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## Trademark Law: Conventional Controls in a Virtual Marketplace

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## CASE COMMENTS

### TRADEMARK LAW: CONVENTIONAL CONTROLS IN A VIRTUAL MARKETPLACE

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

*B. Michael Bachman, Jr.\**

Appellant, an adult entertainment company, owned U.S. trademark rights in the terms PLAYBOY and PLAYMATE.<sup>1</sup> Appellee keyed advertisements of competing adult entertainment businesses and web sites to appellant's trademarked terms.<sup>2</sup> Appellant brought suit in the U.S. District Court for the Central District of California, alleging that Appellee's use of PLAYBOY and PLAYMATE infringed Appellant's trademarks.<sup>3</sup> The district court determined that there was insufficient evidence to prove consumer confusion with regard to the use of the trademarked terms and granted Appellee's motion for summary judgment.<sup>4</sup> The U.S. Court of Appeals for the Ninth Circuit reversed the summary judgment of the lower court and HELD, that there existed an issue of material fact as to whether Appellee's use of trademarked terms created the likelihood of initial interest confusion under the Lanham Act.<sup>5</sup>

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1. *Playboy Enters. v. Netscape Communications Corp.*, 354 F.3d 1020, 1023 (9th Cir. 2004).

2. *Id.* "Keying" is the process by which Internet search engines allow businesses to target individuals with interests that may be similar to the product or service the business provides. *Id.* at 1022. When the individual searches for a specific term in an Internet search engine which relates to a specific product or service, a banner ad will appear with the advertisement of a company offering similar goods or services. *Id.* at 1022-23.

3. *Id.* at 1023.

4. *Playboy Enters. v. Netscape Communications Corp.*, 55 F. Supp 2d 1070, 1086 (C.D. Cal. 1999), *aff'd*, 202 F.3d 278 (9th Cir. 1999). The circuit court also determined that Netscape's use of PLAYBOY and PLAYMATE did not amount to commercial exploitation of PEI's trademarks. *Id.* at 1072.

5. *Playboy*, 354 F.3d at 1029.

When drafting the Lanham Act, Congress envisioned a means of protecting consumers from confusion while simultaneously allowing businesses to create and maintain goodwill in their products.<sup>6</sup> According to section 32 of the Lanham Act, a party may be liable for trademark infringement when it “uses in commerce any . . . copy of a registered mark in connection with the sale . . . or advertising of any goods or services . . . [when] such use is likely to cause confusion, or to cause mistake, or to deceive.”<sup>7</sup> The likelihood of confusion test determines whether the average consumer would be likely to believe that an infringer’s product had a connection with plaintiff’s product.<sup>8</sup> Despite the plain language of the statute, the Lanham Act extends further than mere “point of sale” confusion.<sup>9</sup> Section 43(a) of the Act extends protection to trademark owners against customer confusion that creates an initial interest in a competitor’s product.<sup>10</sup> Courts have held initial interest confusion to be a form of trademark infringement with regard to keyword search terms on the Internet.<sup>11</sup>

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6. See Rachel J. Posner, *Manipulative Metatagging: Search Engine Baiting, and Initial Interest Confusion*, 33 COLUM. J.L. & SOC. PROBS. 439, 448 (2000).

7. See 15 U.S.C.A. § 1114(1) (1996).

8. See *HMH Publ’g Co. v Lambert*, 482 F.2d 595, 598 (9th Cir. 1973).

9. See *id.* Section 32(1) of the Lanham Act establishes the following prohibitions and civil liabilities relating to federally registered trademarks:

- (1) Any person who shall, without the consent of the registrant —
- (a) use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
- (b) reproduce counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for civil remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake or to deceive . . .

