Kohler and Gareis. It is good that these works are now being translated into English. It is even better that they will be available as a common source in a digital copyright library.

IV. Conclusion

1. To understand authors' rights as personal rights helps to explain new distribution models such as open content.

2. To define authors' rights as personal rights helps to link copyright to the creator and to strengthen sympathy by the user/ consumer/ creator.

3. Copyright history helps to understand why the property and authenticity function could drift apart in the 18th and 19th centuries. *Donaldson v. Becket* should be reread in the light of Kant, Fichte, Kohler and Gareis. Many of the arguments brought forward by Lessig and others have been discussed in these works. It is high time that these works are read and discussed with care in the English-speaking (copyright) world.

*Philippe Gilliéron**

Online Advertising Business Models and Distinctive Signs – Should One Rethink the Concept of Confusion?**

Trademarks historically function as an identifier rather than as property. Their goal is to protect consumers against any likelihood of confusion and decrease users' search costs. Over the years, however, trademark holders have pushed for an increase of the scope of protection of their rights, and tried to extend their exclusive rights to any attempt made by third parties to capitalize upon the goodwill attached to their brand, thus seeking to protect their trademarks as such, without any consideration for the type of conduct involved. The development of online advertising models and the expansion of trademark claims in internet-related cases is the latest step in this evolution. This paper addresses this evolution from a comparative perspective and points out the shift of paradigm that this evolution in trademark protection represents from an economic perspective.

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I. Introduction

While revenues generated by e-commerce are still far from the predictions that one could read in the early 2000s, the yearly growth is undeniable. In 2007, e-commerce sales amounted to $16 billion in France, an increase of 35% in comparison with 2006, twice as much as in 2005 and four times as much as in 2003.[1] In the United States, the amount was $136 billion for 2007, an increase of 19% in comparison with 2006.[2] This commercial development of the internet over the past years has seen the emergence of several new business models. Advertising is no exception to that rule.

Trademarks and, more generally, distinctive signs have always been intrinsically linked to the advertising and business strategies pursued by commercial entities. The business value of intellectual property assets is phenomenal: 76% of the Fortune 100's total market capitalization is represented by intangible assets such as patents, copyrights and trademarks, and an estimate of 80% of the value of the Standard & Poor's 500 is made up of intangible assets of all kinds.[3] If one focuses on trademarks only, Coca-Cola would have had a value of over $65 billion in 2007, Google over $17 billion, e-Bay over $7 billion and Amazon over $5 billion according to the annual ranking by BusinessWeek.[4]

Although the most profitable of all business assets, intellectual property is also the least stable. Far more than any other business assets, intangible assets are constructed of legal rules that are subject to constant change; intellectual property's boundary lines are inherently uncertain and can shift from one judicial decision to the next and from one country to another.[5] This stems from the desire of judges, legislators and lawyers to try and find an adequate balance between the legitimate concerns of rightholders to be protected, and those of the public to access and use the information contained in these assets. As pointed out by Professor Goldstein,

> [b]alance – at least if it implies stability – is an illusion. No law that seeks to encourage both the production *and* use of information can possibly achieve more than a momentary equilibrium. Because support for investment incentives inevitably undermines support for free access . . . all balances are temporary; the slightest current of public or political sentiment can shift the balance by extending property rights one day and restricting them the next.[6]

Technological innovations raise new concerns, new possibilities, but also new ways to use and abuse exclusive rights. As such, they play a significant role in possible shifts of "public or political sentiment" which can lead to

1 http://www.zdnet.fr/actualites/internet/0,39020774,39377793,00.htm (January 24, 2008).

2 http://www.census.gov/mrts/www/data/html/07Q4.html.

3 Paul Goldstein, "Intellectual Property – The Tough New Realities that Could Make or Break Your Business" 2 (Portfolio, New York 2007).

4 http://www.businessweek.com/pdfs/2007/0732_globalbrands.pdf.

5 Goldstein, at 2 *et seq.*

6 *Idem*, at 5.

reshaping the way intangible assets are protected, either by extending this protection or, on the contrary, limiting it.

This paper focuses on one of these possible shifts, namely the question of how the development of new online advertising business models may influence the scope of protection granted by trademark rights, and, more particularly, how to interpret the notion of confusion upon which exclusive rights of trademark holders have traditionally been based.

After having introduced the notion of a trademark, what this concept covers and its evolution over the years (II), this paper will focus on two advertising business models, namely pop-up advertising and Google Adwords, with the goal of underlining their possible influence upon the future scope of protection of trademark rights (III), and will finally draw the relevant conclusions (IV).

II. The Notion of Trademark

a) Consumer Protection and Economics of Information

Trademarks have traditionally been defined based upon their capacity to distinguish the goods or services of one undertaking from the goods of services of other undertakings. Such is the case at the regional or national level, whether in the European Union,[7] Switzerland,[8] Turkey[9] or in the United States.[10] It is therefore no surprise to find that this criterion is decisive at the international level in the different treaties and agreements that protect trademarks, such as Art. 15(1) of the TRIPS Agreement.

This capacity to distinguish goods or services, which appears to be at the core of the exclusive rights granted to trademark holders, is consistent with both the historic and economic analysis generally provided for the protection of trademarks:

> Historically, it is worth remembering that, in the common law countries, trademark law's origins lie in the English common law of fraud and deceit; in the nineteenth century, grocers lying about the quality of their products could indeed be held liable for deceitful misrepresentation of their merchandise. It was only a small step for courts to develop a distinct tort of "passing off" to enjoin grocers from misrepresenting not only their products' quality, but also their source and, from there, to grant producers exclusive rights on their distinctive names and symbols against use by competitors to deceive consumers as to the source of goods or services.[11]

7 *See* Art. 2 of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks as well as Art. 4 of Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark.

8 *See* Art. 1 of the Federal Law on the Protection of Trademarks and Indication of Sources (of August 28, 1992).

9 *See* Art. 5 of the Decree-Law No. 556 on the Protection of Trademarks (of June 27, 1995).

10 *See* Sec. 1052 of the Lanham Act.

