Initial Interest Confusion: Attempting to Define its Current Status

Within European Trade Mark Law

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Introduction

From the decisions in Interflora v. Marks & Spencer (CAII)\(^1\) and OCH-Ziff Management v. OCH Capital\(^2\) it has become apparent that there is some uncertainty as to the true nature of initial interest confusion and its current status within the European trade mark regime. There appears to be pressure to accept this doctrine as comprising part of the confusion rationale contained in article 5 (1) (b) of Directive 2008/95. However, despite this mounting pressure there seems to be a reluctance to accept this concept into the current framework resulting in a divergence of judicial opinion.

Initial interest confusion is sometimes referred to as bait-and-switch\(^3\), which is a far more apt label for this type of activity as it accurately describes the situation where a famous brand is used by a rival trader as a bait to lure customers into making a purchase, but that any confusion as to the origin of the goods or services is dispelled prior to the purchase being made. As Johnson\(^4\) notes such activity is likely to be particularly relevant in relation to the use of a trade mark on a website and recent case law appears to confirm this. Given the continued increase in online retail and the recent growth in trade mark disputes that contain

\(^1\) Interflora v Marks & Spencer plc (CAII) [2014] EWCA Civ 1403.
\(^2\) OCH-Ziff Management v. OCH Capital [2010] EWHC 2599 (Ch.)
\(^3\) OCH-Ziff Management v. OCH Capital [2010] EWHC 2599 (Ch) at paragraph 82.
As a result of judicial reluctance to answer whether initial interest confusion should be embraced and comprise part of the scheme of protection there has been little, if any, analysis of whereabouts in the existing framework it would best fit. Although initial interest confusion has the word confusion in its title and therefore suggests it could become a part of the confusion rationale found in article 5(1) (b) of Directive 2008/95 it also suggests that only famous trade marks are targeted, those which are well-known amongst consumers to the extent that they are capable of acting as a bait. This would suggest that the provision drafted especially for trade marks with a reputation, article 5(2), would be the correct place for infringement arguments on this basis to be set. Therefore this article aims to analyse this doctrine, its nature and current status, its use in relation to articles 5(1) (b) and 5(2) before drawing conclusions about its possible future role. The key questions that this article will examine and which it will argue need to be addressed are firstly is initial interest confusion currently actionable? Secondly, should it be actionable and thirdly should it comprise part of article 5(1) (b) or article 5(2) of Directive 2008/95?

To what extent is initial interest confusion currently grounds for an infringement action?

The most recent guidance upon whether or not initial interest confusion is a cause for action under article 5(1) (b) of Directive 2008/95 can be found in the judgment of Kitchin L.J. in Interflora v. Marks & Spencer (CAII)\(^5\). The facts were that Marks & Spencer had purchased the keyword “Interflora” as an adword and that whenever this was typed into the search engine it triggered a sponsored link for Marks & Spencer’s own flower delivery service. The

\(^5\) Interflora v. Marks & Spencer (CAII) [2014] EWCA Civ 1403.
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The word “Interflora” had been selected because, although it does not enjoy the largest share of long-distance flower delivery services, it does have a high level of brand recognition among the public and therefore its trade mark has become heavily associated with this mode of delivery, namely where individual florists sign up to a franchise agreement that they will produce and deliver set flower arrangements for a set price. Therefore flowers can be sent long distance as the shop nearest to the recipient’s address will fulfil the order. Following the case Google France v. Louis Vuitton6, it is clear that the search engine operator is not liable and therefore Interflora issued infringement proceedings against Marks & Spencer. The case was sent to the CJEU for a preliminary ruling. In the subsequent application of this ruling, Arnold J. miss-applied the legal test and reversed the onus of proof placing the burden upon the defendant to prove that his use did not cause confusion. In the subsequent appeal 7Kitchin L.J. was keen to re-establish the correct balance and place the onus upon the claimant to prove their claim, therefore the matter has been referred back to the High Court for a re-trial.