15 U.S.C.A. § 1114(1).

10. See Lanham Act § 43(a), 15 U.S.C.A. § 1125(a).

11. Initial interest confusion assumes that trademark infringement may occur when a consumer has been confused prior to the purchase of a product. See Posner, *supra* note 6, at 453 (citing 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 23:5

The Ninth Circuit addressed the likelihood of confusion using two similar marks in *AMF, Inc. v. Sleekcraft Boats*.<sup>12</sup> Plaintiff, a manufacturer of boats, held trademark rights in the term SLICKCRAFT.<sup>13</sup> Without knowledge of plaintiff's registered mark, defendant, also a boat manufacturer, began using the mark SLEEKCRAFT, for its company logos.<sup>14</sup> Plaintiff brought suit against defendant alleging trademark infringement due to a likelihood of confusion.<sup>15</sup> The U.S. District Court for the Central District of California found for defendant, concluding that the simultaneous use of the two marks was unlikely to confuse the public.<sup>16</sup>

The Ninth Circuit, on appeal, set out to reassess whether defendant's use of SLEEKCRAFT would likely result in confusion of the public.<sup>17</sup> The circuit court found that the goods sold by both companies were related,<sup>18</sup> but not competitive,<sup>19</sup> and introduced an eight-factor test as the means for assessing the likelihood of confusion of the two marks.<sup>20</sup>

The *Sleekcraft* court held that the goods sold by both companies were similar and that the strength of plaintiff's mark was relatively low.<sup>21</sup> In addition, the circuit court also found that the two marks met a requisite level of similarity.<sup>22</sup> Next, while the circuit court noted that there was great difficulty in proving actual confusion, they held that this factor is typically

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(4th ed. 1999)). A defendant's use of a trademark owner's mark may confuse consumers at the initial point of his or her search. *See id.* at 457.

12. *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 347 (9th Cir. 1979).

13. *Id.* at 346.

14. *Id.* The *Sleekcraft* court indicated that Sleekcraft adopted its name in good faith and without any knowledge of appellant's use of the similar mark SLICKCRAFT. *Id.*

15. *Id.*

16. *Id.* at 345-46.

17. *Sleekcraft*, 599 F.2d at 346.

18. *Id.* at 350. "Related goods" are those goods that a reasonable consumer would believe came from the same source if marketed using the same or very similar mark. *Id.* at 348 n.10.

19. *Id.* at 348. In order to determine whether two businesses are "competitive," a court will look to whether the products are being bought by consumers for the same or similar purpose. *Id.* The *Sleekcraft* court found that AMF's boats were used primarily for family activities whereas Sleekcraft specialized in high speed recreation. *Id.*

20. *Id.* at 348-49. The eight *Sleekcraft* factors that help establish a possibility of confusion are: (1) strength of the mark, (2) proximity of the goods, (3) similarity of the marks, (4) evidence of actual confusion, (5) marketing channels used, (6) type of goods and the degree of care likely to be exercised by the purchaser, (7) defendant's intent in selecting the mark, and (8) likelihood of expansion of the product lines. *Id.*

21. *Id.* at 350-51.

22. *Sleekcraft*, 599 F.2d at 352. The similarity of the marks was analyzed in terms of sight, sound, and meaning and the *Sleekcraft* court held that the marks were similar enough with respect to all three. *Id.* at 351-52.

weighed heavily only when hard evidence is available.<sup>23</sup> The circuit court also analyzed the similar marketing channels used by the parties as well as their comparable use of many identical sales methods, such as basic price and advertising.<sup>24</sup> The degree of care likely to be exercised by potential purchasers of boats, as well as the defendant's intent in selecting the mark, weighed heavily in favor of Sleekcraft.<sup>25</sup>

Lastly, the *Sleekcraft* court reviewed the likelihood of expansion of either company.<sup>26</sup> The circuit court found a high probability of a future competitive relationship, thereby affording the senior user, plaintiff, greater protection of its mark.<sup>27</sup> Ultimately, the circuit court held that the eight factors favored a ruling for the plaintiff and issued a limited injunction remanding the case to determine the appropriate relief.<sup>28</sup>

After *Sleekcraft*, courts began using these eight factors in most traditional trademark infringement cases.<sup>29</sup> However, the increased use of e-commerce imposed a greater burden on courts to determine whether certain practices employing trademarked terms were a benefit to consumers or new trademark violations. The Ninth Circuit first conducted a coherent analysis of metatagging and initial interest confusion, utilizing the *Sleekcraft* test, in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*<sup>30</sup>

In *Brookfield*, appellee sought to enjoin appellant, a video rental company, from using its registered trademark MOVIEBUFF, in its domain

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23. *Id.* at 353.

