

Contrefaçon de marque sur internet : évolution récente aux Etats-Unis

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Je remercie Quentin Ullrich , Columbia Law School class of 2022

Moyens de dévier le consommateur: sont-ils tous contrefaisants?

- I. Pratiques d'autrefois: Metatagging, Pop-up Ads, etc.
- II. Pratiques courantes: AdWords
- III. Nouveauté: Mobile Click to Call Ads
- IV. Ambiguïté: In-Website Searches and Webpages
- V. Contrefaçon par complicité

Contrefaçon d'une marque enregistrée: Lanham Act Section 32(1)

Ce qu'il faut prouver: Use in commerce; Likelihood of confusion

“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”

Contrefaçon d'une marque non enregistrée: Lanham Act Section 43(a)(1)

“(1) Any person who, on or in connection with any goods or services . . . **uses in commerce** any word, term, name, symbol, or device . . . which—

(A) is **likely to cause confusion**, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person”

Que veut dire: “Use in commerce”?

Classique: en tant que marque pour les produits ou services du défendeur

Plus controversé: Pour attirer l’attention vers les produits ou services du défendeur qui portent leur propre marque:

En incorporant la marque du demandeur dans les métatags des pages web des produits ou services du défendeur? Faut-il que la marque litigieuse soit visible à l’internaute?

Se servir de la marque d’autrui pour déclencher une publicité pour les produits ou services du défendeur? (“AdWords”)

Vendre l’utilisation ou suggérer une marque en tant que AdWord est-ce une “utilisation” de la marque *de la part du moteur de recherche*?

Attirer l'attention du consommateur vers le site ou les produits/services d'un tiers: pratiques d'autrefois

Metatagging:

Mots inclus dans le code du site, repérables par un moteur de recherche (mais pas par le consommateur), dans le but de manipuler les résultats de la recherche pour faire apparaître le site [technique actuellement dépassée]

Pop-up Ads visant une catégorie générale de produits ou services

En general, pas une "utilisation" de la marque. v. 1-800 Contacts, Inc. v. WhenU.Com, Inc., 414 F.3d 400 (2d Cir. 2005).

En revanche, AdWords, qui ciblent une marque particulière, sont une "utilisation" v. Rescuecom Corp. v. Google Inc., 562 F.3d 123 (2d Cir. 2009).

Metatagging: *Playboy v. Welles* (9th Cir. 2002) (Terri Welles “Playmate of the Year 1981”)

Si utilization, pas en tant que marque, mais informationnelle

```
<HTML>
<HEAD>
<TITLE>Terri Welles-Playboy Playmate Of The Year 1981-Erotic Pictures</TITLE>
<META NAME="description" CONTENT="Playboy Playmate Of The Year 1981
Terri Welles website featuring nude photos, semi-nude photos, softcore
and exclusive Members Club">
<META NAME="keywords" CONTENT="terri, welles, playmate, playboy, playmate
of the year 81, Playmate Of The Year 1981, playboy centerfold,
model, playboy models, semi-nudity, naked,
, nude, Terri Welles, welles, terri,">
<META NAME="rating" CONTENT="adult only"><meta http-equiv="PICS-Label"
content="(pics-1.1 "http://www.rsac.org/ratingsv01.html" 1 generate
comment "RSACi North America Server" by "terri@terriwelles.com"
for "http://www.terriwelles.com" on "1997.09.09T14:02-0800" r (n 3 s
0 v 0 l 0))">

<script language = "JavaScript">
<!--
function func(){
    createwindow()
}
function createwindow()
{
    msgwindow=window.open("news.html","displayWindow","width=600
,height=420")
}
self.name="ABC";
//--></script>
<SCRIPT LANGUAGE="JavaScript">
<!-- Hide from JavaScript-Impaired Browsers
function initArray() {
    for(i=0;i<initArray.arguments.length; i++)
        this[i] = initArray.arguments[i];
```

Metatagging: *North Am. Medical Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211 (11th Cir. 2008)

Utilisation “in connection with the sale of goods”

The screenshot shows a Microsoft Internet Explorer browser window displaying a Google search for "accu-spina & North American Medical". The search results page includes several organic results and a sponsored link. The organic results are:

- North American Medical Corporation::Home Page**
The caduceus swoosh is a trademarked logo of **North American Medical Corporation** ...
Accu-SPINA® Receives Recognition from **Medical** and Scientific Community ! ...
www.namcorporation.com/ - 51k - [Cached](#) - [Similar pages](#)
- North American Medical Corporation::News**
The caduceus swoosh is a trademarked logo of **North American Medical Corporation** ...
Accu-Spina Wins Coveted Induction to the International Museum of ...
www.namcorporation.com/news_page_link_08.htm - 29k - [Cached](#) - [Similar pages](#)
More results from www.namcorporation.com/
- Special Report**
Accu-SPINA Manhatt Treatments include use of Accu-Spina and IDD Therapy for spinal decompression etc etc
IDD therapy is the restrict **AxiomWorldwide.com**
the **Accu-spina** table. Only the **Accu-spina** table can perform IDD ...
cw11.empowereddoctor.com/doctor_index_1426.html - 13k - [Cached](#) - [Similar pages](#)
- icomex.com - Accu-Spina History**
North American Medical, the manufacturer of this revolutionary treatment plan believes that
"The **Accu-SPINA®** system is simply the best non-surgical ...
www.friscourgentcare.com/html/AccuSpina.htm?article_id=22 - 9k - [Cached](#) - [Similar pages](#)
- [PDF] [PUBLISH] IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH ...**
File Format: PDF/Adobe Acrobat - [View as HTML](#)
injunction in favor of the Plaintiffs-Appellees, **North American Medical** and "Accu-Spina"
trademarks, or at least that Axiom distributed or sold all of ...
www.ca11.uscourts.gov/opinions/ops/200711574.pdf - [Similar pages](#)

The sponsored link is:

- Sponsored Links**
Special Report Released
Top **Medical** School Doctors Report.
New Research. Spinal Decompression.
AxiomWorldwide.com/SpecialReport/
- Accu-spina**
Pre-Owned Spina System DRS.
Free Shipping Included In Low Price
Outlet.Med1Online.com

Pop-Up Ads

En réponse d'une recherche de "financial services"

Financial Services: Investment and Financial Management from Service - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites History Mail Print Edit Discuss Research

Address <http://www.schwab.com/public/schwab/home/welcome.html?cmsid=P-997170&vl1=home> Go Links

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[Find funds using Schwab Equity Ratings](#)

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SELECT CASH RATES

CDS ¹	Rate
3 Month CD	5.18% APY
6 Month CD	5.21% APY

Find a branch near you

Enter zip code FIND

Outside the U.S. | [中文](#)

DJIA | NASDAQ | S&P 500

DJIA AS OF 4:00 PM ET 11/2/2006

Index	Value	Change	% Change
DJIA	12,018.54	-12.48	-0.1%
NASDAQ	2,334.02	-0.33	0.0%
S&P 500	1,367.34	-0.47	0.0%

MARKET DATA DELAYED AT LEAST 20 MIN

http://www.schwab.com/public/schwab/research_strategies/market_insight/investing_strategies/other_choices/what_about_cash.html?

start 3 Firefox 2 Microsoft Offi... 2 Windows Exp... Windows Media ... Financial Service... EN 6:42 PM

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Barron's ranks Schwab's stock picks #1. Again.