At paragraphs 152-158 of the appeal judgment Kitchin L.J. sets out that the doctrine does not currently form part of the trade mark regime and furthermore states that it is a highly controversial and an unnecessary and potentially misleading gloss on the tests formulated by the CJEU in relation to this provision. Kitchin L.J. clearly sets out his view, and that of the Court of Appeal, and in so doing takes a stance directly opposed to that taken by Arnold J. in a first instance decision in OCH-Ziff v. OCH Capital8. Here the claimants OCH-Ziff Management, a leading global asset management group managing numerous alternative investment funds, more commonly referred to as a hedge fund, alleged that the defendant had infringed their two Community registrations for the trade marks “OCH-ZIFF” and “OCH” for

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6 Google France Sarl v. Louis Vuitton Malletier SA (C-236/08)
7 Interflora v. Marks & Spencer (CAII) [2014] EWCA Civ 1403.
8 OCH-Ziff Management v. OCH Capital [2010] EWHC 2599 (Ch)
financial services. OCH Capital was established by the defendant Mr. Ochocki to provide stockbroking services on an advisory and execution only basis for high-net-worth individuals or their companies. There were several uses of the OCH sign to which the claimant objected, namely the use of the sign “OCH CAPITAL” displayed in a street level window of OCH Capital’s offices, the use of the sign on their homepage of their website and the domain name and suffixes to company email addresses which were “ochcapital” and “ochcapital.co.uk”.

Also in dispute was the OCH Capital logo which appeared on the company website and was used in its office stationery and brochure. Arnold J. accepted the arguments put forward to hold that initial interest confusion was actionable under article 5(1) (b) of Directive 2008/95. However, following Kitchin L.J.’s ruling in Interflora v. Marks & Spencer (CAII), and his opposition to Arnold J., it would appear that the short answer to the question posed at the start of this section would be that initial interest confusion is not currently a cause of action under EU trade mark law. However, this is too simplistic an answer. Initial interest confusion was not the main cause of contention between the parties in Interflora v. Marks & Spencer (CAII), where the burden of proof had at first instance been incorrectly placed upon the defendant forcing the Court of Appeal to order that the case be forwarded for a re-trial in the High Court. Furthermore the judgment by Kitchin L.J. only refers to the reluctance to incorporate this doctrine into article 5(1) (b) of the Directive which leaves open the real possibility that it could have a role within article 5(2). Therefore this issue has not been fully resolved and merits further analysis.

The infringement provisions are contained within article 5 Directive 2008/95, which sets out the exclusive rights conferred by a trade mark and reads as follows;
"5 (1) The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;

(b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark.

(2) Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark."

Article 5(1) (a), under which protection is said to be absolute, is designed to be the anti-counterfeiting provision whereby protection is offered against third parties selling their goods as though they were those of the registered proprietor and is therefore the provision which most closely resembles the common law tort of passing-off. Under this provision once the necessary facts are established confusion is presumed. Article 5(1) (b) offers protection where because of the similarity between the sign and mark and the goods or services concerned there exists a likelihood of confusion on the part of the public. This is assessed by
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reference to the average consumer who is a legal construct who exhibits the characteristics of being reasonably well-informed, observant and circumspect. That the likelihood of confusion includes the likelihood of association has been held to mean a likelihood of confusion in a wider economic sense for example in Wagamamma v. City Centre Restaurants\(^9\) when the defendant used the sign Rajamama for his Indian cuisine restaurant, the proprietor of the mark Wagamama for the chain of Chinese restaurants objected. Laddie J. held that not only was there a likelihood of confusion, due to the aural similarity between the sign and the mark, which was highly significant given that many restaurant recommendations are given by word of mouth, but that there was a likelihood that customers would make an association between the sign and the mark and falsely assume some kind of economic link in that they were sister companies or part of the same franchise. This extension of the doctrine of confusion takes into account the way consumers have become accustomed to companies with an established brand expanding into neighbouring product markets. The reasoning formulated by Laddie J. in Wagamamma v. City Centre Restaurants and subsequently upheld by the CJEU in Sabel v. Puma\(^10\) enabled the doctrine of confusion to evolve and thereby take into account the way the average consumer perceives trade marks and the economic undertakings they signal. Both articles 5(1) (a) and 5(1) (b) are based on the confusion rationale and are aimed at protecting the trade mark’s core function of signalling trade origin thereby allowing consumers to rely upon it as a guarantee of quality, not that this guarantee is absolute for an undertaking may vary the quality of its goods or services if it chooses but the resulting losses or gains will be theirs’ alone. Article 5(2) is said to be based upon the dilution rationale. It is aimed at protecting the distinctive character and the repute of the trade mark. The CJEU in Arsenal v.