24. *Id.*

25. *Id.* The *Sleekcraft* court noted that typically, when goods are higher end, such as boats, buyers are likely to take greater care in their purchasing decisions. *Id.* The *Sleekcraft* court determined that Sleekcraft's owner acted in good faith, adopted his mark without knowledge of the Sleekcraft mark, and made no attempt to capitalize on the possible resulting confusion. *Id.* at 354.

26. *Id.* A strong possibility of expansion on the part of either party will tend to accord a ruling against the infringing party. *Id.* The *Sleekcraft* court determined that expansion could lead to direct competition, thus unfairly prejudicing the senior trademark owner. *Id.*

27. *Sleekcraft*, 599 F.2d at 354.

28. *Id.*

29. *See, e.g., Eclipse Assocs., Ltd. v. Data Gen. Corp.*, 894 F.2d 1114, 1117 (9th Cir. 1990) (holding that evidence that cleaning products, laundry folding equipment, and industrial heating equipment used the name "eclipse" was inadmissible in trademark suit involving use of the term "eclipse" by two computer companies); *Matrix Motor Co., Inc. v. Toyota Jidosha Kibushiki Kaisha*, 290 F. Supp. 2d 1083, 1090 (C.D. Cal. 2003) (holding that the use of the term MATRIX was unlikely to cause confusion between a passenger car manufacturer and a custom-made racing car manufacturer).

30. *Brookfield Communications, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1041-42 (9th Cir. 1999).

name and metatags.<sup>31</sup> At the lower level, appellee obtained a preliminary injunction against appellant.<sup>32</sup> On appeal, the Ninth Circuit affirmed the judgment barring appellant from using appellee's mark, MOVIEBUFF.<sup>33</sup> The *Brookfield* court used the eight *Sleekcraft* factors to determine whether the public was likely to be confused by use of appellee's trademarked term in metatags.<sup>34</sup> However, the Ninth Circuit recognized that the traditional *Sleekcraft* factors were not adequate for determining the issue involving metatags.<sup>35</sup>

Based on available case law and the letter of the Lanham Act, the circuit court concluded that initial interest confusion was likely to occur.<sup>36</sup> This initial interest confusion would allow appellant to capitalize on the goodwill associated with appellee's products, the very harm against which the Lanham Act protects trademark owners.<sup>37</sup> The *Brookfield* court concluded that the similar marks would likely lead to consumer confusion and a preliminary injunction against appellant would be an adequate remedy.<sup>38</sup>

After the decision in *Brookfield*, courts seemed to follow the rationale used by the Ninth Circuit.<sup>39</sup> Courts viewed metatagging of trademarked

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31. *Id.* Metatags can be equated to virtual library card catalogs wherein information about a particular web site's contents can be located. *Id.* at 1045. Web designers use metatags in search engines so that Internet users will have access to pertinent web sites based on the terms used in a search request. *Id.*

32. *Id.* at 1043. *Brookfield* alleged that West Coast's use of its trademark violated sections 32 and 43(a) of the Lanham Act, 15 U.S.C.A. § 1114, 1125(a). *Id.*

33. *Id.* at 1043. The *Brookfield* court enjoined West Coast from using the trademarked term MOVIEBUFF, in any manner, especially advertising, promoting, and metatagging. *Id.* The *Brookfield* court also barred West Coast's use of the domain name moviebuff.com and any other similar terms likely to cause confusion between the two products at issue. *Id.* The banned terms included "@moviebuff.com" or "moviebuff.com." *Id.* *Brookfield* first became aware of West Coast's intention to use the "MOVIEBUFF" mark when it learned that West Coast registered for the domain name, "moviebuff.com" subsequent to *Brookfield*'s actual use of the mark. *Brookfield*, 174 F.3d at 1042.

34. *Id.* at 1054.

35. *Id.*

36. *Brookfield*, 174 F.3d at 1062. The *Brookfield* court nevertheless conducted an exhaustive analysis of the facts using the *Sleekcraft* factors. *Id.* at 1054-61.

37. *Id.* at 1062. The *Brookfield* court related an example illustrating the misappropriation of goodwill wherein Mobil sued Pegasus Petroleum for utilizing "Pegasus" as a symbol of its product and company, contending that consumers would be confused between Pegasus's new symbol and Mobil's flying horse symbol. *Id.* at 1063 (citing *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254 (2d Cir. 1987)).

