Death of the Initial Interest Confusion Doctrine?

Prof. Eric Goldman
Director, High Tech Law Institute
http://www.ericgoldman.org • http://hightechlaw.scu.edu
egoldman@gmail.com
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”?**
Graph these case-sensitive comma-separated phrases: initial interest confusion
between 1990 and 2008 from the corpus English with smoothing of 0.

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