

# Santa Clara University

## Death of the Initial Interest Confusion Doctrine?

Prof. Eric Goldman

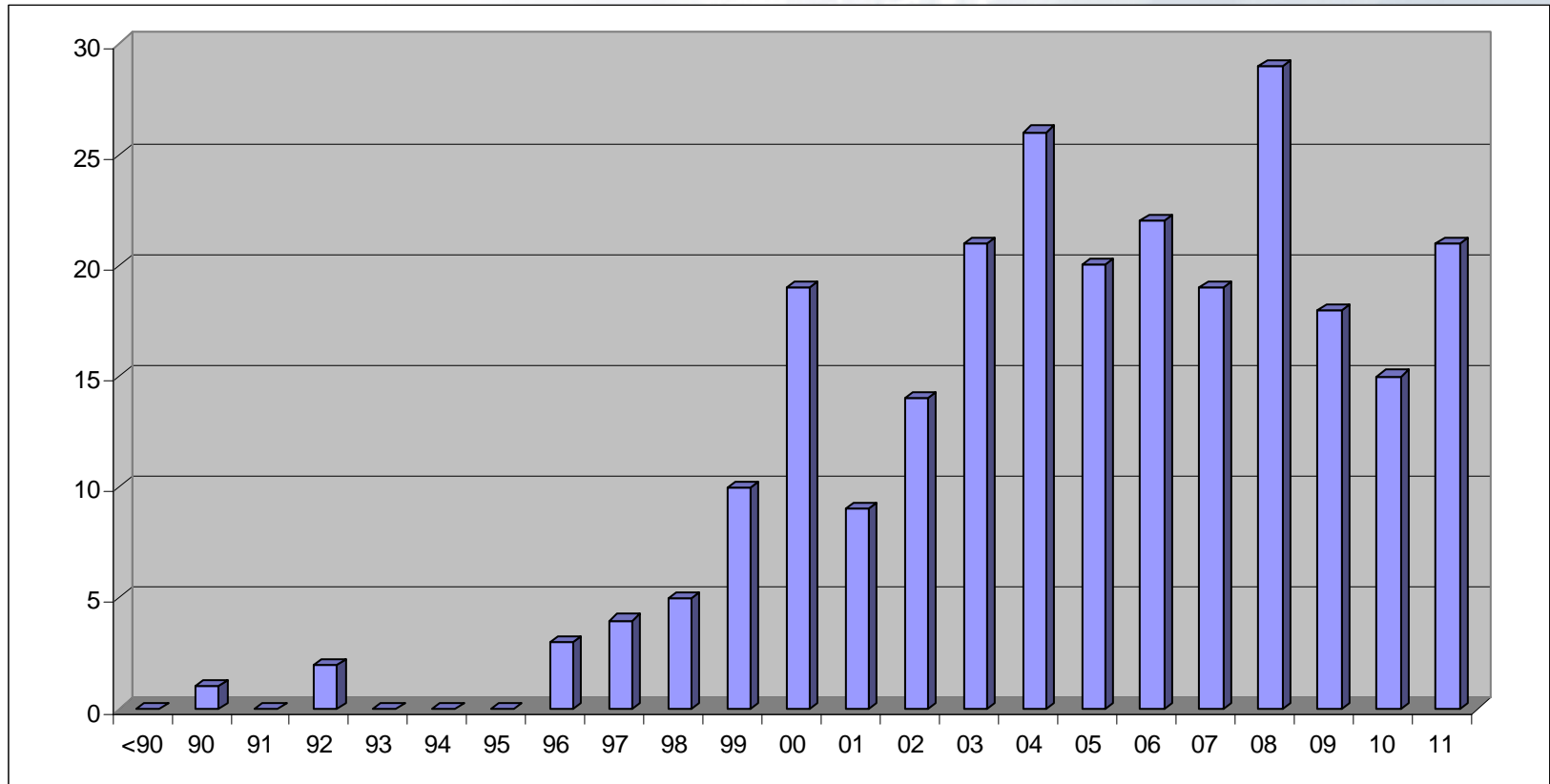
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# Why Academics Hate the IIC Doctrine