11 *See* Goldstein, at 98 *et seq.*

While the historical development of trademark rights in the common law countries differs from that in civil law countries, it provides a good explanation of the economics of trademarks, whose rationale lies in the economics of information. Law and economics scholars agree that the traditional goal of trademarks is to provide information about goods to consumers, in order to protect the latter against any likelihood of confusion. As pointed out by Economides,

> [t]he economic role of the trademark is to help the consumer identify the unobservable features of the trademarked product.... [T]he consumer of "Nabisco Wheat Thins" knows and cares little about the source (manufacturer). Rather, the consumer identifies the trademark with the features of the commodity, including, crispness, sweetness or lack thereof, color, and the like.[12]

Likewise, Professors Landes and Posner consider that "[t]he value of a trademark to the firm that uses it to designate its brand is the saving in consumers' search costs made possible by the information that the trademark conveys or embodies about the quality of the firm's brand."[13] This rationale was confirmed in the United States by the Supreme Court, which describes the basic objectives of trademark law as follows:

> [T]rademark law, by preventing others from copying a source-identifying mark, reduce[s] the customer's costs of shopping and making purchasing decisions, for it quickly and easily assures a potential customer that this item – the item with this mark – is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.[14]

These considerations apply *mutatis mutandis* to civil law countries. Indirectly, protecting the consumers' interests obviously also led from the very start to protecting the commercial interests of producers as pointed out by the Supreme Court in *Qualitex*,[15] thus giving them an incentive to invest in differentiating their products and brands from those of competitors.

b) Producers' Protection and Economics of Public Goods

Over the years, however, trademark holders have been able to shift this primary goal and add another layer to the protection granted by their exclusive rights, thus slowly but surely moving towards a full propertization of their brands. Famous brands' rightholders were at the root of this move. The twentieth century saw the growth of corporate brands increasingly used for a broad range of products, and it is now no surprise to see corporate

12 Nicholas Economides, "The Economics of Trademarks," 78 Trademark Reporter 523, 527 (1988).

13 William M. Landes & Richard A. Posner, "The Economic Structure of Intellectual Property Law" 168 (Harvard University Press, Cambridge/London 2003).

14 *Qualitex, Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 163 *et seq.* (1994).

15 *Qualitex, Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 164 (1994): "[a]t the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product."

brands, such as Microsoft, IBM or GE, in second to fourth places in the BusinessWeek ranking of the most valuable brands.[16] The product diversification sought by corporate brands' owners increased pressure for a doctrine that would extend a company's rights beyond the individual goods or services that carried its brand. This pressure resulted in the dilution doctrine, which was endorsed by different legislations at both the regional and national level,[17] as well as internationally.[18] It is fair to say that dilution's boundaries are inherently ill-defined, and can thus easily lead to an expansion of the scope of protection granted by trademark rights.

By granting famous trademarks' holders an exclusive right against the exploitation of the goodwill attached to their trademarks, legislators created a shift in the traditional rationale for trademarks. Far from protecting consumers, the dilution doctrine is mostly concerned with securing the goodwill attached to the brand and, consequently, with protecting the investment of the trademark holder with regard to its brand. In other words, instead of focusing on the economics of information, the dilution doctrine rationale aligns with the economics of public goods, thus seeking to protect brands for their own sake, much as patent law protects inventions and copyright law protects entertainment and information.[19]

c) Initial Interest Confusion Doctrine: When the Economics of Public Goods Collide with the Economics of Information

While the dilution doctrine was the only significant move towards a propertization of trademarks in civil law countries until the development of the internet, a second step was taken in the United States in 1975 with the so-called "initial interest confusion doctrine." This doctrine was developed by the Court of Appeals for the Second Circuit in *Grotrian v. Steinway.*[20] In this case, the court of appeals ruled that the defendant's "Grotrian-Steinweg" brand infringed the plaintiff's "Steinway" brand, not because a potential customer looking at the "Steinweg" could mistake it for a "Steinway," but because the name "[w]ould attract potential customers based on the reputation built up by Steinway." Such initial confusion amounted to an injury to Steinway for the court. In other words, while trademark law traditionally

16 http://www.businessweek.com/pdfs/2007/0732_globalbrands.pdf.

17 *See* at the regional level: Art. 5(2) of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks as well as Art. 9(1)(c) of Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark. At the national level, *see* for instance: Art. 15 of the Federal Law on the Protection of Trademarks and Indications of Source (of August 28, 1992), Art. 9 lit. c of the Decree-Law No. 556 on the Protection of Trademarks (of June 27, 1995), Sec. 1125 lit. c of the Lanham Act (as amended by the Trademark Dilution Revision Act of 2006, H.R. 683).

18 Art. 16(3) of the TRIPS Agreement.

19 Goldstein, *supra* note 3, at 125; Landes & Posner, *supra* note 13, at 206 *et seq*.

20 *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1342 (2d Cir. 1975).

requires a brand owner to prove that a third party's use of its mark confuses consumers into purchasing the competitor's product rather than its own, "initial interest confusion doctrine holds that it is enough for the brand owner to show that consumers were initially confused as to source, even though their confusion was dispelled by the time they made their purchase";[21] as stated by the Court of Appeals for the Ninth Circuit in *Playboy v. Netscape*, "[i]nitial interest confusion is customer confusion that creates initial interest in a competitor's product."[22]

One could argue that such cases are actually dealt with by unfair competition laws in civil law countries. The truth is, however, that unfair competition laws do not grant exclusive rights to rightholders, and do not therefore directly conflict with the economics of information which originally laid at the heart of trademark protection. More than that, unfair competition laws are not meant to prohibit fair behaviour that does not distort competition, but only to provide information to consumers in a legitimate way, such as referential uses actually do. While *Grotrian* can be seen by civil lawyers as a fair reasoning that would have led to the application of unfair competition laws, the current evolution of the "initial interest confusion" doctrine is yet another step towards a complete propertization of trademarks by rightholders. This is a far-reaching step as this doctrine is not limited to famous brands, but extends to any trademark and goes much further than the sound application of unfair competitions laws would. This propertization is a direct application of the newly born rationale that tends to protect trademarks based upon the economics of public goods rather than the economics of information. As a result, US trademark law has reached a point where the economics of public goods directly conflicts with the economics of information, originally solely relevant to limit trademark protection, since it is close to colliding with doctrines that not only tolerate, but even encourage referential uses of brand names to provide information to consumers.[23] This boundary might already have been crossed as we shall see below.

