

TRADEMARKS IN METATAGS, RECIPROCAL LINKING, AND OTHER MECHANISMS FOR AFFECTING SEARCH ENGINE RESULTS

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Search engine marketing ("SEM") is big business. During the first six months of 2005, online advertising spending in the U.S. increased by 26% -- to \$5.8 billion -- according to PricewaterhouseCoopers LLP.¹ Meanwhile, growth for the entire US advertising market was 4.5% during the same period.² In 2002, 2.5% of U.S. ad dollars were spent online. The figure is expected to reach 4.6% in 2005 and 7.5% by 2009.³

The advertising industry has awakened to this emerging SEM market, and now strives to devise marketing strategies to capture the attention of search engine users. It is little wonder, since search engines are often the first stop for online shoppers. In September, 2005, 41% of US internet users said they used a search engine on a typical day -- some 59 million people, a 55% increase since June, 2004.⁴ Another study has concluded that sites that appear on the first page of Google's search results attract six times the traffic they did before achieving that placement, and earn double the sales.⁵ To optimize placement in the major search engines, advertisers must figure out how the search engines work, and this can be an illusive task.

I. HOW DO SEARCH ENGINES RANK THEIR SEARCH RESULTS?

Each search engine has its own algorithm which arranges indexed materials in sequence. The precise criteria utilized by search engines to decide the sequence, or "best matches" to a keyword query can vary widely from one engine to another. The search engine companies are secretive about the weights given to each factor in their relevancy analysis, and even as to all of the factors. But all major search engines publish general information for the benefit of search engine marketers.

All of the major engines state that their primary goal is to provide what they consider to be the most relevant search results to their users. Just as there is a body of content that search engines feel is relevant and, therefore, desirable, conversely there exists on the web a body of content that, in the opinion of one or more search engines, is detrimental to the relevance, accuracy and/or diversity of search results which is not desirable. At least one court has held that a search engine may rank web pages any way it wishes, without fear of how those rankings may affect the owner of the web page. Search King Inc. v. Google Technology, Inc., 2003 WL 21464568 (W.D.Okla.) (holding

¹ "Top Web Sites Build Up Ad Backlog, Raise Rates," *The Wall Street Journal*, November 16, 2005, Page A1

² Id. In all, PricewaterhouseCoopers estimates that Internet advertising will total as much as \$12 billion for 2005 compared to \$9.6 billion in 2004 and \$6 billion in 2002.

³ Ben Elgin, *Google and Yahoo!: Rolling In It*, BusinessWeek, 10/21/2005 citing eMarketer.

⁴ Pew Internet and American Life Project, reported in San Jose Mercury News, Nov. 21, 2005.

⁵ Adam L. Penenberg, Search Rank Easy to Manipulate, <http://wired-vig.wired.com/news/print/0,1294,66893,00.htm> (March 17, 2005) referencing a study by search engine marketer OneUpWeb.

that page rank is opinion protected by the First Amendment, and that plaintiff was not entitled to inclusion within defendant's search engine index nor to any specific placement in response to particular search queries).

The search engines enforce their own, generally confidential, rules and policies that distinguish between practices considered legitimate and desirable SEO and those considered "spamming the index." Search engines typically have some mechanism by which searchers can report what they believe are irrelevant or 'bad' search results. However, search engines generally do not obligate themselves to take any action to remove listings, most likely again relying upon upon the argument that their search results consist of their opinion of relevance – protected by the First Amendment in the United States.

Today there are three major search engine companies, Yahoo!, Google and Microsoft/MSN, which receive 82.5% of the U.S. users' internet searches.⁶ Each company provides results from its own proprietary search index, created from proprietary webcrawling technology. Each carefully guards its search algorithms and publishes very little information about how, specifically, they rank their search results. Here is a quick review of what they say.

A. Yahoo! Search

Yahoo! Search ranks results according to their relevance to a particular query by analyzing the web page text, title and description accuracy as well as its source, associated links, and other unique document characteristics.⁷ The footnoted help page provides a link to Yahoo!'s Site Guidelines, reprinted in their entirety below, and otherwise refers webmasters to the Search Engine Optimization category in the Yahoo! Directory (<http://directory.yahoo.com>).