38. *Id.* at 1066-67.

39. See generally *SNA, Inc. v. Array*, 51 F. Supp. 2d 554, 562-63 (E.D. Pa. 1999) (holding that the Lanham Act was violated when an assembler adopted an Internet web site with same name as a kit manufacturer's product); *The New York State Society of Certified Public Accountants v.*

terms as an intentional method to lure Internet users to web sites of competitors.<sup>40</sup> Furthermore, manipulative metatagging was found sufficient to cause consumer confusion and thus violate the Lanham Act.<sup>41</sup>

The commercialization of the Internet and, more specifically, the use of metatagging and keying, have imposed a new burden on courts. While these innovative practices are a benefit to consumers, they may also constitute trademark infringement.<sup>42</sup> As courts have endeavored to employ traditional standards of trademark law, most have failed in their attempt to develop a bright line rule to govern the widespread use of keyword banner advertising in the Internet marketplace.<sup>43</sup> For example, in enforcing the Lanham Act, no court can rigidly follow the guiding factors introduced by *Sleekcraft*.

In the instant case, the *Playboy* court attempted to reconcile the discrepancy between conventional trademark infringement and infringement in the context of newly emerging technology.<sup>44</sup> Appellant contended that appellee used its trademarks to actively induce initial interest confusion amongst its consumers.<sup>45</sup> Appellant further alleged that appellee misappropriated the goodwill appellant's marks had accumulated by leading consumers to competitors' web sites.<sup>46</sup>

A flexible use of the eight *Sleekcraft* factors was necessary in this context and the instant court turned first to an analysis of the evidence proving actual confusion.<sup>47</sup> Expert testimony on behalf of appellant concluded that consumers were likely to assume appellant's sponsorship of advertisements that resulted from a search of the terms PLAYBOY and

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Eric Louis Assocs., Inc., 79 F. Supp. 2d 331 (S.D.N.Y. 1999) (holding that defendant's use of "NYSSCPA" in its "nysscpa.com" Internet domain name and as a meta-tag was infringing). However, it was evident that looser infringement standards, deemed desirable by many given the vastness of the Internet, would be at odds with those seeking to protect marks in all mediums. See Maureen A. O'Rourke, *Defining the Limits of Free-Riding in Cyberspace: Trademark Liability for Metatagging*, 33 GONZ. L. REV. 277, 277-79 (1997).

40. *Brookfield*, 174 F.3d at 1066-67.

41. *Id.* at 1064.

42. See *Playboy Enters. v. Netscape Communications Corp.*, 354 F.3d 1020, 1023 (9th Cir. 2004).

43. See *Brookfield*, 174 F.3d at 1062; *Playboy Enters. v. Welles*, 7 F. Supp. 2d 1098 (S.D. Cal. 1998) (holding that defendant's use in metatags of registered marks PLAYBOY and PLAYMATE was permissible).

44. See *Playboy*, 354 F.3d at 1025-26.

45. *Id.* Evidence was produced in court that tended to show that Defendants require adult-oriented companies to link their ads to Appellant's trademarked terms. *Id.* at 1029.

46. *Id.* at 1025.

47. *Id.* at 1026.

PLAYMATE.<sup>48</sup> The instant court determined that summary judgment was not proper and explored the seven remaining *Sleekcraft* factors.<sup>49</sup>

The instant court found that the sixth *Sleekcraft* factor, the type of goods and anticipated degree of consumer care, weighed heavily in favor of appellant.<sup>50</sup> It determined that similar products are likely to divert the attention of consumers who may be seeking specific adult-oriented products or companies on the Internet.<sup>51</sup> In addition, the degree of consumer care exhibited in seeking adult-oriented products was found to be relatively low, thereby increasing the likelihood of consumer confusion.<sup>52</sup>

The relevance of the seventh *Sleekcraft* factor, defendant's intent in selecting a mark for use, depended heavily on the effects of the Internet and marketing techniques such as keying and metatagging.<sup>53</sup> The instant court determined that while there was no indication that appellee had the direct intent to confuse, the company directly profited from the subsequent consumer confusion.<sup>54</sup> Appellee's use of "click-through" rates as a marketing tool to lure advertisers back to their services pointed to the likelihood that appellee's use of appellant's trademark was to generate confusion amongst the advertiser's products and those of appellant.<sup>55</sup> Further evidence of intent was discernible in appellee's refusal to remove the trademarked terms from keyword lists even when asked to do so by advertisers using their service.<sup>56</sup> Judge Berzon, in his concurrence, noted that the issue facing the instant court was one of a much more serious nature than that faced in *Brookfield*.<sup>57</sup> The instant case concerned

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48. *Id.* at 1025.