Originally limited to the United States, the "initial interest confusion" doctrine has now found its way to the courts in civil law countries, without actually mentioning its name. The development of online advertising business models to which we shall now turn is at the heart of this evolution.

III. Online Advertising Business Models

Online advertising can be made in two ways: first, through e-mails; second, on third parties' websites. The first category is mostly concerned with spamming problems, an issue that is outside the scope of this paper. The second category encompasses several advertising business models, from banners to

21 Goldstein, *supra* note 3, at 121.

22 *Playboy Enterprises v. Netscape Communications*, 354 F.3d 1020, 1025 (9th Cir. 2004).

23 *See* as to these different types of uses, Eric Goldman, "Deregulating Relevancy in Internet Trademark Law," 54 Emory L.J. 507, 554–559 (2005).

Google Adwords through affiliate programs. We will focus in the present paper on two particular business models that are relevant for our purpose: pop-up advertising and Google Adwords.

a) Pop-Up Advertising

Pop-up advertisements are usually the result of a particular software that is implemented on users' hardware. In particular, this is the business model chosen by WhenU. This US company delivers online contextual marketing to computers via its "SaveNow" software. While contextual marketing traditionally requires companies to assemble large databases related to individual profiles, WhenU's software enables its customers to deliver contextual advertising without any knowledge of the consumer's past history. The process works as follows: WhenU's customers send their advertisements to WhenU's Advertising Operations team. The team will place the advertisement on the company's server and "map" it by determining the various categories in the directory and keyword algorithms that will trigger the appearance of the advertisement when users enter certain terms on search engines. When users download WhenU's "Save Now" software, they will simultaneously download the directory. Each time users enter a term that is contained in the directory on a search engine, the advertisement of WhenU's customer will be displayed as a pop-up.

The question raised by this business model is the following one: does the display of a pop-up advertisement, triggered by a certain term entered by a user in a search engine, amount to a trademark infringement when this term consists of a third party's trademark?

The first two cases to be decided on this issue were answered in the negative and resulted in rulings in favor of WhenU.[24] Both courts listed several reasons for concluding that consumers would not be confused by pop-up advertisements. First, consumers had voluntarily downloaded "SaveNow" and had consented to view pop-up advertisements, a strange argument as one cannot see how such consent could justify the possible infringement of a third party's trademark. Second, the software did not prevent users from reaching the plaintiffs' websites, as users could simply close the pop-up ad. Third, the pop-up advertisements appeared in a WhenU-branded website that was separate and distinct from those of the plaintiffs. Fourth, the pop-up advertisements amounted to legitimate comparative advertising. Finally, these advertisements did not appear on the plaintiffs' sites, modify or interact with them in any way.

In a third case and more recent case, however, the United States District Court for the Southern District of New York found that pop-up advertisements were likely to cause initial interest confusion, and granted the plain-

24 *U-Haul International, Inc. v. WhenU.com, Inc.*, 297 F. Supp.2d 723 (E.D. Va., September 5, 2003); *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp.2d 734 (E.D. Mich., November 19, 2003).

tiff's motion for a preliminary injunction to stop WhenU from displaying competitors' pop-up advertisements tied to the plaintiff's trademark.[25] The Court of Appeals for the Second Circuit reversed, however, holding that the usage of a trademark as a keyword to trigger the pop-up did not amount to a "use in commerce" as in the two prior cases.[26]

Based upon our prior remarks, it is fairly easy to understand the reasons for these different rulings. In the first two cases, the United States District Court for the Eastern District of Virginia and the Eastern District of Michigan focused on the original rationale for trademark protection, i.e. the economics of information and the question of whether there was a risk of confusion for consumers. Consequently, the courts logically ruled that

> [t]rademark laws are concerned with source identification. They are not meant to protect consumer good will created through extensive, skillful, and costly advertising. The rule favoring comparative advertising rests upon the traditionally accepted premise that the only legally relevant function of a trademark is to impart information as to the source or sponsorship of the product. Comparative advertisements may therefore make use of competitors' trademarks even if the advertiser reaps the benefit of the product recognition engendered by the owner's popularization, through expensive advertising, of the mark.[27]

These courts thus made it clear that they had no intent to apply the economics of public goods to trademarks and the initial interest confusion doctrine. Such was not the opinion of the District Court in New York which extended its analysis to the economics of public goods' rationale and, consequently, ruled in favor of the plaintiff. The reversal by the Second Circuit on appeal in *1-800 Contacts, Inc.* actually comes as a surprise to some extent, as this Circuit was the one that originally introduced the initial interest confusion doctrine in *Steinway.*

These cases clearly demonstrate the opposite results to which a shift from the economics of information to the economics of public goods can lead in the interpretation of trademark laws. Consequences are significant and may substantially impede the fair uses that were traditionally recognized under trademark laws. Such is particularly the case of the referential use of third parties' trademarks or comparative advertising, two fields whose rationale rests upon the economics of information and the desire to provide as much information and choice to consumers as possible.

Considering these three cases, one could argue: first of all, that US courts still largely refer to an economics of information rationale and show some

25 *1-800 Contacts, Inc. v. WhenU.com and Vision Direct, Inc.*, 309 F. Supp.2d 467 (S.D.N.Y., December 22, 2003).

26 *1-800 Contacts, Inc. v. WhenU.com and Vision Direct, Inc.*, 414 F.3d 400 (2nd Cir. 2005).

27 *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp.2d 734 (E.D. Mich., November 19, 2003).

reluctance to extend the scope of exclusive rights to the usage of trademarks in pop-up ads; and secondly, that this move should not take place in civil law countries thanks to the more developed unfair competition laws that exist. Unfortunately, this faith would be misplaced, and the first rulings rendered with regard to metatag and keyword usage, in particular as to Google Adwords, confirm the fear that the undesirable propertization of trademarks through a predominance of the economics of public goods over the economics of information has already crossed the Atlantic and started in Europe as well.

b) Google Adwords

AdWords was launched by Google in 2000. AdWords offers pay-per-click advertising, and site-targeted advertising for both text and banner advertisements. It is Google's main source of revenue and functions as follows: advertisers choose keywords to trigger their advertisements and the maximum amount they are willing to pay per click. When a user enters a chosen keyword, the sponsored advertisements appear either on the right side of the screen or above the main search results. The order of listing depends on other advertisers' bids and the so-called "quality score" of all advertisements shown for a given search. This quality score is calculated by historical click-through rates and the relevance of an advertiser's text and keywords, as defined by Google. To try and find the proper keywords can be a daunting task for newcomers. To help clients with the complexity of building and managing AdWords accounts, search engine marketing agencies offer account management as a business service. Google itself provides a keyword search tool that suggests to the advertiser a list of possible keywords when a user enters terms describing its activities.