Pages Yahoo! Wants Included in its Index

- Original and unique content of genuine value
- Pages designed primarily for humans, with search engine considerations secondary
- Hyperlinks intended to help people find interesting, related content, when applicable
- Metadata (including title and description) that accurately describes the contents of a web page
- Good web design in general

What Yahoo! Considers Unwanted

⁶ Danny Sullivan, *comScore Media Metrix Search Engine Ratings*, <http://searchenginewatch.com/reports/article.php/2156431> (August 23, 2005).
⁷ <http://help.yahoo.com/help/us/ysearch/ranking/index.html>.

- Pages that harm accuracy, diversity or relevance of search results
- Pages dedicated to directing the user to another page
- Pages that have substantially the same content as other pages
- Sites with numerous, unnecessary virtual hostnames
- Pages in great quantity, automatically generated or of little value
- Pages using methods to artificially inflate search engine ranking
- The use of text that is hidden from the user
- Pages that give the search engine different content than what the end-user sees
- Excessively cross-linking sites to inflate a site's apparent popularity
- Pages built primarily for the search engines
- Misuse of competitor names
- Multiple sites offering the same content
- Pages that use excessive pop-ups, interfering with user navigation
- Pages that seem deceptive, fraudulent or provide a poor user experience

Yahoo! sums up its policies like this:

Unfortunately, not all web pages contain information that is valuable to a user. Many pages are created deliberately to trick the search engine into offering inappropriate, redundant or poor-quality search results; this is often called "spam." Yahoo! does not want these pages in the index, and its content quality guidelines are designed to ensure that poor-quality pages do not degrade the user experience in any way.⁸

B. MSN Search

Microsoft's MSN provides the following statement about site ranking:

The MSN Search ranking algorithm analyzes factors such as web page content, the number and quality of websites that link to your pages, and the relevance of your website's content to keywords. The algorithm is complex and never human-mediated.⁹

They provide a link to a brief set of Guidelines for Successful Indexing, including a few technical recommendations and six content guidelines, including this helpful hint: "Add a site map. This enables MSNBot to find all of your pages easily."¹⁰ It also provides three specific prohibitions -- keyword stuffing, hidden text and "using techniques to artificially increase the number of links to your page, such as link farms."¹¹

C. Google

⁸ <http://help.yahoo.com/help/us/ysearch/indexing/indexing-14.html>

⁹ http://search.msn.com/docs/siteowner.aspx?t=SEARCH_WEBMASTER_CONC_AboutSiteRanking.htm&FORM=WRDD

¹⁰ http://search.msn.com/docs/siteowner.aspx?t=SEARCH_WEBMASTER_REF_GuidelinesforOptimizingSite.htm

¹¹ [Id.](#)

Google says the following about its search rankings:

Google's order of results is automatically determined by more than 100 factors, including our PageRank algorithm. Please check out our Technology Overview page for more details. Due to the nature of our business and our interest in protecting the integrity of our search results, we limit the information we make available to the public about our ranking system.

The Technology Overview page says that Google purports "to examine the entire link structure of the web and determine which pages are most important [and] conducts hypertext-matching analysis to determine which pages are relevant to the specific search being conducted."¹² Google goes on to explain that:

PageRank interprets a link from Page A to Page B as a vote for Page B by Page A. PageRank then assesses a page's importance by the number of votes it receives. PageRank also considers the importance of each page that casts a vote, as votes from some pages are considered to have greater value, thus giving the linked page greater value. Important pages receive a higher PageRank and appear at the top of the search results.

Google's search engine also analyzes page content. However, instead of simply scanning for page-based text (which can be manipulated by site publishers through meta-tags), Google's technology analyzes the full content of a page and factors in fonts, subdivisions and the precise location of each word. Google also analyzes the content of neighboring web pages to ensure the results returned are the most relevant to a user's query.¹³

II. SIMILARITIES AND DIFFERENCES BETWEEN THE MAJOR ENGINES.

All three engines strive for relevance, obviously, and say little else. Otherwise the similarities are not very numerous, and growing fewer all the time as each tries to differentiate itself in this fast-growing market. The University of California, Berkeley provides interesting comparative opinion of search engine capabilities as well as useful search tips.¹⁴ If you prefer to conduct your own comparison, there are a number of websites that offer comparative functionality.¹⁵

While positively striving for maximum relevance in response to each query, the engines are united in their fight against search engine spam. They routinely remove sites from their indices that are deemed to denigrate their users' search experience. Yahoo! and MSN specifically discourage the excessive use of keywords, hidden text, and links to and from other sites. Google is generally believed to do the same. All of these engines

¹² <http://www.google.com/intl/en/corporate/tech.html>

¹³ *Id.*

¹⁴ U.C. Berkeley Library, *The BEST Search Engines*, <http://www.lib.berkeley.edu/TeachingLib/Guides/Internet/SearchEngines.html> (last visited November 17, 2005).