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SELECT CASH RATES

CDS ¹	
3 Month CD	5.25% APY
6 Month CD	5.26% APY
1 Year CD	5.00% APY

Find a branch near you

Enter zip code FIND

Outside the U.S. | [中文](#)

DJIA NASDAQ S&P 500

DJIA *charles*
AS OF: 4:00 PM ET 10/9/2006

9:30am 4:00pm

▲ DJIA	11,857.81	7.6
▲ NASDAQ	2,311.77	11.7
▲ S&P 500	1,350.66	1.0

MARKET DATA DELAYED AT LEAST 20 MIN.

AmeriValue
Home Refinance Center

Lock in Your Low Rate Today!
Refinance Now & Save!

Click Here! or **Call Now 877-769-6885**

Top lenders compete for your business:
Get up to 4 offers now!

WHENU SaveNow

This offer is from [software](#) you installed on your PC - not from website(s) you are visiting. Questions about WhenU? [Click here](#) or call toll free 866-WHENU-11.

AdWords

L'achat de mots-clés dont la recherche par un consommateur déclencherà une publicité pour les produits ou services de l'acheteur. Mots-clés vendus par le moteur de recherché (Google, Bing . . .)

Pas de problème si le mot clé est générique: e.g. Lindt paie pour que sa publicité apparaisse quand le consommateur tape "chocolat"

Plus controversé si Lindt achète (et Google propose) "Nestlé" comme mot-clé

Est-ce une utilisation, par qui? Conduit-elle à la confusion?

About 2,470,000 results (0.44 seconds)

Ads · Shop chocolat nestlé i



Nestle dessert
chocolat noir lot
€3.99
Monoprix Plus

By Feed Price



📍 Pick up tomorr...

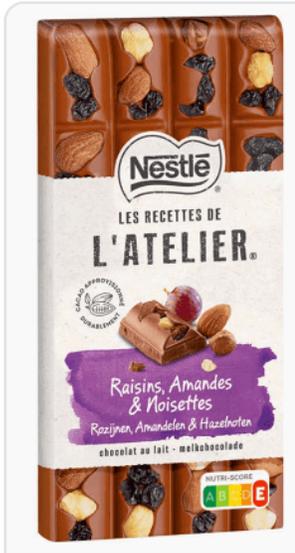
Recettes De
Latelier - ...
€11.99
Carrefour Drive

By Google



Coffret 60 mini
carrés Lindt ...
€19.90
Lindt

By Google



Nestlé dessert
tablette chocolat
€3.39
Monoprix Plus

By Feed Price



Nestlé desser
chocolat au lait
€2.65
Monoprix Plus

By Feed Price



AdWords: Utilisation mais pas confusion(?)

L'achat et la vente de keywords est une "use in commerce." *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009).

Mais la majorité des juridictions ne constatent pas de confusion.

- *V. McCarthy* §25A:7 n.9-10 (recensement de la jurisprudence).

Exceptions:

- Lorsque la publicité qui résulte du AdWord contient la marque visée.
- Agissements trompeurs du site cliqué

Sondage Franklyn et Hyman (2013):

- 47% des internautes faisant une recherche à base de la marque voulaient des infos sur les produits du détenteur de la marque; 31% cherchaient des produits similaires (recherche générique); 22% n'exprimaient pas de préférence.

“Initial Interest Confusion”

Théorie: La marque attire l’attention du consommateur, l’induisant à cliquer sur le lien du défendeur. Même si, au moment d’effectuer un achat, le consommateur comprend qu’il n’est pas chez le détenteur de la marque, le défendeur aura obtenu un avantage commercial indû car le consommateur ne serait pas autrement allé sur son site.

La confusion litigieuse se produit-elle au moment de cliquer? Au moment d’acheter? Entre les deux?

Le consommateur est-il “sophistiqué”? Attentif au contenu du site?

Une fois arrivé sur le site, quelles informations rencontre-t-il?

Est-ce qu’il comprend qu’il est sur le site d’un tiers et que celui-ci lui propose des produits similaires ou concurrents: “bait and switch” ou légitime comparaison?

Your account isn't active - Your ads aren't running because your account has been canceled. **REACTIVATE**

Select campaign settings **Set up ad groups** 3 Create ads 4 Review

Keywords

Find relevant keywords by describing what you're advertising in this ad group

Enter related web page URL

Domino's Pizza Add products or services

Keywords are words or phrases that are used to match your ads with the terms people are searching for

- dominos
- dominos near me
- domino's pizza
- domino's menu
- dominos pizza near me
- dominos vouchers
- dominos coupons
- dominos delivery
- domino's pizza menu
- dominos pizza menu
- dominos hours
- dominos online
- dominos order online
- dominos pizza online

Match types help control which searches can trigger your ads
keyword = Broad match "keyword" = Phrase match [keyword] = Exact match [Learn more](#)

Daily estimates

Estimates are based on your keywords and daily budget

Ad group 1

Enter a budget to see estimated daily clicks, cost and cost-per-click.

Daily budget

Add Budget

AdWords et Confusion

Edible Arrangements, LLC v. Provide Com., Inc., No. 3:14-CV-00250 (VLB) (D. Conn. July 29, 2016) (denying defendant's motion for summary judgment on infringement claims)

Defendant's ad:



- “[T]he conduct at issue is not a defendant's keyword bidding, considered in a vacuum, but rather the effect of the keyword bidding in conjunction with the defendant's advertisement.”
- Reasonable trier of fact could find likelihood of confusion.

1-800 Contacts, Inc. v. Lens.com, Inc.: utilization de la marque en tant que AdWord

The screenshot shows a Google search for "1800contacts" in Microsoft Internet Explorer. The search results are categorized into "Sponsored Links" and "Organic Results".

Sponsored Links:

- 1800CONTACTS.com** (Sponsored Link): www.1800contacts.com Need contact lenses? Buy online in just 5 minutes. We make it simple.®
- Acuvue Contacts - \$14.89** (Sponsored Link): www.Lens.com Ordering Acuvue **Contacts** is easy. Save time and money. Fast delivery
- LensWorld.com 75% Off** (Sponsored Link): Up to 75% off Retail Price! Free Shipping on Orders Over \$89 www.LensWorld.com
- Buy Contacts Online** (Sponsored Link): Simple online ordering of lenses. Compare our prices and save! www.Just_lenses.com
- Discount Contact Lenses** (Sponsored Link): Buy online and save up to 50% on your **contacts**. www.discountedcontactlense.com

Organic Results:

- Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens Store®**
- 1-800 CONTACTS** - The world's largest contact lens store®. Over 23 million factory-fresh contacts in stock, including Acuvue, Focus, Freshlook, Optima, ... [Stock quote for CTAC](#)
- www.1800contacts.com/ - 46k - [Cached](#) - [Similar pages](#)
- [Most Popular](#) - www.1800contacts.com/lenses/contact-lens-p.htm
- [Acuvue](#) - www.1800contacts.com/discount/acuvue.htm
- [My Account](#) - www.1800contacts.com/AccountHub/MyAccount.aspx
- [New Visitors](#) - www.1800contacts.com/BuyersGuide/
- [More results from www.1800contacts.com >](#)

Colored Contact Lenses at 1-800 CONTACTS | World's Largest Contact ...

Colored Contact Lenses at **1-800 CONTACTS** - get free shipping, easy online ordering, and guaranteed customer service at the World's Largest Contact Lens ...

www.1800contacts.com/lenses/color.htm - 48k - [Cached](#) - [Similar pages](#)

A red dashed circle highlights the "Buy Contacts Online" sponsored link.