- **No well-accepted definition**
  - Covers certain types of “pre-sale” confusion
  - Brookfield: “use of another’s trademark in a manner reasonably calculated to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion”
  - Circuits disagree if the doctrine even exists
  - Difficult to disprove
- **Pushes trademark analysis too early into the consumer search process**
  - consumers experiencing IIC suffer no harm
- **Doesn’t improve judicial decision-making**
  - Courts aren’t sure how it interacts with the LOCC test
  - It rarely changes a case’s results

# “Initial Interest Confusion” in Westlaw Cases



# IIC Cases 2009-2011

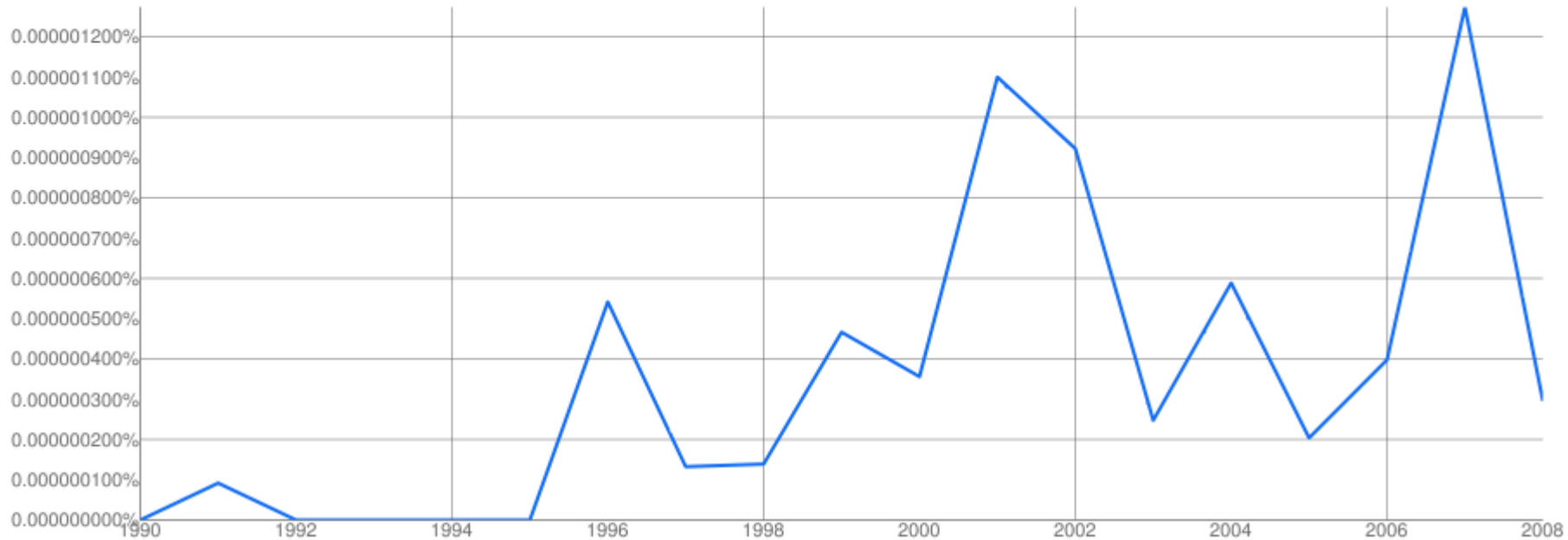
- 55 cases total. IIC “found” in ~9 cases
  - Domain name cases (Teachbook, Compak, Airfloat, Monex, Trehan)
  - Keyword ad cases (Pillow Pets, Morningware)
  - Trade dress cases (Wolf/Viking, RE/MAX)
- Implications
  - Often pled, rarely successful
  - When successful, usually plaintiff is going to win anyway
  - Doctrine increases everyone’s costs with low incremental benefit
- Q: How do we declare a common law doctrinal experiment a “failure”?

# Google books Ngram Viewer

Graph these **case-sensitive** comma-separated phrases:

between  and  from the corpus  with smoothing of .

■ initial interest confusion



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Added at the suggestion of Deven Desai