¹⁵ See, e.g., <http://twingine.com/>.

place significant emphasis on the number and quality of links to and from other sites, though none disclose the level of importance they attribute to 'link popularity' in their algorithms.

A. Link Popularity

Some commentators have suggested that Google places more emphasis on link popularity than does Yahoo! or MSN. "In reality, Google relies mostly on two criteria: The number of sites that link to yours and, to a lesser degree, the content of your page as it relates to the keywords selected. . . . Every link is a vote. But people buy and sell links."¹⁶ If this is an accurate assumption, then sites that are designed for Google may not rank as highly on the other engines, and this may help explain the divergent results that the engines provide in response to identical queries.

Link popularity is just one factor of many and, by itself, does not determine ranking outcomes in any of the major search engines. In truth, the more words in the query, the less likely link popularity will be important in determining the score for a given document for that query. In addition, link popularity analysis is far more sophisticated than merely tabulating incoming links. For example, link popularity analysis includes not only a value judgment as to the linking site, but the age of link, the rate of removal of incoming links as well as the rate of acquisition of back links ('too many, too fast' could indicate unwanted activity).

B. Other factors.

So what is considered by search engines in addition to link popularity? Google says that there are "more than 100 factors," the others do not mention a number, but they are numerous and generally speaking, can be broken into "on-site" and "off-page" categories.

1. On-Site Factors. On-site factors relied upon by search engines are literally found on the web page or site that is indexed by the search engine. On-site factors are within the control of the webmaster or a site and are comprised primarily of keyword usage such as:

- Use of keywords in the domain name(s);
- Use of keywords in the site's directory and file names;
- Use of keywords in the web page titles and tags;
- Keyword density -- ratio of the query keyword(s) to other words on the page; and
- Keyword location such as appearance in the headline or in the first few paragraphs of text (there is an expectation that a relevant page will naturally utilize the keywords at the top, or "beginning," of the document).

¹⁶ Adam L. Penenberg, *Search Rank Easy to Manipulate*, <http://wired-vig.wired.com/news/print/0.1294.66893.00.htm> (March 17, 2005) quoting Greg Boser, owner and operator of search engine optimizer WebGuerilla.

2. Off-the-page factors. As the description suggests, off-the-page factors exist off the web page or site of the indexed content and, accordingly, are less able to be controlled or influenced by webmasters. In addition to link popularity analysis discussed above, other off-the-page factors include:

a) Anchor text. Anchor text is the text that appears within the tags of the documents that link to a given document. These third party descriptions provide more objective descriptions that are considered useful metadata which describe that document.

b) Click through rates. Click through rates indicate the frequency with which users are actually clicking through to a given search result. By measuring actual click through rates, search engines help to identify highly ranking results which are not attracting a high ratio of users who view those results (and thus may be less relevant to users), as well as lower ranking sites which are attracting a high ratio of users (and thus may be more relevant).

c) Additional factors. Wikipedia has produced a list of these additional factors that search engines may consider:¹⁷

- Age of site and age of content on site
- Length of time domain has been registered
- Regularity with which new content is added
- Related terms to those used in content (the terms the search engine associates as being related to the main content of the page)
- External links, anchor text in those external links and in the sites/pages containing those links
- Citations and research sources (indicating the content is of research quality)
- Stem-related terms in the search engine's database (finance/financing)
- Incoming back links and anchor text of incoming back links
- Metrics collected from other sources, such as monitoring how frequently users hit the back button when search engine results pages send them to a particular page
- Metrics collected in data-sharing arrangements with third parties (like providers of statistical programs used to monitor site traffic)
- Use of sub-domains, use of keywords in sub-domains and volume of content on sub-domains
- Semantic connections of hosted documents
- Rate of document addition or change
- IP of hosting service and the number/quality of other sites hosted on that IP
- Other affiliations of linking site with the linked site (do they share an IP address or have a common postal address on the "contact us" page?)

¹⁷ http://en.wikipedia.org/wiki/Search_engine_optimization.