Lens.com (suite)

Utilisation non contrefaisante

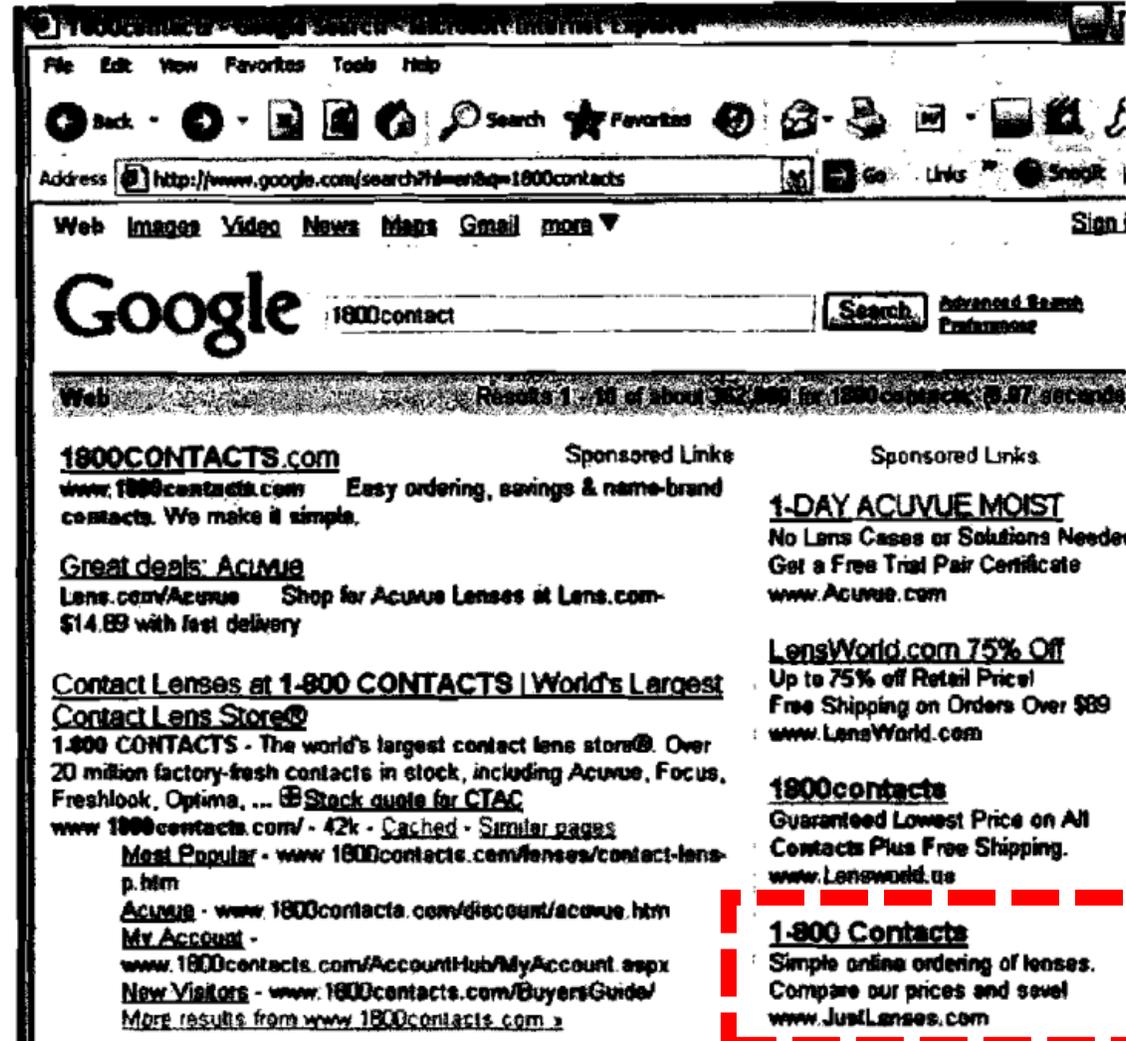
Motif: la marque du demandeur n'apparaissait pas dans la publicité du défendeur

The screenshot shows a Google search results page for the query "1800contacts". The browser is Microsoft Internet Explorer. The search results include several sponsored links and organic results. A red dashed box highlights a sponsored link for "Buy Contacts Online" from JustLenses.com, which includes the text "Simple online ordering of lenses. Compare our prices and save! www.JustLenses.com". Other sponsored links include "1800CONTACTS.com" and "Acuvue Contacts - \$14.89". Organic results include "Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens Store" and "1-800 CONTACTS - The world's largest contact lens store".

Lens.com (suite)

Utilisation contrefaisante

Filiales du défendeur utilisant la marque du demandeur dans leurs publicités.



AdWords & Initial Interest Confusion: comparaison

Non-contrefaisante (*Lens.com*)

The screenshot shows a Google search for "1800contacts". The search results page includes a navigation bar with "Web", "Images", "Video", "News", "Maps", "Gmail", and "more". The search bar contains "1800contacts" and a "Search" button. Below the search bar, there is a link to "View and manage your web history". The results section shows "Results 1 - 10 of about 423,000 for 1800contacts. (0.07 seconds)". The first result is a sponsored link for "1800CONTACTS.com" with the text "Need contact lenses? Buy online in just 5 minutes. We make it simple.®". Below this, there is a red dashed box highlighting a result for "Acuvue Contacts - \$14.89" from "www.Lens.com". Other results include "Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens Store®" and "Colored Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens ...".

Contrefaisante (*Edible Arrangements*)*

The screenshot shows a Google search for "edible arrangements". The search bar contains "edible arrangements" and a "Search" button. Below the search bar, there is a navigation bar with "All", "Maps", "Shopping", "Images", "News", and "More". The results section shows "About 14,400,000 results (1.24 seconds)". A red dashed box highlights an advertisement for "Edible Fruit Arrangements - Delicious Fruit Gifts 20% Off" from "www.proflowers.com/Fruit.Gifts". The ad includes a 4.2 star rating and the text "Guaranteed On-Time Delivery!". Below the ad, there is a link to "https://www.ediblearrangements.com" and a heading "Edible Arrangements® Fruit Baskets, Bouquets, & Delivery". The page also features several other links and sections, including "Gifts Under \$50", "About Our Store", "Store Locator", "Edible Arrangements Hoboken", "Edible Arrangements Fort Lee", and "Birthday Gifts Delivered".

*Note: the above image has been digitally re-constructed for illustrative purposes.

Select Comfort Corp. v. Baxter (8th Cir. May 11, 2021)

Les partis vendent des matelas concurrents.

Les marques du demandeur sont “SLEEP NUMBER”, “SELECT COMFORT”, et “COMFORTAIRE”.

Le défendeur achetait des AdWords; sa publicité comprenait des termes peut-être trompeurs. Les liens vers son site contenaient les marques du demandeur.

Le site du défendeur encourageait les consommateurs d'appeler un numéro, ou de “chatter” avec un représentant .

