West Coast's site rather than Brookfield's, there is initial interest confusion because by using the MOVIEBUFF trademark, West Coast would improperly benefit from the goodwill Brookfield developed in its mark by diverting consumers from Brookfield's site.618 Because initial interest confusion would ultimately result, the court concluded West Coast was prohibited from using the MOVIEBUFF mark in its metatags.619

Similar to the use of metatags in Brookfield, in Interactive, the use of the LAP TRAVELER trademark in the post-domain path of a2z's website brought consumers to a2z's website.620 The consumer

613. Id.
614. Compare Checkpoint, 269 F.3d at 294 (noting that once the consumer is in the door, initial interest confusion has succeeded, because a consumer may stay, even though the consumer realizes that there is no relationship with the plaintiff), with Interactive, 326 F.3d at 687 (note for lack of analysis of initial interest confusion).
615. Compare Checkpoint, 269 F.3d at 296-97 (noting that when products are similar, a company is more likely to benefit from the goodwill of its competitor with an established mark and recognizing that when consumers do not exercise a high level of care in making purchasing decisions, it is more likely that the consumer's initial interest confusion will result in a benefit to the infringer from the use of the competitor's goodwill), with Interactive, 326 F.3d at 687 (note for lack of analysis of the similarity of the marks and degree of purchaser care).
616. See supra notes 603-15 and accompanying text.
617. Brookfield, 174 F.3d at 1062.
618. Id.
619. Id. at 1041, 1064.
620. Compare Brookfield, 174 F.3d at 1062 (stating initial interest confusion results from the use of metatags and the infringer benefits from the trademark owner's established goodwill and stating that consumers looking for a Brookfield's searchable database are taken by a search engine to West Coast's similar database and the consumer may decide to use West Coast's website instead), with Interactive, 326 F.3d at 687 (note for lack of analysis on whether the presence of a trademark in the post-do-
may choose to stay at the website because the Mobile Desk and Lap Traveler are similar products and a2z obtained this benefit by diverting consumers to its website. Thus, a2z benefited from the goodwill IPC established in the Lap Traveler and initial interest confusion resulted.

Furthermore, the court in PAACAR found TeleScan's use of the PETERBILT and KENWORTH trademarks in TeleScan's domain names resulted in a likelihood of consumer confusion, and the disclaimer on TeleScan's websites did not remedy the confusion. The court stated initial interest confusion had already occurred when the consumer saw the disclaimer disavowing association with the trademark owner because the misdirected consumer is at the infringer's website. Thus, there had been trademark infringement in violation of the Lanham Act. Likewise, in Interactive, by the time the consumer saw the disclaimer on a2z's website, the misdirected consumer was already at a2z's website and the disclaimer did not remedy the likelihood of confusion. Thus, initial interest confusion had already occurred.

Unlike the courts in Brookfield, PAACAR, and Checkpoint, the court in Interactive failed to analyze whether initial interest confusion would result by the time the consumer realizes that a2z has no association with IPC. The Lanham Act prohibits a competitor from luring possible consumers away from a producer by initially passing off its products as those of the producer's, even if the competitor dispels consumer confusion regarding the source of the products by the time of the final sale. A consumer looking for a product, such as the LAP main path will result in infringing user benefiting from trademark holder's established goodwill.

621. Compare Brookfield, 174 F.3d at 1062 (stating that consumers looking for a Brookfield's searchable database are taken by a search engine to West Coast's similar database and the consumer may decide to use West Coast's website instead), with Interactive, 326 F.3d at 687 (note for lack of analysis on whether the presence of a trademark in the post-domain path will result in diversion and permit the infringing user to benefit from trademark holder's established goodwill).

622. See supra notes 617-21 and accompanying text.

623. PAACAR, 115 F. Supp. 2d at 778.

624. Id.

625. Id.

626. Compare PAACAR, 115 F. Supp. 2d at 778 (stating that initial interest confusion has already occurred when the consumer sees the disclaimer disavowing association with the trademark owner because the consumer has already been misdirected to the infringer's website), with Interactive, 326 F.3d at 687 (note for lack of discussion on the possibility of initial interest confusion resulting by the time a consumer sees the disclaimer on a2z's website and realizes there is no relationship between IPC and a2z's website).