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\(^10\) Sabel BV v. Puma AG (C-251/95)
Reed\textsuperscript{11} stated that the core function of a trade mark is in effect threefold in that it encompasses the ability to signal trade origin, investment and advertising. Through being based on the confusion rationale at articles 5(1)(a) and 5(1)(b) the emphasis is on protecting the core function of signalling trade origin whilst under article 5(2) the emphasis shifts more towards protecting the investment and advertising function and therefore is restricted to being available only for those marks deemed to have a reputation, and to have achieved enough prominence to be at risk from damage to their distinctiveness and repute. The provisions are aimed at preventing different types of damage and therefore they each have different checks and balances built into their legal tests.

Initial interest confusion occurs where a person upon encountering a sign similar to a registered trade mark, is initially confused by such use, but that this is corrected prior to the purchase being completed. The key feature is that even though the confusion is corrected prior to the transaction being completed, technically it could still amount to a likelihood of confusion to the extent that it could form an infringement under article 5(1) (b) of the Directive. It is for this reason that there is dispute as to whether or not it ought to be allowed to form part of the confusion rationale under EU trade mark law and, that despite Kitchin L.J.’s dismissal of this line of reasoning in the Court of Appeal that it is likely to be contested at some future date.

\textsuperscript{11} Arsenal Football Club plc. v. Reed (C-206/01)
In *OCH-Ziff v. OCH Capital*\(^{12}\) initial interest confusion was put forward in argument for infringement under article 5(1) (b) as both parties operated in the financial services market under similar marks. OCH-Ziff was a global asset management group, managing numerous alternative investment funds (a hedge fund) whilst OCH Capital provided stock broking services on an advisor and execution-only basis for high-net worth individuals or their companies. OCH-Ziff complained about the defendant’s use of the signs “OCH”, “OCH CAPITAL” in both its office premises and its website and the online use of the signs “ochcapital” and “ochcapital.co.uk”. The origins of initial interest confusion lie within US trade mark law as counsel for OCH-Ziff demonstrated by reference to the resolution adopted by the International Trade Mark Association on 18\(^{th}\) September 2006 which states;

“Initial interest confusion is a doctrine which has been developing in US trademarks cases since the 1970s, which allows for a finding of liability where a plaintiff can demonstrate that a consumer was confused by a defendant’s conduct at the time of interest in a product or service, even if that initial confusion is corrected by the time of purchase.”\(^{13}\)

They also cited a well-known hypothetical example of initial interest confusion taken from the U.S. case *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*\(^{14}\) which merits being set out here as it provides a detailed illustration of how the doctrine operates in practice.

“Suppose West Coast’s competitor (let’s call it ‘Blockbuster’) puts up a billboard on a highway reading ‘West Coast Video: 2 miles ahead at Exit 7’ where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast’s

\(^{12}\) OCH-Ziff Management v. OCH Capital [2010] EWHC 2599 (Ch)

\(^{13}\) Ibid. at paragraph 80.

\(^{14}\) Brookfield Communications, Inc. v. West Coast Entertainment Corp. 174 F. 3rd 1036 (9th Cir., 1999)
store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there. Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by, West Coast. Nevertheless, the fact that there is only initial interest confusion does not alter the fact that Blockbuster would be misappropriating West Coast’s acquired goodwill.”

Accepting this definition Arnold J. went on to hold that initial interest confusion was actionable under article 5(1)(b) of the Directive. Later, when Arnold J. was called upon to give judgment in Interflora v. Marks & Spencer, he applied this same reasoning. However, in Interflora v. Marks & Spencer the facts were that Interflora, the famous florist franchise and registered proprietor of that trade mark objected to Marks & Spencer having purchased a keyword identical to that mark as an adword from Google so that whenever that mark was entered by a surfer into that search engine it would trigger the display of a sponsored link for Marks & Spencer’s own flower delivery website in the search engine results page (SERP). On these facts it was article 5(1)(a) which was argued in Court and importantly in the subsequent Court of Appeal ruling, and Kitchin L.J.’s overturning of Arnold J.’s reasoning, he focuses on the reasons why initial interest confusion is not a part of article 5(1)(a). This part of the appeal ruling is fudged in that Kitchin L.J. examines how and why Arnold J. accepted this doctrine in relation to article 5(1)(b) in OCH-Ziff v. OCH Capital, but then

