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**Q:** *Is my trademark protected in cyberspace?*

**The courts have taken different views of when the use of another party's trademark to "trigger" Internet content is an actual "use" of a trademark sufficient to sustain an infringement claim.**

**A:** Web site operators often employ technical strategies to attract visitors to a site. Operators of web sites should be mindful, however, that use of a competitor's trademark in connection with these strategies may give rise to a claim of trademark infringement based on "initial interest" confusion. "Initial interest" confusion occurs when a party improperly uses a competitor's mark to create initial consumer interest, even if the customer later realizes, prior to making a purchase, that the product or service he is purchasing is not actually associated with the trademark holder.

One of the most popular and primitive ways to attract visitors to a web site is through the use of "metatags," or hidden text, to alter search engine results. Although search engines have become increasingly sophisticated, the goal of a party using metatags containing the trademark of a competitor is to have their web page appear in the search results for the competitor's mark.

The courts have taken different views of when the use of another party's trademark to "trigger" Internet content is an actual "use" of a trademark sufficient to sustain an infringement claim. For example, one Federal Court of Appeals ruled that use of a competitor's trademark as a metatag can give rise to an infringement claim. More recently, however, another Federal Court of Appeals declined to extend this ruling. The court determined that a pop-up ad company does not actually "use" a trademark owner's mark when it references that mark in a non-viewable manner to generate pop-up ads for a competitor of the trademark owner. Even more recently, the Sixth Circuit has indicated an unwillingness to provide relief for "initial interest" confusion claims in a case involving the shape of Gibson USA's iconic Les Paul guitar.

Given the mix of outcomes in recent "initial interest" confusion cases, there has been increasing uncertainty concerning the scope of protection available under this claim, especially in cases involving the "nontraditional" use of a trademark on the Internet. In January 2006, the

U.S. District Court for the Southern District of Ohio revisited the use of a competitor's marks in metatags and held that using trademarks owned by another in metatags to attract viewers to a web site constitutes trademark infringement under the theory of "initial interest" confusion.

Tdata, Inc. (Tdata), is a producer and seller of a software product used for managing aircraft maintenance and repair. Aircraft Technical Publishers (ATP) was involved in a patent dispute with Tdata. In the course of the dispute, ATP filed a counterclaim against Tdata alleging, in part, that Tdata had infringed ATP trademarks—ATP, ATP NAVIGATOR and ATP MAINTENANCE DIRECTOR—by using these marks as metadata tags to attract consumers to Tdata's website.

The court held that, if a company uses the trademark of another to capture the interest or attention of consumers, the party creating the initial interest may be misappropriating the goodwill of the trademark owner. In this case, Tdata's use of ATP's trademarks as metatags serves only to bring potential customers to Tdata's web site, some of whom might never have gone there but for the misuse by Tdata of ATP's trademarks.

In reaching the conclusion that an infringement had occurred, the court stated that the initial interest confusion doctrine is to be considered as part of the eight-factor test used to determine whether there is a likelihood of consumer confusion and, hence, trademark infringement:

1. The strength of the plaintiff's mark
2. The relatedness of the products/services
3. The similarity of the marks
4. Evidence of actual confusion (or initial interest confusion in this context)
5. Marketing channels used
6. Likely degree of purchaser care
7. The defendant's intent in selecting the mark
8. The likelihood of expansion of the product lines.



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The court found that Tdata's use of ATP's mark in metatags did not constitute a good faith, descriptive use of the mark, but was instead use in a "bad faith, bait-and-switch, create-initial-confusion sense."

While there have been some cases that have rejected by implication that a "behind-the-scenes" use of trademarks constitutes a trademark infringement (regardless of consumer confusion), the Tdata case reaffirms the possibility that a company using the trademarks of its competitors in non-traditional ways to drive visitors to their site must consider the risks of trademark infringement.

Mark Plotkin, an associate of the firm, also contributed to this article.