49. *Playboy*, 354 F.3d at 1027.

50. *Id.* at 1028.

51. *Id.*

52. *Id.*

53. *Id.* at 1028-29.

54. *Playboy*, 354 F.3d at 1029. The *Playboy* court stated that if a defendant has the intent to confuse consumers, this intent can be used as probative evidence of the likelihood of future confusion. *Id.* at 1028.

55. *Id.* at 1023. The instant court explained that after searching in a search engine, results were displayed both in text and graphics (as in the nature of the keyed advertisements). *Id.* The advertisements are even labeled, "click here." *Id.* The ratio between the number of times an advertisement appears as the result of a search and the number of times consumers actually click on them are known as click-through rates. *Id.* These rates are cited to potential clients in an effort to convince them to advertise with a particular search engine. *Playboy*, 354 F.3d at 1023.

56. *Id.* at 1029.

57. *Id.* at 1035 (Berzon, J., concurring).



deliberate deceit of consumers who were diverted by the search engine from their destination by the use of keyed advertisements.<sup>58</sup>

Until *Brookfield*, courts had only *Sleekcraft*-like factors to guide them in determining trademark protection. Increased use of the Internet for information and commerce has stripped trademark owners of control over use of their marks. The controversy over trademark infringement rights on the Internet produces two very distinct arguments.<sup>59</sup> Many commentators argue that the broad protection afforded to trademark owners in the context of the Lanham Act should extend directly to the Internet.<sup>60</sup> Others maintain that the free-flowing exchange of ideas and plethora of consumer choice on the Internet should be encouraged through diminishing traditional protections afforded to trademark owners.<sup>61</sup> The instant court's analysis represents the current struggle to classify the use of trademarked terms in the context of search engine indexing.<sup>62</sup>

The Lanham Act has provided a broad framework wherein most trademarked items remain safe.<sup>63</sup> The goal of the Ninth Circuit in the instant case was simply to enforce the letter and nature of the Lanham Act.<sup>64</sup> The instant court was forced to consider specific facts and circumstances which are novel to cyberspace, let alone that of a court of law.

In an attempt to enforce the Lanham Act using traditional and familiar measures, the instant court looked to the *Sleekcraft* factors to determine whether a likelihood of confusion existed.<sup>65</sup> However, *Sleekcraft* involved a visible, physical mark which was unintentionally and inexactly reproduced.<sup>66</sup> In the instant case, appellee's use of the appellant's marks to automatically key banner advertisements of competing adult entertainment companies was an intentional use of an exactly reproduced mark with the probable result of consumer confusion.<sup>67</sup> While the instant court relied on *Sleekcraft* and its eight factors to measure likelihood of confusion, the analysis as applied to Internet search engines seemed inadequate.

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58. *Id.* (Berzon, J. concurring).

59. *See* O'Rourke, *supra* note 39, at 277-79.

60. *See id.* at 278-79.

61. *See id.* at 278-79.

62. *See Playboy*, 354 F.3d at 1020.

63. *See generally* Lanham Act § 32(1), 15 U.S.C.A. 1114(1).

64. *See Playboy*, 354 F.3d at 1020, 1024.

65. *Id.* at 1026-29.

66. *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 354 (1979).

67. *Playboy*, 354 F.3d at 1029.