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15 Ibid. at paragraph 1064.
16 Interflora v. Marks & Spencer [2013] EWHC 1291 (Ch)
17 Interflora v. Marks & Spencer (CAII) [2014] EWCA Civ. 1403.
confines his refusal to accept this doctrine to a discussion about article 5(1)(a)\textsuperscript{18}. Therefore there remains a possibility that in a future case where the factual circumstances gave rise to an article 5(1)(b) infringement action the incorporation of initial interest confusion into the confusion rationale at article 5(1)(b) could still be argued. Kitchin L.J. states why initial interest confusion ought not to be imported into article 5(1)(a), and perhaps his reasoning can also be applied to article 5(1)(b) and so merits further scrutiny. In specific relation to article 5(1)(a) and the use of signs identical to registered trade marks in keyword advertising, he states that the CJEU have held that it is not an inherently objectionable practice per se and that it is useful in developing an undistorted system of competition\textsuperscript{19}. To this end the CJEU have formulated legal tests which incorporate appropriate checks and balances. Kitchin L.J. concludes that importing initial interest confusion into these carefully constructed tests would be tantamount to adding an unnecessary and potentially misleading gloss thereby upsetting the delicate legal balance set by the CJEU. At paragraph 157 he sets out his broader views on the doctrine.

"Returning now to the doctrine of initial interest confusion, it is, as the judge recognised, highly controversial and, as he also recognised, it has been applied to a range of situations in which a sign which is the same as or similar to a registered trade mark is used by a third party in advertisements for goods or services for which it is registered. They extend from, at one end of the spectrum, initial attraction of consumers based upon some kind of association of advertised goods or services with those of the trade mark proprietor or even mere diversion, to, at the other end of the spectrum, initial confusion which gives rise to a real risk that consumers will actually buy the advertised goods or services even though they know they

\textsuperscript{18} Ibid. at paragraph 155.
\textsuperscript{19} Ibid. at paragraph 156.
These criticisms are certainly forceful but they ought not to deter one from asking the question of whether initial interest confusion should play a part in the European trade mark regime and if so, to weigh the various options available.

Should the doctrine of initial interest confusion form part of the confusion rationale?

The legal test for deciding whether or not there exists a likelihood of confusion on the part of the public under article 5(1) (b) of the Directive was set out by the CJEU in their judgment in *Sabel v. Puma*\(^{21}\). They held that all of the relevant circumstances should be weighed by the court, together, in answering the one question of whether there existed a likelihood of confusion thereby creating what has become more commonly known as the global appreciation approach. This approach enabled the court to avoid messy legal questions as to whether greater weight ought to be attached to the similarity between the sign and the mark or the goods and services concerned, and whether when assessing the mark more attention should be given to its distinctive and dominant components or its overall impression. This of course was crucially important in *Sabel v. Puma* for both parties’ goods were sportswear.

The sign which Sabel was using consisted of both a pictorial and a word element in that it comprised the picture of a bounding cheetah over the top of a lozenge shape in which was displayed the word Sabel. Puma were seeking to protect their famous trade mark of the silhouette of a bounding puma. Under the global appreciation approach the greater the

\(^{20}\) Ibid. at paragraph 157.

\(^{21}\) *Sabel BV v. Puma AG (C-251/95)*
degree of similarity between the mark and the sign can allow for a greater degree of
dissimilarity between the goods or services or vice versa. The assessment will take into
account the mark and the sign each as a whole, while taking into account their distinctive and
dominant components and the fact that a consumer rarely has the opportunity to compare the
two side by side and therefore has to rely upon the imperfect recollection of the trade mark he
carries in his mind. Credit is given to both the inherent distinctiveness of a mark and its
acquired distinctiveness, which will usually be the result of widespread marketing,
longstanding use or a wide geographical reach or a combination of these. Furthermore it is
believed that the more well-known a trade mark becomes, the more likely it is to be confused
by a consumer encountering a similar sign. Given the extreme flexibility of the global
appreciation approach it is easy to comprehend how initial interest confusion could be added
to this mix and simply become one more factor for the courts to weigh in making their global
assessment. It would easily fit into the existing legal framework and sit comfortably with the
legal principles already employed. It would not for example place pressure on any of the
factors or judicial reasoning outlined above. In fact inserting initial interest confusion into
the global appreciation approach in this way might provide a solution to the problem,
identified by Kitchin L.J.in Interflora v. Marks & Spencer (CAII)\textsuperscript{22}, that it does not contain
appropriate checks and balances, for the CJEU in creating the global appreciation approach
made these checks and balances. The checks and balances here are that the matter is assessed
globally where all the relevant circumstances are weighed together in the one question. It is
this context that provides the correct balance between a monopoly right and the rights of
others. In Specsavers International Healthcare Ltd. v. Asda Stores Ltd.\textsuperscript{23} Kitchin L.J.