627. See supra notes 623-26 and accompanying text.

628. See supra notes 603-26 and accompanying text.

629. Checkpoint, 269 F.3d at 294 (quoting Dorr-Oliver, 94 F.3d at 382).
TRAVELER, but not knowing the difference between the LAP TRAVELER and the MOBILE DESK may decide to purchase the MOBILE DESK without attempting to locate IPC's website. Although a2z had a disclaimer on its website indicating that a2z was no longer affiliated with IPC, a2z has benefited from the goodwill associated with the LAP TRAVELER name. Thus, the Interactive court should have analyzed the likelihood of consumer confusion factors, and in doing so the court would have found initial interest confusion and thus trademark infringement.

CONCLUSION

In Interactive Products Corp. v. a2z Mobile Office Solutions, the United States Court of Appeals for the Sixth Circuit determined using a trademark in the post-domain path of a URL does not signify source of origin and is not trademark infringement. In Interactive, Interactive Products Corporation ("IPC") brought an action against a2z Mobile Office Solutions, Inc. ("a2z") and Mobile Office Solutions ("MOE") for trademark infringement when a2z used IPC's trademark LAP TRAVELER in the post-domain path of the URL in a2z's website. The district court found IPC had not presented sufficient evidence of the likelihood of consumer confusion and granted the defendants' motions for summary judgment. On appeal, the Sixth Circuit found the presence of a trademark in the post-domain path of the URL does not indicate source of a website and is not trademark infringement. In addition, the court stated because the presence of a trademark in the post-domain path of a URL does not indicate source of a website, the court did not need to examine the likelihood of consumer confusion factors.

The Sixth Circuit in Interactive correctly determined the post-domain path of a URL does not expressly signify source. However, the Sixth Circuit failed to determine whether the presence of a trademark in the post-domain path of a URL can signify sponsorship or

630. See supra notes 585-629 and accompanying text.
631. Id.
632. Id.
633. 326 F.3d 687 (6th Cir. 2003), reh’g and suggestion for reh’g en banc denied (June 6, 2003).
634. Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc., 326 F.3d 687, 698 (6th Cir. 2003).
636. Interactive, 195 F. Supp. 2d at 1024, 1032.
637. Interactive, 326 F.3d at 687, 698.
638. Id. at 698.
639. See supra notes 457-68 and accompanying text.
endorsement of a website.\textsuperscript{640} Furthermore, in failing to recognize the possibility of sponsorship confusion by such a use, the Sixth Circuit did not analyze the likelihood of consumer confusion factors.\textsuperscript{641} In applying the likelihood of confusion factors to \textit{Interactive} there was a likelihood of consumer confusion as to the sponsorship of the website.\textsuperscript{642} Finally, the Sixth Circuit failed to consider the possibility of initial interest consumer confusion that may result from the use of a trademark in the post-domain path of a URL.\textsuperscript{643}

The Sixth Circuit's decision in \textit{Interactive}, may have serious ramifications. The Sixth Circuit implied in \textit{Interactive} that courts do not need to conduct a likelihood of consumer confusion analysis in a trademark infringement case where the trademark is in the post-domain path of the URL. If one were to follow the court's reasoning, the defendant's use of the plaintiff's trademark only in the post-domain path of the URL renders Plaintiff's defenseless. According to the Sixth Circuit, it is unlikely there would ever be trademark infringement, because the use of the trademark in the post-domain path only signifies where the website's information is located.\textsuperscript{644}

Unfortunately, depending on the circumstances, the presence of the trademark on the website has the potential to indicate sponsorship of a website or cause initial consumer confusion. The non-experienced consumer could see a trademark in the post-domain path and assume the trademark holder offers the product or consents to the use of the trademark. Furthermore, the stronger the trademark holder's mark, the greater the chance of consumer confusion. A consumer seeing a well recognized or strong mark may assume the owner of the strong mark sponsors the website. Even if the consumer later learns the owner of the strong mark did not sponsor the website, the infringing user has already benefited from the trademark owner's goodwill with consumers. Thus, courts should always conduct a likelihood of consumer confusion analysis, because the presence of a trademark in the post-domain path could indicate sponsorship of a website or cause initial interest consumer confusion.

\textit{Sara L. Keenan — '05}

\begin{itemize}
  \item \textsuperscript{640} See supra notes 471–504 and accompanying text.
  \item \textsuperscript{641} See supra notes 511–78 and accompanying text.
  \item \textsuperscript{642} See supra notes 532–71 and accompanying text.
  \item \textsuperscript{643} See supra notes 581–629 and accompanying text.
  \item \textsuperscript{644} \textit{Interactive}, 326 F.3d at 687, 698.
\end{itemize}