The relevant question for our purpose is to know whether the selection of a third party's trademark as a keyword constitutes a trademark infringement, or whether the selection of such a keyword should be considered a "fair use" in one way or another? That question is not entirely new, and the selection of third parties' trademarks as metatags raises the same concern.

1. Metatags

A metatag is a term embedded in the source code of a website. It refers to a method once used by website owners to be detected by search engines when users selected terms that referred to the chosen metatag. Although this method is no longer widely used, metatags used to play the role that keywords currently have.

Website owners obviously had an incentive to choose third parties' trademarks as metatags, so as to appear at the top of search results: to take an example, a newcomer to the sports industry would have found it much easier to appear at the top of search results by choosing metatags containing the trademarks "Nike," "Puma" or "Adidas" rather than "tennis shoes." Did the insertion of such trademarks in one's source code amount to trademark infringement?

According to the traditional rationale for trademarks and the economics of information, the answer should be negative. Considering that metatags are embedded in the source code of a webpage, they can only be detected by search engines and not by consumers. Consequently, their usage does not create a likelihood of confusion among consumers and does not increase their search costs for the goods or services they are looking for. As a result, courts should have rejected such cases and advised the parties to base their claims solely upon unfair competition laws.

Such was, however, not the case. From the very beginning, courts showed great sympathy for trademark holders no matter what the jurisdiction was. While admitting that

> [s]ince there is no confusion resulting from the domain address, and since West Coast's initial web page prominently displays its own name, it is difficult to say that a consumer is likely to be confused about whose site he has reached or to think that Brookfield somehow sponsors West Coast's web site[28]

the Court of Appeals for the Ninth Circuit nevertheless held that the insertion of "Movie Buff," the plaintiff's brand, as a metatag amounted to a trademark infringement. Expressly referring to the initial interest confusion doctrine, the court ruled that

> a sizeable number of consumers who were originally looking for Brookfield's product will simply decide to utilize West Coast's offerings instead. Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using "moviebuff.com" or "MovieBuff" to divert people looking for "MovieBuff" to its web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark.[29]

The court finally "recognized that the federal trademark and unfair competition laws do protect against this form of consumer confusion,"[30] thus confirming prior rulings rendered in the same way.[31] The truth is that the initial interest confusion doctrine does not protect any "form of consumer confusion" and cannot be based upon the economics of information; by expressly referring to the "improper benefit from the goodwill that Brookfield developed in its mark," the court clearly aims at protecting the value of the rightholder's trademark, thus shifting the protection towards an economics of public goods' rationale. Yet, in spite of this criticism, the case was perceived as a sound rule with regard to metatags by many courts.[32]

28 *Brookfield Communications v. West Coast*, 174 F.3d 1036, 1062 (9th Cir. 1999).

29 *Id.*, at 1062.

30 *Id.*, at 1063.

31 *Playboy Enters v. Asiafocus Int'l, Inc.*, No CIV.A.97-734-A, 1998 WL 724000 (E.D. Va., April 10, 1998); *Playboy Enters v. Calvin Designer Label*, 985 F. Supp. 1220 (N.D. Cal. 1997).

32 *See Promated Indus., Ltd v. Equitrac Corp.*, 300 F.3d 808, 813 (7th Cir. 2002); *Checkpoint Sys. v. Check Point Software Techs, Inc.*, 269 F.3d 270, 293 (3d Cir. 2001); *Bihari v. Gross*, 119 F. Supp.2d 309, 319 (S.D.N.Y. 2000). More recently, the Court of Appeals

(Contd. on page 698)

Such was also the case on this side of the Atlantic, particularly in France where, since 1998 and the *Pacanet* case, courts have constantly held that the use of third parties' trademarks as metatags amounts to an infringement, enabling the rightholder to claim its exclusive rights.[33] While German courts were split on the issue,[34] the Federal Supreme Court put an end to the discussion and expressly held on May 18, 2006 that the use of third parties' trademarks as metatags infringes upon the exclusive rights of the trademark owner.[35] The Court ruled in essence that the mere appearance of a competitor's website in the search results could confuse the consumers *ex ante*, even when such confusion would be excluded based upon the content of the website.

These rulings, in particular the one rendered by the Supreme Court, clearly demonstrate that the courts implicitly based their reasoning upon the economics of public goods as a rationale to protect trademark owners rather than the economics of information. Confusion among users was not seriously at stake. Admittedly, these courts actually had to interpret the notion of confusion extensively, in a way that can easily be compared with the initial interest confusion doctrine that prevails among certain jurisdictions in the United States. This was the case in the wording of the *Impuls* decision, according to which "[a] likelihood of confusion can already result from the fact that users, which search for the name of the plaintiff to get information about it, will also be informed about the defendant's offer of goods or services."[36] In extending the exclusive rights of trademark owners to such cases, the courts obviously aimed at protecting the goodwill attached to these trademarks – a goal far from the initial one pursued by trademark laws – which should normally be dealt with by unfair competition laws. As stated

(Contd. from page 697)

for the 11th Circuit ruled in favor of *North American Medical Corp. and Adagen Medical Corp. v. Axiom Worldwide, Inc.* on April 7, 2008 (not yet published at the time of writing). This case, however, presented a significant difference as the search results displayed Axiom's website along with a description including complainants trademarks in a manner likely to confuse consumers and suggest a relationship between the parties according to the court.

33 *See Pacanet*, Draguignan District Court, December 18, 1998; *Distrimart*, Paris Court of Appeal, March 14, 2001; *Nomad*, Paris District Court, April 5, 2002; *Vuitton*, Nanterre District Court, June 25, 2002; *Odin*, Paris District Court, October 29, 2002.

34 In favor of a trademark infringement: *Galerie d'Histoire*, Hamburg District Court, September 13, 1999 (related to a corporate name); *Dialprog*, Frankfurt-am-Main District Court, December 14, 1999; *Hanseatic*, Munich Court of Appeal, April 6, 2000; *Steihöfel*, Hamburg District Court, June 6, 2001. Against: *Kotte*, Dusseldorf Court of Appeal, February 17, 2004; *Impuls*, Dusseldorf Court of Appeal, July 15, 2003 (reversed by the Supreme Court).

