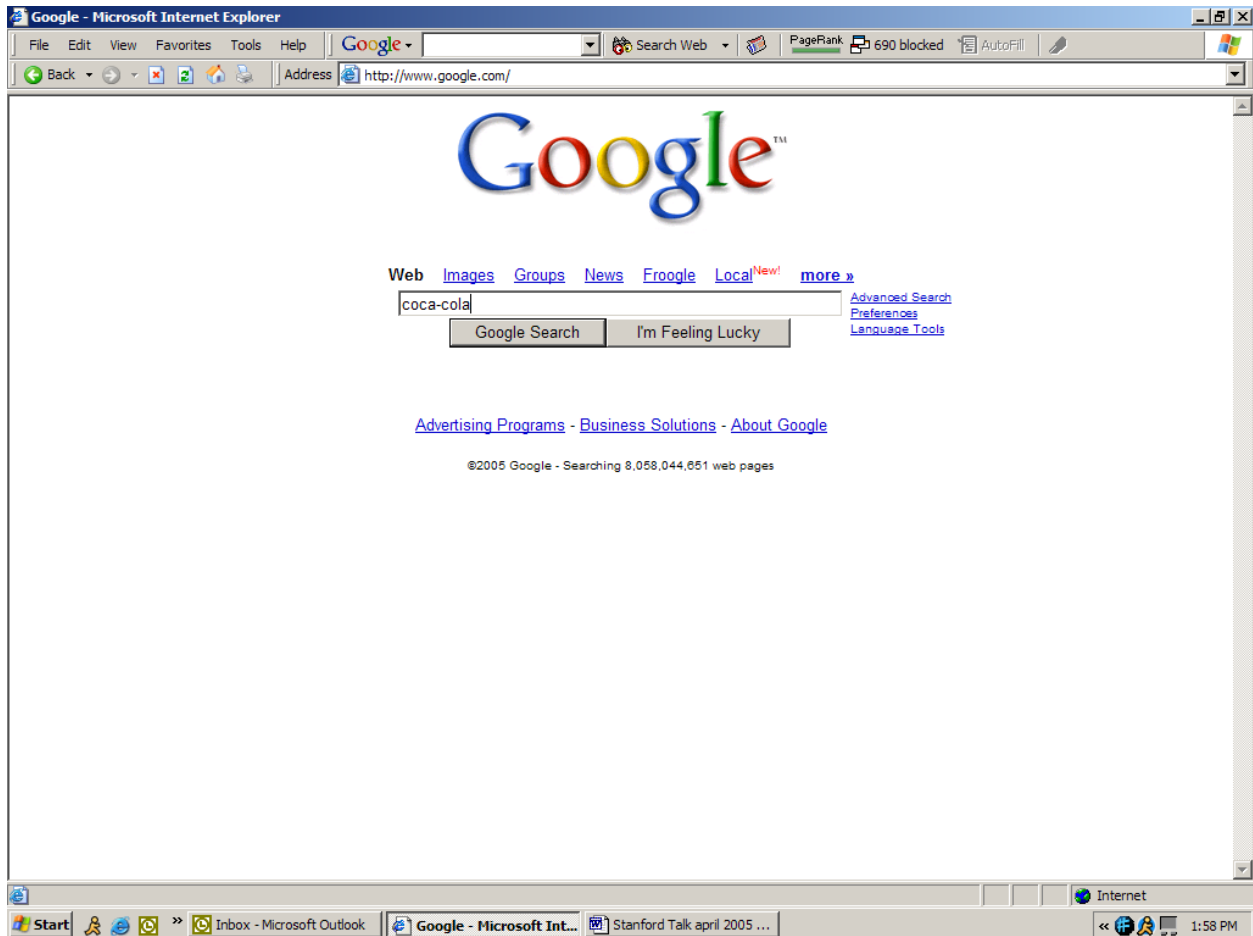


Stanford Talk

- Let's assume that a searcher picks a famous fanciful trademark as a search term and enters that term into Google
 - We'll try Coca-cola
 - Process works with any term



- What is the user looking for? WE DON'T KNOW. Why not?
 - Problem #1: search is decontextualized
 - We don't know the user's history or preferences
 - We don't know what the user is doing before or during the search
 - We don't know where the user is located
 - Problem #2: Searchers pick their search terms poorly
 - most searchers use no more than two keywords in a keyword search,¹

¹ See *iProspect Natural SEO Keyword Length Study* (88% of search engine referrals are based on only one or two keywords); see also Declan Butler, *Souped-Up Search Engines*, NATURE, May 11, 2000, at 112, 116 (citing an NEC Research Institute study showing that up to 70% of searchers use only a single keyword as a search term); Bernard J. Jansen et al., *Real Life Information Retrieval: A Study of User Queries on the Web*, 32 SIGIR FORUM 5, 15 (1998)

- searchers almost never use advanced search methodologies like Boolean logic² or advanced searching functionality offered by search providers.³
- Because of this, the searcher could have a variety of search objectives
 - Looking to purchase Coca-Cola products
 - Educating themselves about new products
 - Or neutral product evaluations/comparisons
 - Interest in Coca-Cola's role as a cultural institution
 - Coca-Cola museum
 - Collectibles
 - Advertisements
 - Interest in health issues
 - Information about employee relations/unions
 - Use of Coca-Cola as a proxy for a class of soft drinks
- So, who decides what content the searcher gets in response to this search?
- Option #1: publisher decides
 - Publishers want to know what searchers mean by the words they choose
 - When they pay, they are especially motivated to deliver relevant content
 - But publishers seeking attention may engage in some abuses
- Option #2: search engine decides
 - Search engines compete on relevancy
 - Need to divine searcher intent
 - Need to deliver relevant results
 - Need to curb publisher efforts to game system
 - Consumer chooses preferred search engine to serve their needs
 - Market forces will cause search engines to deliver relevant results
- Option #3: trademark owner (or trademark law) decides
 - Argument: TM owner should have right to prevent misappropriation of goodwill
 - BUT, If we don't know where the searcher was going, we can't know if they were diverted
 - Giving too much power to TM owners can lead to abuses (or worse, greater consumer confusion)
 - Abuse #1: TM owner can control its channel
 - Ex: Promatek (after market servicer), Telescan cases (directory provider)
 - Abuse #2: TM owner can control criticism of its brand
 - Ex: OBH (gripe/parody site)
 - Abuse #3: TM owner can squash minority definitions
 - Many TMs coexist, but on Internet, powerful TM owners can blast all subordinate uses

(average keyword length was 2.35 words; 1/3 of searches used one keyword and 80% used three keywords or fewer); Jakob Nielsen, *Search: Visible and Simple*, May 13, 2001 (average keyword length was 2.0 words)

² Jansen, at 15 (only 1 in 18 searchers used any Boolean functions).

³ Vividence, (May 25, 2004), ("less than 3% actually used advanced search techniques in any given search task.").

- My preferred solution:
 - Recognize that we can't draw any legal conclusions from an ambiguous decontextualized keyword
 - Instead, consider the full range of defendant's behavior
 - Consumers tell us a lot about their interests based on what they do
 - Keyword usage, standing alone, is too early in the search process to divine good information about consumer confusion
 - We don't need new laws; just self-restraint to avoid making unwarranted assumptions about consumer interests based on incomplete data