- Technical matters like use of 301 to redirect moved pages, showing a 404 server header rather than a 200 server header for pages that don't exist, proper use of robots.txt
- Hosting uptime
- Broken outgoing links not rectified promptly
- Unsafe or illegal content
- Quality of HTML coding, presence of coding errors
- Hand ranking by humans of the most frequently accessed search engine results pages ("SERPs")

II. COMMON WAYS WEBSITE OPERATORS ATTEMPT TO MANIPULATE RESULTS, AND SEARCH ENGINE TACTICS TO COUNTERACT SPAM

Every commercial website operator seeks to optimize his or her placement within the major search engines, and the practices outlined above and made publicly available by the major search engines allow companies to legitimately facilitate the indexing and presentation of content.

Given that the "best practices" provided by search engines for legitimate search engine optimization ("SEO") are general in nature, what distinguishes legitimate SEO from search engine spamming may not always seem clear. Generally speaking, any attempt to game a search engine in order to unnaturally elevate ranking is considered "spamming the engine". Clean, standards-compliant sites offering unique content tend to rank well, and there is no substitute for doing the homework and spending the time necessary to: (i) prepare unique, compelling and accurate metadata (e.g., title tags, title description, meta tag description, keywords, etc.); (ii) write clear and concise text, arranged in a natural and uninterrupted order for human readers; and (iii) use standard practices in describing and implementing scripts, style sheets and other components that govern the display of the page.

In its most basic form, the term "search engine spam" refers to machine-generated pages designed to appear in search engines to attract traffic. But there are many other ways that webmasters try to trick search engines to rank their pages higher in search results pages. Below is a table describing other common search engine spamming techniques. Spammers rarely use any one method in isolation, instead combining multiple techniques to create and disseminate spam.

Technique	Definition	Detection Method ¹⁸
Cloaking	The document's content as presented to a search engine's crawler differs from the content presented to a user's browser, primarily accomplished via IP address delivery software, which performs an automated check to see if the requesting party's IP address matches that of known search engine spiders (if not, the software assumes "human" and serves a different page or redirects user to alternative content). ¹⁹	Consistently change webcrawler IP addresses in an effort to overcome cloaking. Crawl and cache documents and compare the cache to the document as shown in a browser (often using a non-identifiable IP address).
Mirroring	Hosting multiple websites with the same content, but different URLs. A mirror site is an exact copy of the content of another site without a legitimate reason for doing so (e.g., such as to counteract censorship, or as a legitimate way to quickly and reliably offer large software downloads).	Algorithmic duplication detection technology.
Metadata Abuse	False meta tags. Including one or more meta tags in the document's header that do not reflect the actual content of the document. Keyword stuffing. Excessive use of keywords in meta tags (as well as on the page) in order to increase the document's apparent relevance to use queries. Hiding keyword lists within HTML code.	Utilize technology to analyze and compare source code and header text (especially in the description and keywords meta tags) and the text in the body. Algorithmic filtering to detect abnormal keyword density and/or location.
Text Abuse	The body of the document includes visible text (often a keyword list) that does not reflect the actual content of the	Obvious when viewed in a browser.

¹⁸ All detection methods discussed are general in nature and are not intended to reflect the practice(s) of any search engine, including Yahoo! Search.

¹⁹ In some circumstances, there are legitimate uses for cloaking such as for delivering content such as Macromedia Flash (search engines are not able to capture content delivered in Flash).

	<p>document.</p> <p>Hidden / Invisible text. Hiding text (often commonly searched terms) on a page by placing it in the same color as the background</p>	<p>Analysis and comparison of source code, fonts and background information.</p>
<p>Gateway or Doorway Pages</p>	<p>Creating low-quality web pages that contain very little content but are stuffed with key words and phrases designed to rank highly within the search results. These pages are designed with the purpose of sending users to a different destination (doorway pages often have a "click here to enter" button).</p>	<p>Human review following technical identification.</p>
<p>Link Spamming aka Blog or Comment Spam</p>	<p>Automated robots inundate blogs, wikis, guestbooks, discussion boards or any web application that displays hyperlinks submitted by visitors by creating posts with return links.</p> <p>A spammer may also create multiple web sites at different domain names that all link to each other.</p> <p>Link farms: a large group of web pages, typically created in an automated manner, that contain hyperlinks to one another or specific other pages in order to deceive search engines regarding apparent link popularity.</p>	<p>Algorithmic identification of documents having a disproportionate number of unique outbound links in comparison to the amount of anchor text in the document.</p> <p>Aging delay (e.g., repressing sites from appearing in an index for a period of time).</p>
<p>Site or Page Replacement</p>	<p>A URL, or entire domain name, that once contained legitimate content, is reused for undesirable content once sufficient ranking has been achieved.</p>	<p>Content analysis to identify mismatches between the URL string (e.g., the domain name) and the document's content.</p>
<p>Redirect Doorways or Gateways</p>	<p>A set of URLs that redirect for an illegitimate purpose, such as affiliate spam.</p>	<p>Algorithmic analysis of URL strings to identify trigger factors such as embedded keywords and affiliate IDs.</p>