35 *Impuls*, Supreme Court, May 26, 2006, 2007 GRUR 65.

36 In German: "*Eine Verwechslungsgefahr kann sich bereits daraus ergeben, dass die Internetnutzer, die das Firmenschlagwort der Klägerin kennen und als Suchwort eigeben, über deren Angebot zu informieren, als Treffer auch auf die Leistung der Beklagten hingewiesen wird*".

by Professor Goldman, "[t]he linchpin is capturing initial consumer attention; everything after that appears immaterial."[37]

One may fear that this move will unfortunately be confirmed and even extended in certain jurisdictions with regard to Google AdWords, as some cases to which we shall now turn already seem to prove.

2. Keywords

This is the case in certain jurisdictions in the United States, such as California, a State that plays a leading role in shaping the scope of application of intellectual property rights. In considering that there existed a genuine issue of material facts that prevented the granting of a summary judgment, the Court of Appeals for the Ninth Circuit expressly addressed the initial interest confusion doctrine in *Playboy Enterprises v. Netscape Communications* in relation to the usage of third parties' trademarks as keywords.[38] The court expressly admitted the application of this theory as a trademark infringement and ruled that "[a]lthough dispelled before an actual sale occurs, initial interest confusion impermissibly capitalizes on the goodwill associated with a mark and is therefore actionable trademark infringement."[39] Referring to *Brookfield*, based upon an expert testimony, it held that there was a strong likelihood of initial confusion in the present case, in the sense that

> [s]ome consumers, initially seeking PEI's sites, may initially believe that unlabeled banner advertisements are links to PEI's sites or to sites affiliated with PEI. Once they follow the instructions to "click here," and they access the site, they may well realize that they are not at a PEI-sponsored site. However, they may be perfectly happy to remain on the competitor's site, just as the *Brookfield* court surmised that some searchers initially seeking Brookfield's site would happily remain on West Coast's site. The internet user will have reached the site because of defendant's use of PEI's mark. Such use is actionable.[40]

In his dissenting opinion, Judge Berzon voiced sharp criticism against such a shift in the scope of application of exclusive rights granted to trademark holders. Referring to *Brookfield*, he held:

> [t]he metatag holding in *Brookfield* would expand the reach of initial interest confusion from situations in which a party is initially confused to situations in which a party is never confused. I do not think it is reasonable to find initial interest confusion when a consumer is never confused as to source or affiliation, but instead knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the list produced by the search engine so informs him. There is a big difference between hijacking a customer to another website by making the customer

37 Goldman, at 562.

38 *Playboy Enterprises v. Netscape Communications*, 354 F.3d 1020 (9th Cir. 2004).

39 *Id.*, at 1025.

40 *Id.*, at 1025 *et seq.*

> think he or she is visiting the trademark holder's website (even if only briefly) ... and just distracting a potential customer with another *choice*, when it is clear that it is a choice.... [S]uppose a customer walks into a bookstore and asks for Playboy magazine and is then directed to the adult magazine section, where he or she sees Penthouse or Hustler up front on the rack while Playboy is buried in back. One would not say that Penthouse or Hustler had violated Playboy's trademark. This conclusion holds true even if Hustler paid the store owner to put its magazines in front of Playboy's.[41]

In spite of these criticisms, this trend in favor of the application of initial interest confusion doctrine in internet-related cases was confirmed in other jurisdictions.[42]

In Europe, French and German courts have both already had to deal with numerous cases relating to keywords and Google AdWords. While some German courts remain reluctant to see a trademark infringement in the usage of a third parties' trademark as a keyword and stick to a traditional interpretation and rationale of the notion of confusion,[43] a vast majority holds

41 *Id.*, at 1034–1035.

42 *See Government Employees Ins. Co. v. Google, Inc.*, 330 F. Supp.2d 700 (E.D. Va. 2004). Considering that the case was dealing with a motion to dismiss a claim filed by Google, the court did not expressly rule on Google's liability, but nevertheless argued that there was a strong likelihood that Google could be held liable, either directly or at least as a contributory infringer or under a vicarious liability theory (at 704); *Rescuecom Corp. v. Computer Troubleshooters USA, Inc.*, 464 F. Supp.2d 1263 (N.D. Ga. 2006); *800-JR Cigar v. Goto.com*, 437 F. Supp.2d 373 (D.N. J. 2006); *Buying for the Home v. Humble Adobe*, 459 F. Supp.2d 310 (D.N. J. 2006); *Edina Realty v. theMLSOnline*, No. 04.4371 (JRT/FLN), 2006 U.S. Dist. LEXIS 13775 (D. Minn, Mar. 20, 2006); *J.G. Wentworth, S.S.C. v. Settlement Funding LLC*, No. 06-0597, 2007 U.S. Dist. LEXIS 288 (E.D. Pa., January 4, 2007). *See* however *Rescuecom.Com v. Google, Inc.*, 456 F. Supp.2d 393 (N.D.N.Y. 2006); *FlagranceNet.com, Inc. v. FlagranceX.com, Inc.*, 493 F. Supp.2d 545 (S.D.N.Y. 2007). On Google's liability under US Law, *see* Benjamin Aitken, "Keyword-Linked Advertising, Trademark Infringement, and Google's Contributory Liability," 2005 Duke L. & Tech. Rev. 21, 24 (concluding that search engine providers will be contributorily liable if "the ads conceal the advertiser's identity such that the consumer is confuserd as to the source of the ad, even if just initially").

43 Such is the case in particular in Cologne (Cologne Court of Appeal, August 31, 2007, which expressly ruled that keywords could not be treated as metatags and expressed doubts as to the reasoning of the German Federal Supreme Court in the *Impuls* decision) and Hamburg (Hamburg District Court, December 21, 2004; Hamburg District Court, September 21, 2004, confirmed by Hamburg Court of Appeal, May 4, 2006, rendered prior to the *Impuls* decision, however, so that the situation in Hamburg might change). It is worth noting that, in its decision of September 21, 2004, the court expressly referred to the traditional rationale for trademarks by stating (freely translated): "[o]ne cannot admit that the selection of a protected term as an AdWord amounts to a trademark use that could create a likelihood of confusion according to Sec. 14(2) of the Trademark Act. For this, the trademark should be used to distinguish goods or services from the advertiser; in other words, the public should conclude, based upon the use of the trademark, that the goods or services come from a certain source. In the present case, one cannot even see the trademark in the AdWord advertisement."

that such usage amounts to a trademark infringement.[44] Considering the ruling of the German Federal Supreme Court relating to metatags, there is little doubt that courts will find it harder to deny a trademark infringement in such cases.

