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Death of the Initial Interest Confusion Doctrine

Abstract: The paper will present my findings from a pseudo-empirical study of trademark cases discussing the initial interest confusion doctrine. The study shows that the initial interest confusion doctrine has become virtually irrelevant in court. Over the past several years, few courts have cited the doctrine favorably, and in even fewer cases has the doctrine contributed to a ruling in favor of the trademark owner--even though trademark owners routinely accuse defendants of initial interest confusion. As a result, my study indicates that the initial interest confusion imposes substantial adjudication costs on trademark cases but contributes almost nothing useful to the outcomes. This data suggests that everyone--trademark owners, defendants and the courts--would be better off if the initial interest confusion doctrine did not exist. Because the initial interest confusion doctrine is purely a creation of common law (it has no statutory foundation), judges can--and should--simply kill the doctrine off.