<u>Customer's Search</u>	<u>Appellees' Ad</u>
Sleep Number Bed	<p>Sleep 55% Off Number Beds (888) 690-4088 personalcomfortbed.com/v/SleepNumber Online Edition Bed Sale *Ends 6/10! Save \$2000 on set + \$500 Upgrades</p>
sleep number	<p>Number Bed Sleep Sale 60% - Closeout Sale Ad personalcomfortbed.com/v/SleepNumber (888) 694-4088 Personal Comfort Bed Compare Best (Price Warranty Value)</p> <p>FDA Registered Facility Try In-Home "Risk Free" Free Ship, Pillow, No tax Compare Now (Save \$2000)</p>
Sleep Number Bed	<p>Sleep 60% Off Number Sale PersonalComfortBed.Com PersonalComfortBed.Com/v/SleepNumber Closeout Number Bed Sale Ends 5/5 Compare Best (Price Warranty Value)</p> <p>(Official) Online Specials 120 Night "Risk Free" Trial 60% Savings over Sleep Number Top 10 Reasons To Buy Compare Now (Save \$2000)</p>
“Select Comfort”	<p>Select 55% Off Comfort personalcomfortbed.com/SelectNumber ▼ 1 (888) 694 4088 Online Edition Bed Sale *Ends 8/5! Free Bed Base, Pillows, No Tax, S/H</p>
Comfortaire	<p>Comfort Air Beds On Sale www.personalcomfortbed.com/v/Comfortaire ▼ Online Edition Bed Sale *Ends 3/17 Compare Best (Price Warranty Value)</p>



Search box containing "Sleep Number bed"



Sign in

Search

About 45,600,000 results (0.23 seconds)



- Web
- Images
- Maps
- Videos
- News
- Shopping
- More

Richfield, MN
Change location

Show search tools

Ads related to sleep number bed

Sleep Number® Bed Sale 1 (877) 610 1916
www.sleepnumber.com/OfficialSite
 ★★★★★ 280 reviews for sleepnumber.com
 Queen Mattresses Start at \$699. Shop Our Semi Annual Sale Now!
 New Customers: Get \$50 Savings Card - Find a Store Near You
 Map of Minnetonka, MN and nearby [sleepnumber.com](#) locations
 (952) 525-1595 - Directions

Sleep 50% Off Number Beds 1 (877) 280 6031
personalcomfortbed.com/v/SleepNumber
 (Save \$1600) + Free \$500 Upgrade! Extra Savings & Offers (Ends 11/05)
 (Official) Online Specials - 60 Night "Risk Free" Trial - Our Most "Popular" Model

Shop for sleep number bed on Google Sponsored

Dream Number \$699.00 Dream...	Sleep Number Pearl \$2838.00 QVC.com	Sleep Number Bed \$1510.00 eBay	Sleep Number Pearl \$4557.00 QVC.com	Sleep Number Pearl \$2940.00 QVC.com

Shop by price: Up to \$600 \$600 - \$1000 \$1000 - \$2500

Map for sleep number bed



Ads

Sleep Comfort™ Sale Event
sleep-comfort.com/Call_800-611-2808
 #1 Rated Adjustable Bed.
 Made in the USA & Lifetime Warranty

Buy Sleep Number Beds
www.qvc.com/SleepNumber
 ★★★★★ 19,202 reviews for qvc.com
 Take Advantage Of 3+ Easy Payments
 On Comfortable Sleep Number Beds!

Compared to Number Bed*
www.comfortairedirect.com/OnlineSpecial
 Online Special - All Beds on Sale!
 Lowest Price Guaranteed - Ends Soon



Select Comfort bed



Sign in

Search

About 32,200,000 results (0.26 seconds)



Web

Images

Maps

Videos

News

Shopping

More

Minneapolis, MN

Change location

Show search tools

Ads related to select comfort bed ⓘ

Sleep Number® Bed Sale 1 (877) 530 9188

www.sleepnumber.com/OfficialSite

★★★★★ 280 reviews for sleepnumber.com

Queen Mattresses Start at \$699. Shop Our Semi Annual Sale Now!

New Customers: Get \$50 Savings Card - Find a Store Near You

Map of 12503 Wayzata Blvd., Suite 148 and nearby sleepnumber.com locations
(952) 525-1595 - Directions

Select 50% Off Comfort Bed | Personal Touch Bed.Com

personaltouchbed.com/vsSleepNumber

(Ends 11/05) + \$500 Free Upgrades! + Save \$1600 w/ Online Edition Beds

Select Comfort Bed | Amazon.com

www.amazon.com/

★★★★★ 2,013 reviews for amazon.com

Buy **select comfort bed** at Amazon! Qualified orders over \$25 ship free

Sleep Number Beds and Mattress by Sleep Number

www.sleepnumber.com/

Shop the Official Site for Sleep Number **beds**, mattresses & bedding. ... Discover the only **bed** that lets you adjust each side to your ideal comfort - your ... SLEEP NUMBER, **SELECT COMFORT** and the Double Arrow Design are registered ...

Sleep Number Beds - Sleep Number Store Locator - Current Specials - C2

Shop for **select comfort bed** on Google

Sponsored ⓘ



Comfort Dreams

\$584.99

Overstock.com



Genuine Select Comf...

\$349.00

eBay



Ships 10/26 Sleep Numb...

\$3218.00

QVC.com



10 Inch Thick King Size

\$1774.79

Buy.com



Splendorest Select Your...

\$494.99

Overstock.com



Select Comfort

\$100.00

eBay



Select Comfort

\$169.95

eBay



Select Comfort

\$1.00

eBay

Map for **select comfort bed**

Free Shipping*, Free Pillow, No Tax

Live Chat
OFFLINE

Call today for the best price
888-694-4088
OPEN 7 DAYS A WEEK - CONTACT US

Authorize.Net
SSL SECURED

LIFETIME
WARRANTY

Compare Us to Sleep Number Bed*

Home Financing About Us Free Trial Warranty My Account Cart

*PREFERRED OVER SLEEP NUMBER® BED

FACTORY DIRECT PRICES

- Support**
- Series 2 Save \$193
 - Series 3 Save \$453
 - Series 4 Save \$472
 - Series 5 Save \$495
 - Series A6 Save \$880
- iced Series**
- Series Silver Save \$2,541
 - Series A8 Save \$1,326
 - Series A10 Save \$1,967
- Memory Foam Series**
- Series H9 Save \$1,000
 - Series H11 Save \$1,600
- Specials**
- Online Special [View Sale](#)
- Compare**
Top 10 Reasons to Buy vs. Sleep Number's® All Personal Comfort Beds
- Accessories**

BLACK NOVEMBER SALE

STARTS AT \$699

50% OFF ONLINE SPECIAL
FREE 60 NIGHT TRIAL
FREE SHIPPING, PILLOW, NO TAX!

CLICK TO VIEW SALE

**FREE SHIPPING FedEx Ground



LIMITED TIME ONLY
\$500 FREE
UPGRADE
CALL NOW FOR OFFER
888-694-4088
SALE ENDS NOV 23RD

FINANCING AVAILABLE ▶

ZERO

ADJUSTABLE SPECIALS ▶

HOW MUCH COULD YOU SAVE ON YOUR NEXT MATTRESS?

OUR TECHNOLOGY ▶

WHAT NUMBER ARE YOU?



AdWords & Initial Interest Confusion: *Select Comfort*

Sur la sophistication des consommateurs-internautes:

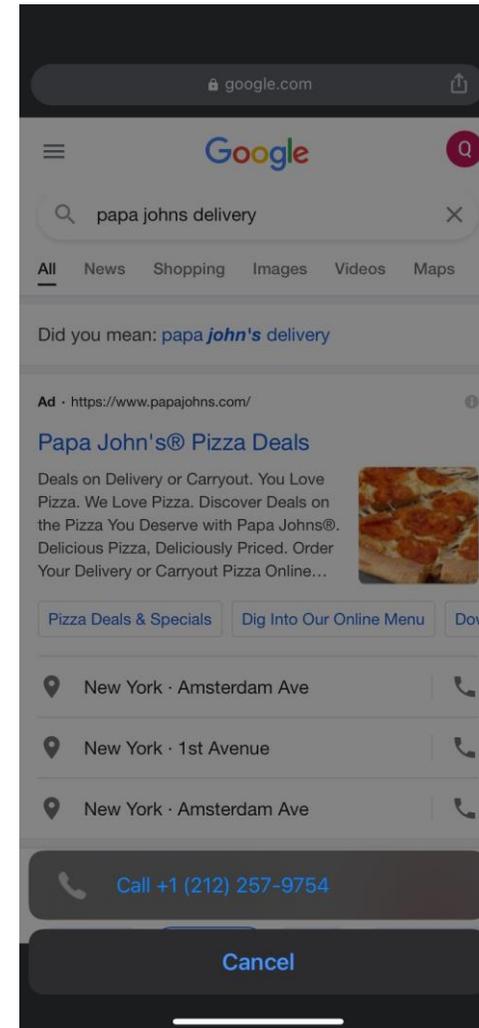
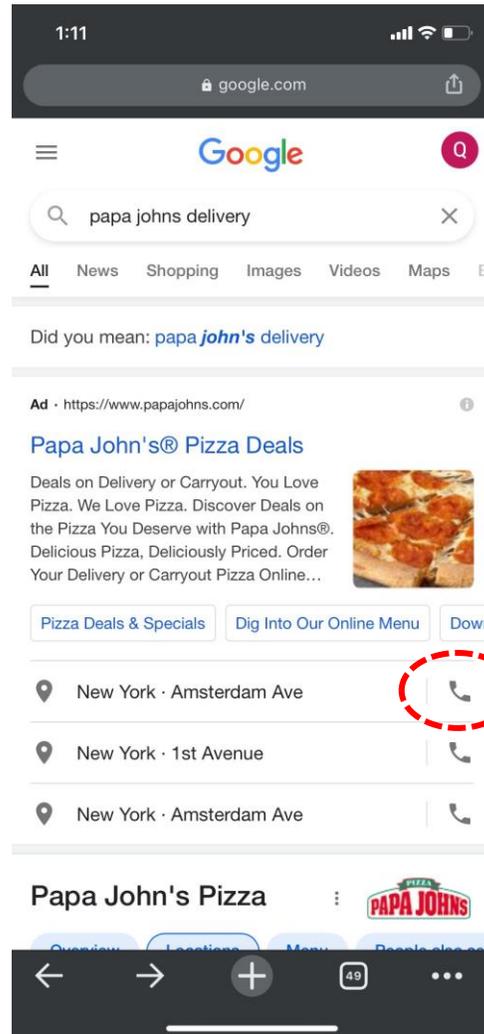
Comparer GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1209 (9th Cir. 2000) (“Navigating amongst web sites involves practically no effort whatsoever, and arguments that Web users exercise a great deal of care before clicking on hyperlinks are unconvincing.”)

Avec Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171, 1179 (9th Cir. 2010) (“[I]n the age of [the internet], reasonable, prudent and experienced internet consumers are accustomed to such exploration by trial and error. They skip from site to site, ready to hit the back button whenever they’re not satisfied with a site’s contents.”)

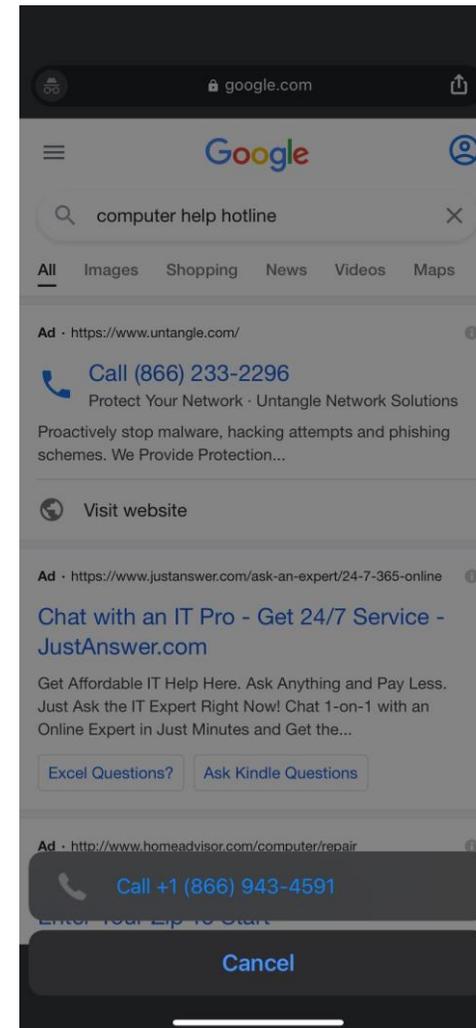
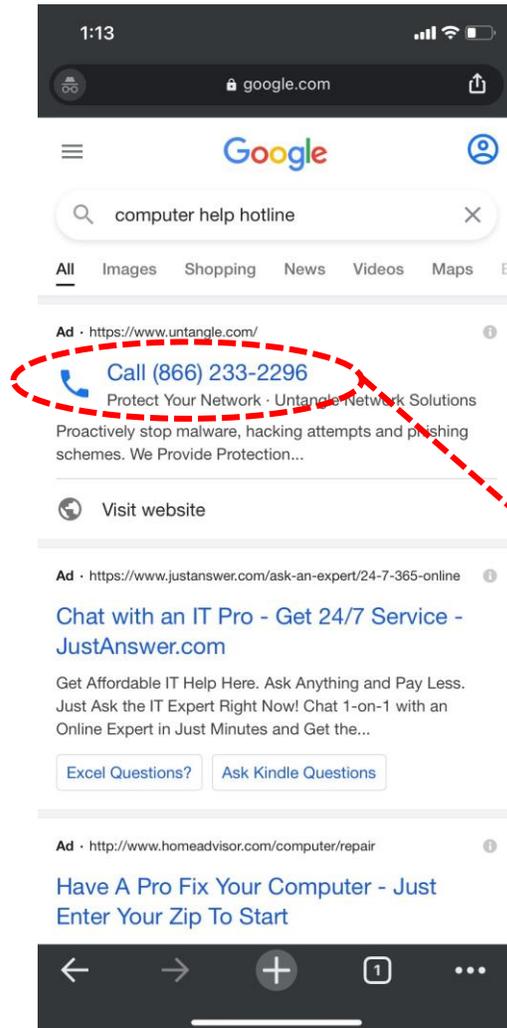
Pertinence du type d'écran

Edible Arrangements, LLC v. Provide Com., Inc., (D. Conn. July 29, 2016): “Increasingly, purchases are often made impulsively on small screen cellular telephones or even using cell phone applications.”