\textsuperscript{22} Interflora v. Marks & Spencer plc. (CAII) [2014] EWCA Civ. 1403.
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summarised the global appreciation approach at paragraph 52 before concluding at paragraph 87.

"In assessing the likelihood of confusion arising from the use of the sign the court must consider the matter from the perspective of the average consumer of the goods or services in question and must take into account all the circumstances of the case that are likely to operate in that average consumer’s mind in considering the sign and the impression it is likely to make on him. The sign is not to be considered stripped of its context."24

Therefore by adding initial interest confusion into the global appreciation approach and enabling the effect of the defendant’s mark upon the average consumer to be assessed in the light of all the other relevant factors, thus examining it in its proper context, it would not be devoid of proper checks and balances.

Initial interest confusion under article 5(2): An alternative approach

To date the debate has been focussed upon whether initial interest confusion should be accepted within European trade mark law. As a result there exists little if any analysis as to the true nature of the doctrine. If one takes a closer look at its constituent parts it appears to have all the components necessary to fall within article 5(2) thus providing an alternative option. Recent years have witnessed the development of unfair advantage form being perceived as a descriptor to aid the heads of damage of harming the ‘distinctive character’ or the ‘repute of the trade mark’ into a head of damage in its own right. This expansion of the heads of damage under article 5(2) creates the possibility that if initial interest confusion were

24 Ibid. at paragraph 87.
defined as where a third party takes an unfair advantage of the distinctive character or the
repute of the trade mark that this concept could fit neatly within this provision. *L’Oreal v. Bellure*\(^{25}\) marks the key evolutionary stage in the CJEU’s promotion of unfair advantage into
a head of damage in its own right. The case concerned the four fragrances ‘Tresor’, ‘Noa’,
‘Miracle’ and ‘Anais Anais’. These were manufactured by, and the trade marks registered to,
the L’Oreal Group who issued legal action against Bellure for their sales of so-called ‘smell-
alikes’ which are cheaper scents, not counterfeits, that purport to smell very similar to the
expensive luxury perfumes they attempt to imitate. At the time of the first instance hearing in
the High Court in 2006 L’Oreal held the largest share of the perfume market with the famous
brand names Chanel and Estee Lauder not far behind. It was estimated by L’Oreal that the
cost of launching a new fragrance was between €60 million and €120 million. The largest
item of expenditure was the launch campaign listed at between €50 million to €100 million.
The launch campaign is the chief mechanism by which the brand image of luxury is
constructed upon the foundations of trade mark registrations for both the fragrance name and
the shape of the bottle. Bellure were using the L’Oreal trade marks ‘Tresor’, ‘Miracle’, ‘Noa’
and ‘Anais Anais’ on price comparison lists to explain to consumers which famous perfume
their own cheap ‘smell-alike’ was imitating. By their use of the trade marks the defendants
were benefitting from the fame and reputation of those marks which in turn would help to
increase the sales of their own perfumes. In their judgment the CJEU held that not only did
the defendant’s actions amount to taking an unfair advantage of the registered trade marks,
but also that this was a head of damage in its own right separate from that of damage to the
distinctive character or the repute of the trade mark. They also stated that this concept relates
not to the detriment caused to the mark but to the advantage taken by the third party as a

\(^{25}\) *L’Oreal SA v. Bellure NV (C-487/07)*
result of the use of an identical or similar sign. Therefore it is possible for a third party to take an unfair advantage of a trade mark even in instances where there has been no damage to the distinctive character or repute of the mark. The CJEU in *L’Oreal v. Bellure* also appeared to go one step further and delete the pre-modifier “unfair” by suggesting that any advantage taken by a third party from a mark with a reputation is unfair.