		Monitoring IP ranges and DNS server data.
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CASE LAW ON USE OF OTHERS' TRADEMARKS AS META TAGS.

As described above, there are a number of spamming methods used in an attempt to impermissibly manipulate search engine results, including the unauthorized use of trademarks in text and or metadata. A body of case law has developed in the United States courts regarding the use of trademark keywords as meta tags. Generally these cases are brought by a plaintiff who alleges their competitor has added the plaintiff's trademarks as meta tags on the competitor's site, designed to increase traffic to the competitor's site from users looking for the plaintiff's products or site. But of course these cases, as with all trademark cases, are heavily fact intensive and appear to have divergent results. We provide a synopsis of this case law below.

I. Early cases.

Niton Corporation v. Radiation Monitoring Devices, Inc., 27 F. Supp. 2d 102 (D.Mass., 1998) The court granted a preliminary injunction, thus providing an early source of authority for the proposition that the use of trademarks in meta tags could be actionable trademark infringement. During the course of litigation between the parties involving competing claims of false and misleading marketing statements, the plaintiff learned that the defendant had copied its HTML, including meta tags, which caused defendant's website to appear in search results in response to queries containing plaintiff's name. The court order stated that defendants' meta data was likely to divert consumers by leading users to believe that defendant was also known as plaintiff or otherwise affiliated with plaintiff.

Bally Total Fitness Holding Corporation v. Andrew S. Faber, 29 F. Supp. 2d 1161 (C.D.Cal., Nov. 23, 1998). Five days after the Niton decision, the Central District of California provided one of the earliest decisions permitting the use of trademarks as meta tags. The defendant developed a gripe site to demonstrate that "Bally Sucks." The plaintiff sued for trademark infringement, trademark dilution and unfair competition. In response to defendant's summary judgment motion, the court dismissed each of plaintiff's causes of action, finding there was no likelihood of confusion and that commercial use, an essential element of the dilution claim, was lacking. The decision is most noteworthy in that the court expressly provided support for the use of another party's trademark as a meta tag, stating that to hold otherwise could deprive consumers of protected and useful information.

II. Playboy cases.

Following these early decisions, Playboy Enterprises began actively pursuing website owners that it found to be using Playboy trademarks as meta tags.

Playboy Enterprises, Inc. v. Calvin Designer Label, 985 F. Supp. 1219 (N.D.Cal. 1997) In response to defendant's use of the PLAYBOY and PLAYMATE marks in domain names and as meta tags, plaintiff brought claims of trademark infringement, unfair competition, including false designation of origin and false representation, and dilution. The court granted plaintiff's request for a preliminary injunction; however, the defendant did appear to oppose the motion.

Playboy Enterprises, Inc. v. Asiafocus Int'l, Inc., 1998 WL 724000, 1998 U.S. Dist. LEXIS 10459 (E.D.Va. 1998). The defendants used plaintiff's marks in domain names and as meta tags. Plaintiff brought claims for trademark infringement, false designation of origin, unfair competition and dilution under the Lanham Act, and common law trademark infringement and unfair competition under the common law of the Commonwealth of Virginia. In entering default judgment against all defendants, the court found there was a likelihood of confusion and that defendant's uses diluted the plaintiff's mark. The court awarded three million dollars in damages, plus attorneys' fees and costs.

Playboy Enterprises, Inc. v. Global Site Designs, Inc., 1999 WL 311707 (S.D.Fla.) The defendants used plaintiff's marks in domain names and as meta tags. Plaintiff brought claims for trademark infringement, false designation of origin and dilution. The court preliminarily enjoined defendants from using the plaintiff's marks as, among other things, meta tags.