The situation is even clearer in France, but for the Strasbourg District Court which, basing its analysis upon a traditional notion of the likelihood of confusion, ruled that no confusion exists as the sponsored links clearly mention another trademark owner in the sponsored search results. Clearly referring to the original rationale of trademarks and its goal of reducing search costs for consumers, the court held that:

> [c]onsidering the fact that sponsored links resulting from a search under the terms “Tryba” or “Triba” do not reproduce in any way the trademark “Tryba”, but clearly mention the corporate names K by K or Techni Windows which, as such, are not counterfeiting, as neither their title nor their description or URL address to which they point reproduce the trademark “Tryba,” the mere usage of this protected brand in keywords, which cannot be perceived by users, does not create any confusion in the latter’s mind, who cannot be deceived as to the source of the products.[45]

Nevertheless, the ruling of the Strasbourg District Court remains isolated and French courts, turning their backs to the economics of information rationale to endorse the economics of public goods, have otherwise never denied the infringing nature of a third party’s trademark used as keyword.[46] As an

44 Such is constantly the case in Braunschweig: Braunschweig District Court, February 4, 2008; Braunschweig District Court, January 30, 2008; Braunschweig District Court, November 28, 2007; Braunschweig Court of Appeal, July 12, 2007; Braunschweig Court of Appeal, December 11, 2006; Braunschweig Court of Appeal, December 5, 2006; Braunschweig District Court, November 15, 2006. The same goes for Munich (Munich Court of Appeal, December 6, 2007), Stuttgart (Stuttgart Court of Appeal, July 26, 2007, which, unlike the Cologne Court of Appeal, expressly and rightfully ruled that keywords had to be treated in the same way as metatags, and considered that the *Impuls* decision rendered by the Supreme Court had to apply), Dresden (Dresden Court of Appeal, January 1, 2007) and Berlin (Berlin District Court, November 21, 2006).

45 *Atrya v. Google France and others*, Strasbourg District Court, July 20, 2007. It is worth noting that this ruling is to our knowledge the only French one that expressly admits the application of Art. 6(2) LCEN (“*Loi sur la confiance dans l’économie numérique*”), thus considering Google to be a mere service provider with regard to its Google AdWords system and search tool. In all others cases mentioned below, the Courts expressly held that Google could not invoke the provider’s exemption regime as it takes an active part in offering a search tool to its users.

46 *Cnrrh, Pierre Alexis T. v. Google France and others*, Nanterre District Court, December 12, 2004, confirmed by Versailles Court of Appeal, March 23, 2006; *Amen v. Espace 2001 and Google*, June 24, 2005; *Corb’s v. Evoc*, Paris District Court, October 5, 2005; *Kertel v. Google and Cartephone*, December 8, 2005; *Auto IES v. Google and others*, Paris District Court, April 27, 2006; *Iliad v. Google and Helios Services*, Paris District Court, October 31, 2006; *Rentabiliweb, Jean-Baptiste D.-V. v. Google and others*, Lyon District Court, March 13, 2008.

example, in sharp contrast to the ruling of the Strasbourg District Court, in *Crrnh, Pierre Alexis T. v. Google France and others* one can read that:

> Google company also invokes the fact that keywords cannot be perceived by users of its search engine, so that there is no likelihood of confusion possible with the concerned trademark. This reasoning is rejected. Sponsored links appear on the same page and in parallel to the relevant websites that are found through the usage of the keyword in dispute. As a consequence, several websites are suggested to the user including those of the advertisers who pay to appear on the page resulting from the search with this term. The truth is that these websites are mentioned in a separate heading under the title "sponsored links," but this adjunction is insufficient as the display of all these websites together, sponsored links as well as search results, makes an average user believe that the websites in a separate heading are in relation to the search conducted, which will encourage him to click on these links. . . . Consequently, the question whether the trademark appears as such is irrelevant since it is clearly used to have the websites appear on the page of the results.[47]

While this reasoning can obviously not be supported by an economics of information rationale that would only protect consumers against a risk of confusion, and clearly amounts to a shift in favor of the economics of public goods to protect the rightholder as to the value of its brand, French courts are going even further. While the German courts so far remain opposed to hold Google liable in such cases, not only as a trademark infringer, but even under an unfair competition claim or a tort action,[48] French courts do not hesitate to hold Google liable both under a tort claim, like the Paris District Court,[49] and as a direct trademark infringer, in particular, but not only, before the Nanterre District Court.[50] In several cases, the plaintiffs even

47 *Cnrrh, Pierre Alexis T. v. Google France and others*, Nanterre District Court, December 12, 2004.

48 *See* Hamburg District Court, September 21, 2004, confirmed on appeal by Hamburg Court of Appeal, May 4, 2006; Munich District Court, December 3, 2003 (related to Google AdSense).

49 *Kertel v. Google and Cartephone*, Paris District Court, December 8, 2005; *Gifam and others v. Google France*, Paris District Court, July 12, 2006, confirmed on appeal by Paris Court of Appeal, February 1, 2008; *Auto IES v. Google and others*, Paris District Court, April 27, 2006 (where the court did not, however, take into consideration a possible trademark claim against Google); *Laurent C. v. Google France*, Paris District Court, February 13, 2007.