Mobile Click to Call Ads



Mobile Click to Call Ads

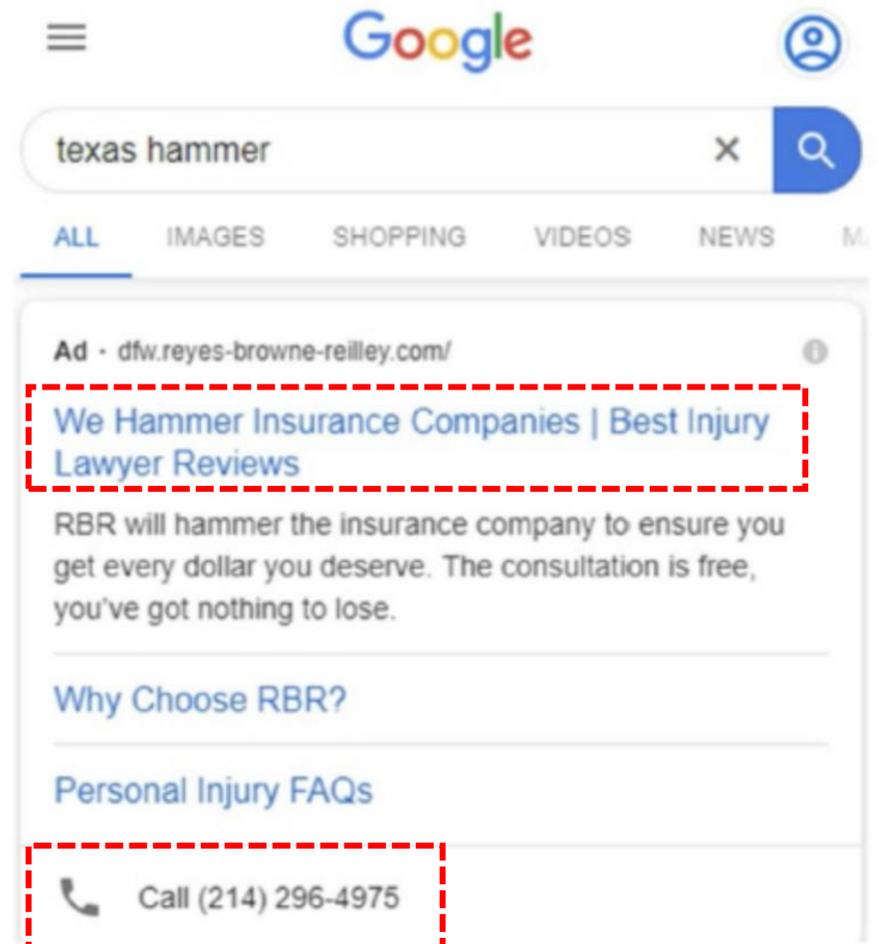


AdWords & Mobile Click to Call Ads: *Angel L. Reyes*

Jim S. Adler, P.C. v. Angel L. Reyes & Assocs. PC (N.D. Tex. Aug. 7, 2020)

- Defendant's mobile ads used part of the plaintiff's "Texas Hammer" mark and included a "click to call" button.
- "Defendant's employees [were] directed to answer the calls with a generic greeting like 'did you have an accident' or 'tell me about your accident' instead of identifying Defendant."
- Court held Plaintiff pleaded facts sufficient to show a likelihood of confusion and denied the defendant's motion to dismiss trademark infringement claims.

Defendant's ad:



AdWords & Mobile Click to Call Ads: *McNeil*

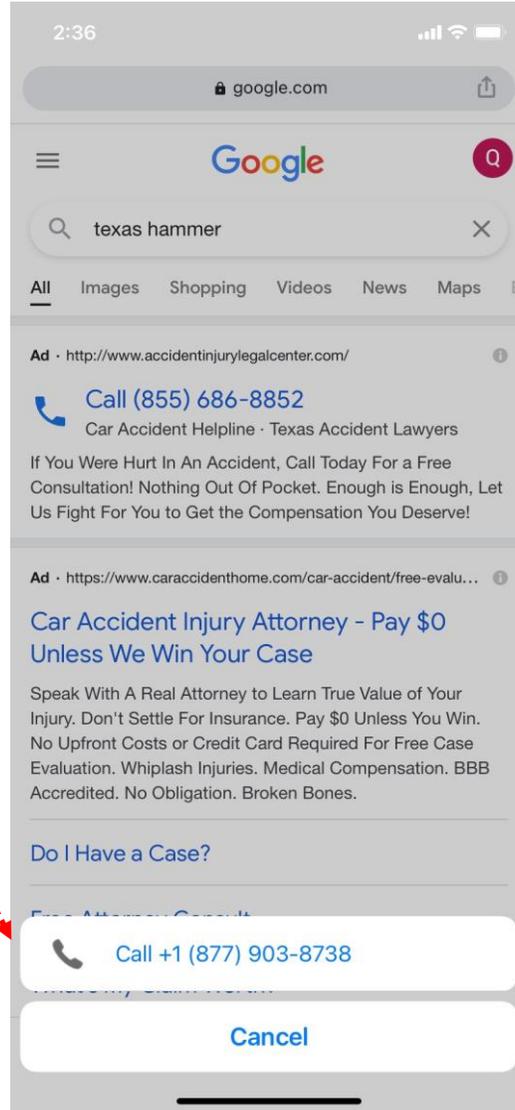
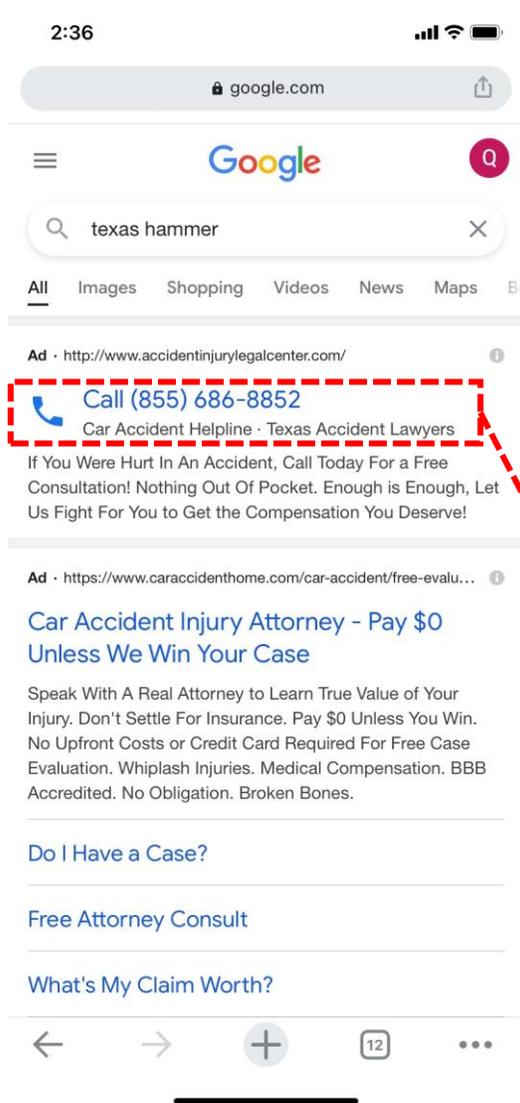
Jim S. Adler, P.C. v. McNeil Consultants, LLC, No. 3:19-CV-2025-K-BN (N.D. Tex Aug. 10, 2020)

- Same plaintiff, same judge, and same call center behavior as *Angel L. Reyes & Assocs.*, but defendant's ads did not feature the plaintiff's mark.

Defendant's ads:



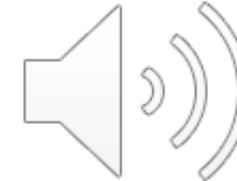
AdWords & Mobile Click to Call Ads: *McNeil*