Playboy Enterprises, Inc. v. Welles, 7 F.Supp.2d 1098 (S.D.Cal.1998), aff'd. in part, rev'd in part, 162 F.3d 1169 (9th Cir. 2002) Playboy's string of victories ended with its case against former Playmate Terry Welles. The district court denied plaintiff's request for a preliminary injunction, and later granted defendant's summary judgment motion. On appeal, the Ninth Circuit largely affirmed the district court's decision, finding that defendant's use of plaintiff's marks in headlines, banner advertisements and meta tags were permissible, nominative fair uses.

III. Brookfield Communications.

Following the district court decisions discussed above, the Ninth Circuit became the first Circuit to address the issue of trademark infringement by way of domain name use, including use of a mark in meta tags. Brookfield Communications Inc. v. West Coast Entm't Corp., 174 F.3d 1036 (9th Cir. 1999). This case was the first to find "initial interest confusion" to be a form of trademark infringement.

In 1998 the plaintiff, owner of the registered MOVIEBUFF trademark in connection with an online database providing data and information regarding the motion picture and television industries, learned that the defendant intended to offer a searchable

entertainment industry database at moviebuff.com. Plaintiff filed a lawsuit against defendant, primarily alleging trademark infringement and unfair competition under the Lanham Act.

Whether considering defendant's use of plaintiff's mark in defendant's website's domain name or in its meta tags, the Brookfield court found that the analysis of the likelihood of confusion factors was essentially the same, since either use by defendant involves the same marks, products and services, and consumers. In applying the likelihood of confusion analysis in the context of the internet, the Brookfield court found that the most important factors for consideration were the: (1) virtual identity of marks, (2) relatedness of plaintiff's and defendant's goods, and (3) overlap in marketing and advertising channels. Given the nearly identical, virtual identity of marks (in fact, identical other than the .com TLD), the close proximity of the parties' competing goods, and the parties' simultaneous use of the Web as a marketing channel, the court found that consumer confusion was likely.

The court found that defendant's use of plaintiff's mark in its meta tags would cause defendant's website to appear along with plaintiff's in search engine results. Users who queried "moviebuff" would be able to scroll through the search results and would be able to distinguish defendant's site from plaintiff's site by the respective domain names. Although there would be no source confusion in the sense that consumers would know they were patronizing defendant rather than plaintiff, consumers looking for plaintiff's site, who are instead diverted to defendant's site, may find a service similar enough to what they were searching for that they may decide to utilize defendant's website. This initial interest confusion was held to be trademark infringement because, by using search engine manipulation to divert consumers in this way, the defendant improperly benefited from the goodwill that plaintiff had developed in its mark. Accordingly, the panel reversed and remanded the case to the district court with instructions to enter a preliminary injunction in favor of plaintiff, thus creating the doctrine of 'initial interest confusion' which is still heavily debated today.

IV. Additional cases.

SNA, Inc. v. Paul Array, 51 F. Supp.2d 554 (E.D. Pa., 1999) aff'd 259 F.3d 717 (3d Cir. 2001). Plaintiffs offered "do-it-yourself" assembly kits for an amphibious aircraft called the Seawind, and the court found that plaintiffs had common law trademark rights in the SEAWIND mark. The defendants sold engines which could be installed in the amphibious crafts, provided assembly services for purchasers of plaintiff's kits and published "The Seawind Builders Newsletter" in print and at the domain name seawind.net. Plaintiffs filed suit alleging, among other things, trademark infringement under and unfair competition under §43(a) of the Lanham Act.

In issuing a preliminary injunction, the court found that plaintiff had common law rights in the SEAWIND mark, and following a bench trial the court further found that: (i) consumer confusion was likely to result from defendant's use of the seawind.net domain name, and the court made permanent its preliminary injunction prohibiting the

defendant's use of that domain; and (ii) defendant's repetitive use of plaintiff's mark in its meta tags evidenced a bad faith attempt to confuse consumers rather than a good faith effort simply to index the content of the website, and enjoined defendants' use of plaintiff's mark in the meta tags of defendant's website.

Marianne Bihari and Bihari Interiors, Inc. v. Craig Ross and Yolanda Truglio, 119 F.Supp.2d 309 (S.D.N.Y., 2000). A dissatisfied former client of plaintiffs' interior design services, the defendants maintained websites which were highly critical of plaintiffs' services. Plaintiff filed suit to preliminarily enjoin defendants from using the names "Bihari" or "Bihari Interiors" in the domain names or meta tags of their websites, alleging that the defendants' actions violated the Anticybersquatting Consumer Protection Act ("ACPA"), the Lanham Act.