50 *Viaticum Luteciel v. Google*, Nanterre District Court, October 13, 2005 confirmed by Versailles Court of Appeal, March 10, 2005; *Hôtels Méridien v. Google*, *référé* (interim measures), Nanterre District Court, December 16, 2004, confirmed at first instance by Nanterre District Court, March 2, 2006, as well as on appeal by Versailles Court of Appeal, May 25, 2007; *Louis Vuitton Mailletier v. Google*, February 4, 2005, confirmed on appeal by Paris Court of Appeal, June 28, 2006; *Cnrrh, Pierre Alexis T. v. Google France and others*, Nanterre District Court, December 12, 2004, confirmed by Versailles Court of Appeal, March 23, 2006; *Axa v. Google*, Nanterre District Court, May 2, 2005, whose jurisdiction has, however, been dismissed on appeal by Paris Court of Appeal, June 6, 2007. *See* for other jurisdictions: *TWD Industrie v. Google France and Google, Inc.*, Aix-en-Provence Court of Appeal, December 12, 2007; *Rentabiliweb, Jean-Baptiste D.-V. v. Google and others*, Lyon District Court, March 13, 2008.

limited themselves to suing Google rather than the actual advertiser and prevailed.[51]

Such rulings are surprising to say the least; one finds it hard to see how a court may consider Google as infringing a third party's trademark merely offered as a possible keyword to a given advertiser in its search tool. Aside from the fact that one may wonder whether such a usage actually amounts to use as a trademark,[52] an issue that may also be raised with regard to the advertiser,[53] there seems little doubt that Google itself does not use these trademarks in the first instance, and rarely carries out identical or similar activities in the second instance. While the Nanterre District Court does not contest the fact that a trademark infringer has to conduct activities that are identical or similar to the ones of the rightholder under French law, it surprisingly held in *Cnrrh, Pierre Alexis T. v. Google France and others* that:

> Google is not a competitor of CNRRH. It does not have any activity in the same field. Nevertheless, it reproduced the "Eurochallenges" trademark in its keyword listing so as to offer it to advertisers that conduct identical activities to those covered by the trademark. Thus, it does actually use the "Eurochallenges" brand as a trademark. In other words, even though its activities are

51 *Viaticum Luteciel v. Google*, Nanterre District Court, October 13, 2005 confirmed by Versailles Court of Appeal, March 10, 2005; *Hôtels Méridien v. Google*, *référé* (interim measures), Nanterre District Court, December 16, 2004, confirmed at first instance by Nanterre District Court, March 2, 2006, as well as on appeal by Versailles Court of Appeal, May 25, 2007; *Louis Vuitton Mailletier v. Google*, February 4, 2005, confirmed on appeal by Paris Court of Appeal, June 28, 2006; *Promovacamos, Karavel v. Google France*, Paris District Court, March 9, 2006.

52 While the Paris District Court rightly excluded the idea that Google could conduct identical or similar activities to the ones of the trademark holder as a matter of principle, it nevertheless admits that the suggestion of certain keywords by Google's search tool amounts to a trademark usage by Google, as it expressly admitted trademark infringement claims when the trademark at stake was famous (*see Iliad v. Google and Helios Service*, October 31, 2006), or that Google did have identical or similar activities to the rightholder (*see Promovacamos, Karavel v. Google France*, Paris District Court, March 9, 2006). The question of whether such usage by Google amounts to a trademark use was submitted on May 20, 2008 by the French Supreme Court to the scrutiny of the European Court of Justice. The proceedings are currently pending. On that issue under the Lanham Act, Goldman, at 593 *et seq.*, who clearly considers that "[s]earch providers do not 'use' a trademark regardless of the editorial role played by search providers," but nevertheless recognizes that "Search Providers Are Editors, Not Passive Intermediaries" (532 *et seq.*).

53 On this important question into the details of which we shall not go: Greg Lastowka, "Google's Law" 54–58 and the literature review provided, available at http://ssrn.com/abstract=1017536 (work in progress); Stacey L. Dogan & Mark Lemley, "Grounding Trademark Law Through Trademark Use," 92 Iowa L. Rev. 1669 (2007); for a reply to that paper, Graeme B. Dinwoodie & Mark D. Janis, "Lessons from the Trademark Use Debate," 92 Iowa L. Rev. 1703 (2007); Graeme B. Dinwoodie & Mark D. Janis, "Confusion Over Use: Contextualism in Trademark Law," 92 Iowa L. Rev. 1597 (2007); Margreth Barrett, "Internet Trademark Suits and the Demise of 'Trademark Use'," 39 Davis L. Rev. 371 (2005); Uli Widmaier, "Use, Liability and the Structure of Trademark Law," 33 Hofstra L. Rev. 603 (2004).

> not identical or similar to the ones protected by the "Eurochallenges" trademark, one cannot deny the fact that its activity consists of proposing and selling advertising space made up of sponsored links of clients which have an identical or similar activity to that of the trademark.[54]

In practice, the Nanterre District Court ascribes advertising activities to Google, as if it was one of their representatives. Such argumentation is highly dubious not to say completely wrong. It nevertheless sheds an interesting light upon the possible extension of exclusive trademark rights to their most absolute extent, where the activities carried out by the parties would not matter anymore as long as the value attached to the trademark is exploited by a third party.

IV. Conclusion: Towards a Full Internalization of Trademarks' Externalities?

Trademark laws have traditionally been considered as a tool to protect consumers against confusion and to reduce their search costs by giving them an indication as to the source of a given product. Unlike copyrights or patents, trademarks were thus originally more akin to unfair competition or tort law, and did not entitle their owners to a full propertization of their brands.

This rationale, based upon the economics of information, led courts to contrast proprietary uses of trademarks to referential ones. While rightholders were entitled to exercise their exclusive rights when confronted with a proprietary usage of their brand, i.e. one that created a likelihood of confusion among consumers, they were not entitled to exercise their rights against a referential usage of their brands. Whether in the United States or Europe, companies have traditionally been entitled to compare their goods to those of a trademark holder, so that consumers can make informed choices about which product to buy, or to refer to a third party's brand as long as this usage does not cause confusion as to the source.[55] Consequently, it is fair to argue that trademark law was never meant to give monopoly rights over the use of marks, especially at the expense of the greater public good.[56] From an economic perspective, such uses can be seen as positive externalities, i.e. uses from information which, once created, can be simultaneously enjoyed by many people without interfering with the benefits each derives.[57] As

54 *Cnrrh, Pierre Alexis T. v. Google France and others*, Nanterre District Court, December 12, 2004.

55 In the United States, for instance, *Champion Spark Plugs v. Sanders*, 331 U.S. 125, where the Supreme Court expressly held: "[w]hen the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo.," confirmed in *Moseley v. V. Secret Catalogue, Inc.*, 537 U.S. 418, 428–429 (2003). In Switzerland, *Audi*, 128 BGE III, at 146.