Call 1



Call 2



Call 3



Recherches au sein d'un site visant un produit particulier

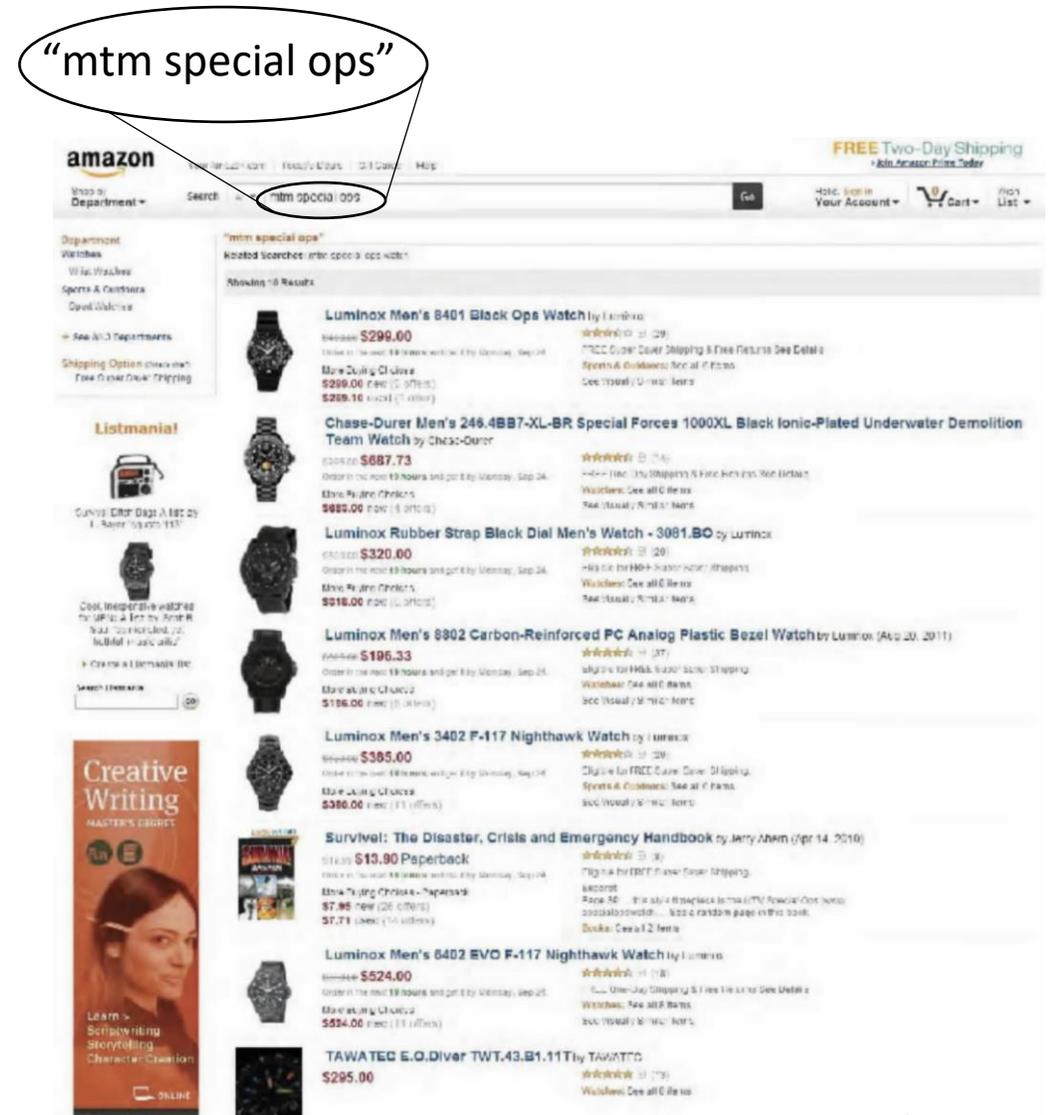
Multi Time Machine, Inc. v. Amazon.com, Inc. 804 F.3d 930 (9th Cir. 2015)

Recherches sur Amazon pour des montres "MTM SPECIAL OPS" rendaient des résultats avec les montres concurrentes.

La Cour d'appel du 9e Circuit confirmait le rejet de la plainte:

Les résultats mentionnaient clairement les marques des montres concurrentes.

Les consommateurs ne croieraient pas à une connexion entre les concurrents et le demandeur



Comparer : Williams-Sonoma, Inc. v. Amazon.com, Inc., No. 18-cv-07548-EDL (N.D. Cal. May 2, 2019)

Le site de Amazon fait la promotion de produits Williams-Sonoma (“WS”) malgré le fait que WS n’autorise pas la vente en ligne de ses produits par des tiers.

WS soutenait que les pages web de Amazon donnaient “l’impression que les consommateurs visitant un lieu de commerce établi par ou approuvé par Williams-Sonoma.”

In-Website Pages: *Williams-Sonoma*

The screenshot shows the Amazon product page for Williams-Sonoma Classic Striped Dishcloths. The page layout includes a navigation bar with categories like 'Shop by Style', 'Home Décor', and 'Furniture'. A promotional banner for 'Save up to 20% on Area Rugs' is visible. The product title is 'Williams-Sonoma Classic Striped Dishcloths, Jojoba Yellow (set of 8)'. The brand name 'Williams-Sonoma' is circled in red. The price is '\$39.99 & FREE Shipping'. The product features a list of bullet points: 'Made from 100 Percent Turkish cotton with basketweave texture.', 'Includes loop for hanging.', 'A Williams Sonoma exclusive.', 'Set of 8', and '15" Square Dishcloths'. The shipping details section indicates 'Only 4 left in stock - order SOON.' and 'Fulfilled by Amazon.' is circled in red. The 'Add to Cart' button is at the bottom right.

Williams-Sonoma Classic Striped Dishcloths, Jojoba Yellow
(set of 8)
by Williams-Sonoma

Price: \$39.99 & FREE Shipping. Details

Arrives before Christmas.

- Made from 100 Percent Turkish cotton with basketweave texture.
- Includes loop for hanging.
- A Williams Sonoma exclusive.
- Set of 8
- 15" Square Dishcloths

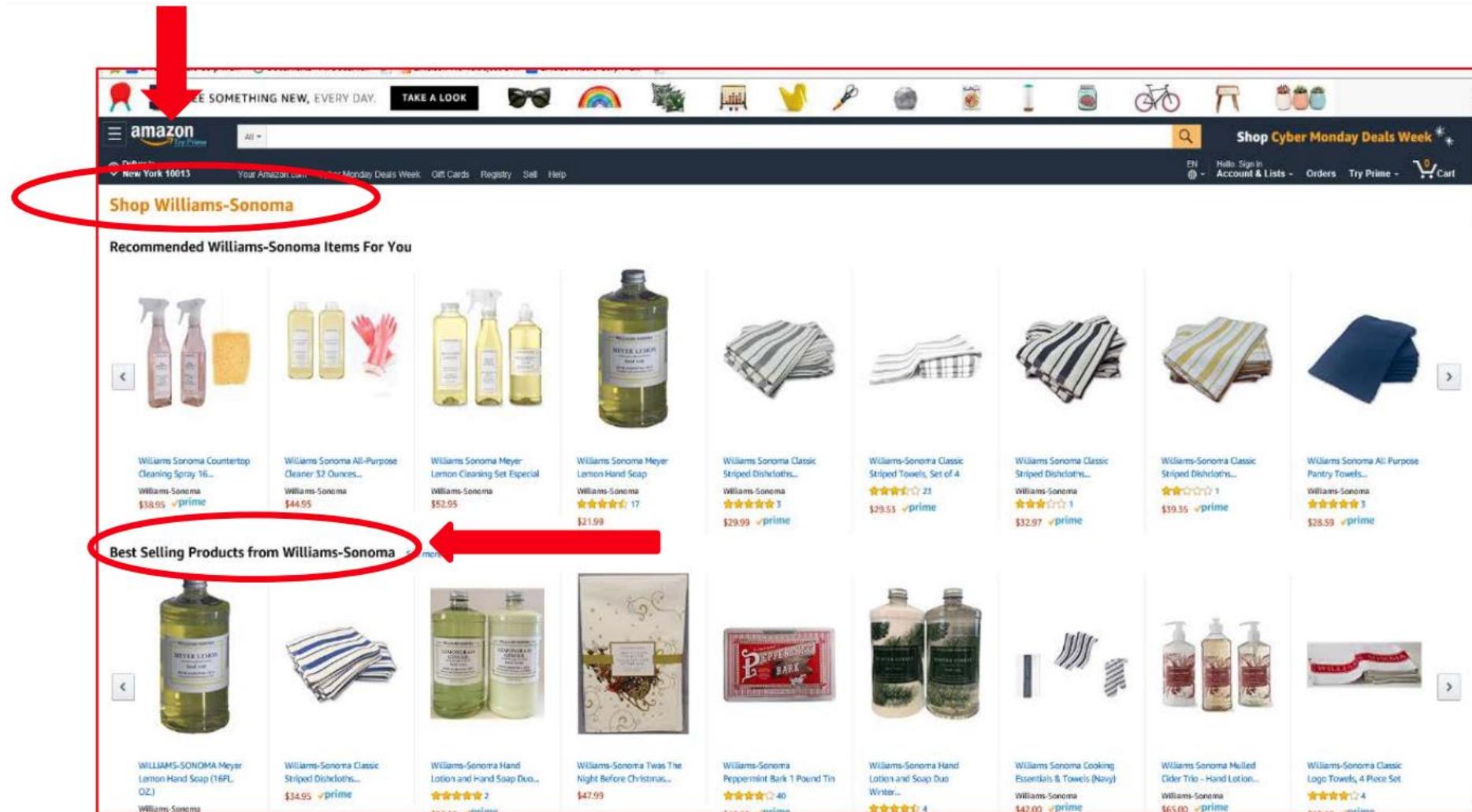
Only 4 left in stock - order SOON.