The defendants' websites were originally located at bihar.com and bihariinteriors.com, but the content was transferred to designscam.com and manhattaninteriordesign.com following the filing of the lawsuit. Further, defendants' agreed to terminate their registrations of the bihari.com and bihariinteriors.com domain names. Consequently, the court's analysis was limited to defendants' use of plaintiffs' marks as meta tags, and the court held that ACPA was inapplicable to meta tags.

The court further found that plaintiff failed to demonstrate a likelihood of success on the merits of her trademark infringement claim. Citing the Bally decision, the court adopted the holding that the mere use of another party's mark on the Internet does not constitute use in commerce per se. In the case at hand, however, the court held that the defendants' actions in providing hyperlinks to other interior designers transformed defendants' use of plaintiffs' marks to a use in commerce. Nevertheless, the court held that the plaintiff was not likely to prevail on their Lanham Act claims of trademark infringement, because the plaintiffs had failed to establish a likelihood of confusion as a result of defendants' use of plaintiffs' marks in the meta tags of defendants' websites.

In so holding, the court rejected the plaintiff's argument that they could establish a likelihood of confusion under the initial interest confusion espoused by the Ninth Circuit in the Brookfield case. The Bihari court noted that the Second Circuit had not yet applied the initial interest confusion doctrine to an Internet case but, assuming *arguendo* that the doctrine was applicable, held that the plaintiffs could not prove initial interest confusion because plaintiff did not maintain a website. As a result, users were not being diverted from one site to another, deemed an essential component of an "initial interest confusion" claim in the context of the Internet. Further, the court held that users were not likely to mistake defendants' sites as being sponsored or affiliated in some way with plaintiffs' services, given the domain name and short descriptions of defendants' websites that appear to users in search engine results.

Finally, the court found that the defendants' use of the plaintiffs' marks in meta tags was in good faith and protected fair use. The court stated that the use of a mark in meta tags was descriptive as contemplated by the fair use doctrine when used in an index or catalog to accurately describe the defendant's connection to the business claiming

trademark protection, and defendant had used plaintiffs' marks "to fairly identify the content of his websites." The court was also pointedly sensitive to First Amendment considerations, stating that "A broad rule prohibiting use of "Bihari Interiors" in the metatags of websites not sponsored by Bihari would effectively foreclose all discourse and comment about Bihari Interiors, including fair comment."

Ford Motor Company v. 2600 Enterprises, et al., 177 F. Supp. 2d 661 (E.D.Mich. 2001). Defendant registered the domain name fuckgeneralmotors.com which redirected users to ford.com. Plaintiff filed an action for trademark infringement, dilution and unfair competition. Plaintiff moved for a preliminary injunction which the court denied. In finding that plaintiff likely could not prevail on its dilution claim, the court noted that the defendant's only use of the FORD mark was in the programming of code of the website located at the domain which automatically redirected users to plaintiff's website, and the court concluded such a use was not commercial as required by the Federal Trademark Dilution Act ("FTDA"). Likewise, the court found that the defendant had failed to allege facts sufficient to show a likelihood of succeeding on the merits of its infringement and unfair competition claims, since it could not demonstrate that defendant had used the mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services.

Promatek Industries, Ltd. v. Equitrac Corporation, 300 F.3d 808 (7th Cir. 2002). Defendant placed plaintiff's COPITRACK mark in its website meta tags, as defendant provided maintenance and service on Copitrak equipment. In response, plaintiff brought suit and sought a preliminary injunction preventing any use of plaintiff's marks in defendant's meta tags, which motion the district court granted. The Seventh Circuit affirmed the district court's issuance of the injunction, holding that the plaintiff was likely to prevail in its trademark infringement claims due to initial interest confusion among consumers. While at first blush it would seem the defendant's use may be a fair description of its services, the court made clear that the defendant had manipulated the meta tags in a way "calculated to deceive consumers into thinking that Equitrac was Promatek."