The *Brookfield* court was the first to apply the Lanham Act and *Sleekcraft* factors to search engine metatagging.<sup>68</sup> *Brookfield* held that metatags were used by search engines and businesses to manipulate Internet users into visiting web sites they were never originally seeking.<sup>69</sup> In addition, the *Brookfield* court determined that metatag usage allowed competitors to profit from the goodwill associated with another.<sup>70</sup> With this precedent in place, the instant court fashioned a logical connection between trademarked terms in metatags and the use of those terms in keyed advertisements.<sup>71</sup> The appellee in *Brookfield* benefited from the goodwill associated with appellant's mark by using the mark in metatags and luring consumers away from the trademark owner's services.<sup>72</sup> Likewise, the instant court determined that consumers searching for appellant's sites might conclude that unlabeled advertisements, which appeared as a result of searching for appellant's trademarked terms, were associated with appellant.<sup>73</sup>

The instant court's use of *Brookfield* as a guiding post was its second attempt to return to conventional standards to shape a new ruling on keyed advertising.<sup>74</sup> The Lanham Act's protection does not give trademark owners exclusive rights to their marks.<sup>75</sup> The goal of trademark law has always been to protect consumers and to shield entrepreneurs from the misappropriation of the goodwill they have established in their products.<sup>76</sup>

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68. See Posner, *supra* note 6, at 480.

69. *Brookfield Communications, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999).

70. *Id.*

71. See generally *Playboy*, 354 F.3d at 1020.

72. *Brookfield*, 174 F.3d at 1064. The *Brookfield* court illustrated the misappropriation of goodwill and likelihood of initial interest confusion using the following metaphor: Using another's trademark in one's metatags can be likened to posting a sign with another's trademark in front of one's commercial establishment. *Id.* Consumers will be confused by the use of the mark and stop, all along believing the products being offered are probably those of the trademark owner. *Id.* Upon finding a competitor's product, even consumers who prefer the trademark owner's product may find a continued search unwarranted because the competitor's product will suffice. *Id.* In addition, *Sleekcraft*'s consumer level of care factor is relevant here. *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 353 (1979). Consumer care in *Brookfield* as well as in the instant case was held to be generally quite low. *Playboy*, 354 F.3d at 1028; *Brookfield*, 174 F.3d at 1060.

73. *Playboy*, 354 F.3d at 1025.

74. See *id.* The instant court's tools of analysis were limited to section 32 of the Lanham Act, *Brookfield*, and the *Sleekcraft* factors. *Id.*

75. See Lanham Act § 32(1), 15 U.S.C.A. 1114(1). According to the instant court, the core element of trademark infringement is likelihood of confusion, not simple similarity. *Playboy*, 354 F.3d at 1024.

76. See 15 U.S.C.A. § 1114.

The instant court seemed determined not to allow *Brookfield's* analysis to handcuff them as they faced a newer, more complex issue.

*Brookfield* limits a finding of infringement by initial interest confusion to situations where the parties involved are competitors.<sup>77</sup> As the instant case revealed, *Brookfield* may not provide standards suitable for the Internet's virtual marketplace, and is more suited to brick and mortar environments. The Internet is a forum where all web sites are competing for the attention of consumers. In the instant case, appellant's marks were infringed, not by a competing adult-oriented entertainment company, but by a search engine seeking to make a profit on advertisements for competing adult-oriented entertainment companies.<sup>78</sup> Subjecting all participants of World Wide Web commerce to the standards of the Lanham Act is likely to be a judicial necessity. However, the instant case demonstrates that the use of concrete, established precedent such as *Sleekcraft* and *Brookfield* in the ever-evolving world of cyberspace is difficult and inadequate.

The instant case presented a situation where appellant's potential customers were led falsely and directly to a competitor's site, while at least initially believing their search for appellant's material was successful.<sup>79</sup> The fact that consumer care with respect to such purchases is supposedly low should be of no consequence.<sup>80</sup> The instant case reveals that purposeful and deceitful misdirection is now a commonly employed method of the virtual marketplace. Courts cannot be limited by established standards when it comes to electronic commerce. As the Internet continues its rapid growth, courts must analyze situations on a case-by-case basis to determine whether confusion may exist, even in light of consumer progression and sophistication. Until Congress enacts legislation dealing specifically with trademark infringement in the context of e-commerce, courts will have no choice other than to apply traditional standards of precedent to each new case brought before them.

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77. See *Brookfield*, 174 F.3d at 1036.

78. *Playboy*, 354 F.3d at 1035-36 (Berzon, J., concurring).

79. *Id.* at 1025-26.

80. *Id.* at 1035.