Fulfilled by Amazon.

Add to Cart

In-Website Pages: *Williams-Sonoma*

- Amazon maintains a page reading “Shop Williams-Sonoma” and featuring WS’s copyrighted product imagery. It features no disclaimer of a relationship with WS.



In-Website Pages: *Williams-Sonoma*

**Williams-Sonoma, Inc. v. Amazon.com, Inc., No. 18-cv-07548-EDL
(N.D. Cal. May 2, 2019)**

Le juge a refusé de débouter WS de son action.

Il a rejeté la defense de revente légitime (first sale doctrine)

L'utilisation par Amazon de la marque de WS pourrait faire croire que Amazon ne fait pas que revendre les articles WS, mais qu'il y a une relation commerciale entre WS et Amazon qui en fait n'existe pas.

Contrefaçon par complicité (Contributory Infringement), responsabilité des plateformes: *Tiffany v. eBay*

Tiffany v. eBay Inc., 600 F.3d 93 (2d. Cir. 2010)

- Faits de l'espèce:
 - Plaintiff notified eBay of counterfeit Tiffany brand products sold through the marketplace.
 - eBay suspended sellers when Tiffany gave notice of specific instances of counterfeiting, but eBay did not remove all infringing counterfeit goods despite a general knowledge of the behavior.
- Second Circuit affirmed holding of no contributory infringement:
 - Applied *Inwood* (i.e. contributory infringement by way of intentional inducement or continuing to supply product to known infringer).
 - Contributory infringement requires more than a generalized knowledge of infringement.
 - eBay's general knowledge of the presence of counterfeit goods and even the fact a "significant portion of the 'Tiffany' sterling silver jewelry listed on the eBay website . . . was counterfeit" was insufficient to establish contributory infringement.
 - Willful blindness: eBay could only be liable if it had reason to suspect counterfeit goods and "intentionally shielded itself from discovering the offending listings...."
 - Defendant must have known of and failed to act upon specific instances of infringement.

Contributory Infringement: *Akanoc*

Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc., 658 F.3d 936 (9th Cir. 2011)

- Facts / background:
 - Websites were selling counterfeit Louis Vuitton merchandise (through email addresses listed on their webpages).
 - IP addresses were assigned to defendant web hosting businesses, which leased servers, bandwidth, and IP addresses.
 - Louis Vuitton sent over eighteen Notice of Infringement letters, but defendants failed to remove the infringing content from their servers.
- Ninth Circuit affirmed \$31.5mm jury verdict on contributory infringement.
 - “To prevail on its claim of contributory trademark infringement, Louis Vuitton had to establish that Appellants continued to supply its services to one who it knew or had reason to know was engaging in trademark infringement...” and that “appellants had ‘direct control and monitoring of the instrumentality used by a third part to infringe’” (citing *Inwood* and *Lockheed Martin*).
 - “Appellants had direct control over the ‘master switch’ that kept the websites online and available.”

Contributory Infringement: Notice and takedown?

Digital Millennium Copyright Act § 512 prévoit un régime de “notice and take down” qui protège les hébergeurs de contenus contrefaisants – en matière de droit d’auteur. Pas “transversal” (cf. Directive Commerce électronique arts 13-15.)

Mais les juges ont calqué l’analyse de droit commun des marques sur le régime DMCA (*v. Tiffany v. eBay*) et les pratiques commerciales des plateformes licites s’inspirent du système du DMCA (par ex. eBay)

Quid?



chocolat nestlé



All

Images

News

Shopping

Videos

More

Settings

Tools

About 2,470,000 results (0.44 seconds)

Ads · Shop chocolat nestlé



Nestlé dessert
chocolat noir lot
€3.99
Monoprix Plus

By Feed Price



Pick up tomorr...

Recettes De
Latelier - ...
€11.99
Carrefour Drive

By Google



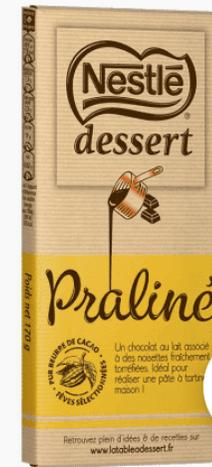
Coffret 60 mini
carrés Lindt ...
€19.90
Lindt

By Google



Nestlé dessert
tablette chocolat
€3.39
Monoprix Plus

By Feed Price



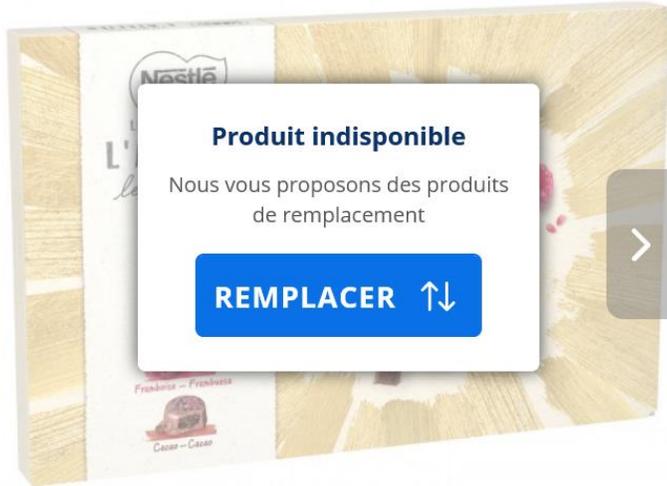
Nestlé dessert
chocolat au lait
€2.65
Monoprix Plus

By Feed Price



Courses en ligne : Drive ou Livraison

RETOUR Accueil > Rayons > Epicerie sucrée > Chocolats et Bonbons > Confiseries chocolatées > Rochers et Boites de chocolats > Chocolat les bouchées NESTLE LES RECETTES DE L'ATELIER



Produit indisponible



Chocolat les bouchées NESTLE LES RECETTES DE L'ATELIER

la boite de 398g

0,00€



Bonbons de chocolat

Description



Courses en ligne : Drive ou Livraison

Produit à remplacer

↑↓ Produits proposés en remplacement



Produit indisponible
Chocolat les bouchées NESTLE LES RECETTES DE L'ATELIER
la boîte de 398g



0,00€

Promotion
Chocolat assortiment LINDT
la boîte de 217 g
26.50 € / Kilogramme



Prenez en 3 = Payez en 2

5,75€



Chocolat assortiment VILLARS
le sachet de 500 g
24.00 € / Kilogramme



12,00€



Produit indisponible
Chocolat les bouchées NESTLE LES RECETTES D...
la boîte de 398g



0,00€