Paccar, Inc. v. Telescan Technologies, L.L.C., 115 F. Supp. 2d 772 (E.D. Mich., 2000), aff'd. in part, vacated in part and remanded, 319 F.3d 243 (6th Cir. 2003) overruled in part, KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111; 125 S. Ct. 542; 160 L. Ed. 2d 440 (2004). Plaintiff brought trademark infringement and dilution claims against defendant, and the district court granted plaintiff's request for a preliminary injunction. After considering the typical trademark infringement factors, the Sixth Circuit found a likelihood of confusion related to defendant's use of plaintiff's trademark in domain names. After a considered discussion of the fair use and nominative fair use defenses, the court found that defendant's use of plaintiff's marks in domain names was not a fair use. The court went on to finding that the district court's injunction enjoined defendant from not only using plaintiff's marks in domain names, but also in web page meta tags. The Sixth Circuit held that the district court should have conducted a separate analysis as to whether the defendant's use of plaintiff's trademarks as meta tags, by itself, was likely to cause confusion. The panel held that

the scope of the preliminary injunction was too broad, vacated the injunction's prohibition of the use of trademarks in meta tags, and remanded the case for further consideration in this regard.

J.K. Harris & Co. v. Kassel, 253 F.Supp.2d 1120 (N.D.Cal. 2003). The court refused to apply the fair use doctrine to allow uses of another's mark that unfairly manipulated search engines, and found that these uses diverted consumers away from the plaintiff's services. Distinguishing Bihari, where the parties were not competitors, the J.K. Harris court enjoined defendant's use as likely to cause initial interest confusion among consumers, and found that the design of defendant's website indicated an intent to induce consumer confusion.

Trans Union LLC v. Credit Research, Inc., 2001 U.S. Dist. LEXIS 3526 (N.D.Ill. 2001). The plaintiff sought to enjoin the defendants from using TRANS UNION in their website meta tags. The court found no evidence of a likelihood of confusion due to the meta tags, and noted that the defendants' websites were not among the top fifty results for a "Trans Union" search. Further, the court found no evidence of bad faith and held that the defendants' use was fair and descriptive.

Eli Lilly & Company v. Natural Answers, Inc., 233 F.3d 456 (7th Cir. 2000). Plaintiff, owner of the PROZAC trademark, sued defendant regarding its "Herbrozac" product. Defendant's website contained the word "Prozac" in its meta tags. The court of appeals found that the use resulted in a likelihood of confusion and that defendant could not rely upon the fair use defense because the term "Prozac" was not used in a merely descriptive manner.

Horphag Research Ltd. v. Larry Garcia, dba Healthierlife.com, 328 F.3d 1108 (9th Cir. May 9, 2003), amended and superseded by Horphag Research Ltd. v. Pellegrini, 337 F.3d 1036 (9th Cir. 2003) cert den. by Garcia v. Horphag Research Ltd., 157 L. Ed. 2d 900, 2004 U.S. LEXIS 142 (U.S., 2004). The court found that defendant's repeated use of plaintiff's trademark on the defendant's website, including in the site's meta tags, satisfied the elements of a trademark infringement claim, and that defendant could not avail himself to either the classic or nominative fair use defenses. The Ninth Circuit reversed and remanded the district court's decision as it related to plaintiff's dilution claims, in order to provide the district court with an opportunity to consider the matter in light of the Supreme Court's Moseley v. V. Secret Catalogue, Inc. decision.

Bijur Lubricating Corp. v. Devco Corporation, et al., 332 F. Supp. 2d 722 (U.S.D.C., N.J. 2004). Plaintiff brought suit alleging trademark infringement, dilution and unfair competition under the Lanham Act, common law service mark infringement and unfair competition, and dilution and unfair competition under New Jersey state law in response to defendant's use of plaintiff's mark in the meta tags of defendant's website. Defendant claimed that its meta tag use of defendant's mark was lawful and limited to the extent necessary to promote and sell replacement parts manufactured by plaintiff and/or compatible replacement parts manufactured by plaintiff's competitors. Holding that, as a matter of law, defendant was permitted to truthfully describe the replacement

parts, the court granted defendant's summary judgment motion as to the state and federal trademark infringement and unfair competition claims. As to plaintiff's dilution claims, the court adopted the Ninth Circuit's holding in Playboy Enterprises, Inc. v. Welles, that nominative uses of marks are excepted from the Dilution Act, and in the case at hand the defendant's use of plaintiff's mark, to describe its products as replacement parts for plaintiff's products, did not weaken the distinctive link between plaintiff's mark and its goods. The court likewise granted defendant's summary judgment motion as to the state and federal dilution claims.

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