“The advantage arising from the use of by a third party of a sign similar to a mark with a reputation is an advantage taken unfairly by that third party of the distinctive character or the repute of the mark where that party seeks by that use to ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark’s image.”

In the High Court Jacob L.J. noted that no consumer was likely to be deceived into believing that a scent purchased for €1 would be identical to a luxury perfume, however this is not the point. The point is that by his use of an identical or similar sign, the third party has obtained an advantage from the registered mark which is unfair because he has not contributed towards the creation and maintenance of the reputation and power of attraction of that mark and has not paid the proprietor any recompense. Given this definition of an unfair advantage under article 5(2) it is possible to draw parallels between this and the concept of initial interest confusion.

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26 Ibid. at paragraph 50.
A third party who uses a rival trader’s registered trade mark as a bait with which to lure customers into buying his goods or services is obtaining an unfair advantage from that trademark. By its very nature bait-and-switch depends upon the power of attraction generated by famous trade marks. If they were not famous and had their proprietors not invested in creating a strong identity they would not have the necessary power of attraction that a third party could then seek to exploit. It is the trade marks of brand leaders within a specified market which are those most likely to be targeted for they have the strongest identity. The third party uses the attractive force of their rival’s trade mark in order to help stimulate the desire to make a purchase within the consumer. Once this desire has been created they then substitute their own product or service. It is this facet of substitution selling, or initial interest confusion, which takes an unfair advantage of the trade mark and therefore if this were held to be just one type of unfair advantage, as prohibited by article 5(2) it would have all of the correct checks and balances built within its legal tests for these have already been outlined by the CJEU in L’Oreal v. Bellure. Placing initial interest confusion within the head of damage of taking an unfair advantage would allow the law to develop to more closely reflect the reality of the situation.

To some extent the use by a third party of a brand leader’s trade mark in order to lure customers into purchasing goods originating from a different economic undertaking has already been held as amounting to taking an unfair advantage of the trade mark as illustrated in Cosmetic Warriors v. Amazon. At the centre of this case was Amazon’s use of the trade mark ‘lush’. The facts were that Amazon had purchased ‘lush’ as an adword and that whenever this was typed into a Google search engine it would trigger a sponsored link for the
Amazon website. Under the CJEU’s formula set out in Google France in this situation Amazon was the party deemed to be using the sign in the course of trade as they were the ones who selected as an adword a sign identical to a registered trade mark. Amazon also had its own search engine facility within its website to help consumers navigate the vast amount of products offered for sale there. Two key facts were that not only did Amazon not sell any Lush products but that they also did not display a ‘no results found’ message in response to a consumer search. The search mechanism then as now, automatically selects and therefore directs consumers to alternative products. Lush claim to be the inventor of the bath bomb, a product with which it is heavily associated, and therefore when consumers entered the terms ‘lush’, ‘lush cosmetics’ or ‘lush bath bombs’ into the Amazon search engine, they were taken to web pages where alternative brands of bath bombs and cosmetic products were offered for sale. Amazon were in effect using the term ‘lush’ in a generic sense to indicate the class of goods rather than the economic undertaking responsible for them. There appears to be a fine line between using trade marks in a generic sense to signal the class of goods and the use made in initial interest confusion. Both uses place the mark’s ability to signal the class of goods above that of signalling the economic undertaking who is the proprietor of that mark. Both uses are reliant upon the fame of the trade mark and advertising functions. They also are a potential threat to the trade mark’s core function of indicating trade origin. Such damage is not about causing harm to the consumer, who may or may not be confused, but damaging the very essence of that famous trade mark and therefore placing this within the framework outlined in article 5(2) would be consistent with the underlying ethos of this provision.
Conclusion

To date the issue of initial interest confusion has not been resolved. Its present status has not been satisfactorily answered but given the increased trade mark infringement cases with an online element it is a question that is unlikely to go away and one which ultimately will need to be ruled upon by the CJEU. Dependent upon the pronouncement of the CJEU will be the future role of this doctrine. It seems that it would be best suited to being viewed as part of the head of damage of taking an unfair advantage of a mark with a reputation under article 5(2). This outcome would allow the doctrine to develop in a way which would more accurately fit with the factual circumstances of what the third party is seeking to gain by his use of that mark and what the proprietor wishes to be protected against.