56 *See,* for instance, Jennifer E. Rothman, "Initial Interest Confusion: Standing at the Crossroads of Trademark Law," 27 Cardozo L.R. 105, 108 (2005).

57 On trademark externalities in particular, *see* David W. Barnes, "Trademark Externalities," 10 Yale J.L. & Tech. 1, 22 (2007) (hereinafter: "Externalities").

stated by Professor Barnes, "[b]y permitting unrestricted, free referential and customary use, trademark law increases the non-rivalrous use of search of information, reducing but not eliminating the deadweight loss associated with static inefficiency."[58]

Over the years, trademarks holders have, however, pushed towards a full propertization of their trademarks. Trademarks have increasingly become entities separate and apart from particular goods and services.[59] New infringement claims have enabled them to internalize some of the benefits that were previously granted to third parties: the current evolution of the treatment of keywords in search engines is a good example of such an internalization. Expansion of trademark protection based on goodwill is focused only on compensation to businesses, thus undeniably extending the scope of proprietary uses to the detriment of referential ones. As pointed out by Professor Barnes, "Courts use a variety of policy justifications for finding infringement in these cases that have nothing to do with competition or consumer protection and everything to do with free riding."[60] This evolution represents a shift in the theoretical framework of trademark law, a move away from a limited set of circumstances in which consumers are likely to be confused based upon an economics of information rationale, towards a broader protection based upon an economics of public goods theory that would, or at least could, prevent any reference to another's trademark.[61]

Numerous scholars have criticized this trend on both sides of the Atlantic.[62] Boundaries have to be urgently set to limit this extension.[63] The limitations put to these referential uses, in particular to the usage of third parties' trademarks as keywords, could only be justified if the social benefits were superior

58 Barnes, "Externalities" 23.

59 Rothmann, at 189; Mark A. Lemley, "The Modern Lanham Act and the Death of Common Sense," 108 Yale L.J. 1687, 1688 (1999); Jessica Litman, "Breakfast with Batman: The Public Interest in the Advertising Age," 108 Yale L.J. 1717, 1721–1725 (1999) (describing a variety of ways in which there has been a vast expansion of trademark protection); Barton Beebe, "The Semiotic Analyses of Trademark Law," 51 UCLA L. Rev. 621 (2004) (describing evolution of trademarks from identifying source to identifying products to identifying trademarks themselves).

60 David W. Barnes, "Misappropriation of Trademark" 8, Research Paper No 2007-003, available at http://ssrn.com/abstract=101172 (hereinafter: "Misappropriation").

61 Rothmann, at 166, 190.

62 Such is in particular the case in the United States, where several scholars have focused on the initial interest doctrine and its influence upon internet-related cases. Apart from the scholars already mentionned, *see* Eric Goldman, "Deregulating Relevancy in Internet Trademark Law," 54 Emory L.J. 507, 565 *et seq.* (2005); Stacey L. Dogan & Mark A. Lemley, "Trademarks and Consumer Search Costs on the Internet," 41 Hous. L. Rev. 777 (2004); David M. Klein & Daniel C. Glazer, "Reconsidering Initial Interest Confusion on the Internet," 93 Trademark Rep. 1035 (2003); Lisa M. Sharrock, "Realigning the Initial Interest Confusion Doctrine with the Lanham Act," 25 Whitter L. Rev. 53 (2003). In Switzerland, Ivan Cherpillod, "Le droit suisse des marques" 261–266 CEDIDAC No. 73 (Lausanne 2007).

63 *See* Benjamin F. Sidbury, "Comparative Advertising on the Internet: Defining the Boundaries of Trademark Fair Use for Internet Metatags and Trigger Ads," 3 N.C.J.L. & Tech. 35 (2001).

to those resulting from an absence of limitations.[64] Such is not the case of the current trend. Referring to the economics of public goods shifts the traditional paradigm of trademark rights without any economic justification. The benefits from permitting the use of trademarks as keywords are found in decreased consumer search costs and increased competition.[65] Competition is indeed more likely to be increased by reducing search costs and increasing the availability of competing alternatives.[66] Courts on both sides of the Atlantic which have started to recognize as a trademark infringement the use of third parties' trademarks without any restriction offer no limits on internalization of externalities and ignore balancing.[67] This move is all the more worrying as most French courts have started to admit infringement claims directed towards intermediaries, thus giving up *contra legem* the requirement that the infringer should offer similar goods or services. If these cases are to be confirmed in the future, the only remaining question for companies will be "to know whether these expansionary rules crafted for the internet will migrate from this setting into trademark law's mainstream,"[68] and contribute to what will be a full propertization of trademarks, to the detriment not only of consumers, but of competition itself. This question will be left open for further investigation to ascertain whether the specificities of online searches as compared to offline ones justify different legal treatment from a cognitive perspective: does confusion among consumers increase online due to the fact that everything is one click away from another rather than clearly separated as in our offline environment? Would it be fair to argue as Professor Goldman does that, on the contrary, search costs play a less significant role online than offline as switching costs are particularly low, an argument that would tend to favor a restriction of the scope of application of trademark rights in the online environment rather than their expansion?[69] These issues will not be addressed within the limited scope of this paper. At this stage, it is sufficient to keep in mind that fair competition is not the same as *no* competition. There is a big difference between harming a company's goodwill and benefiting from that goodwill; trademark law is meant to prevent the former, but not the latter.[70] There is no general anti-free-riding principle in intellectual property law.[71] While the historical trend towards an expansion of intellectual property rights may raise serious concerns as to any possible reversal of this evolution, one needs to keep faith and hope that courts will get back to the original and sole legitimate rationale of trademarks: the economics of information and the related question whether a likelihood of confusion exists among consumers, the sole relevant criterion to rule on a trademark infringement claim.

64 *See* Barnes, "Externalities" 30.
65 Barnes, "Externalities" 35; Goldman, at 531.
66 Barnes, "Misappropriation" 12.
67 Barnes, "Externalities" 44.
68 Goldstein, at 169.
69 Goldman, at 572, 579.
70 Rothmann, at 163–164.
71 *See* Mark A. Lemley, "Property, Intellectual Property, and Free Riding," 83 Tex. L. Rev 1031, 1032 (2005); Lastowka, at 54.