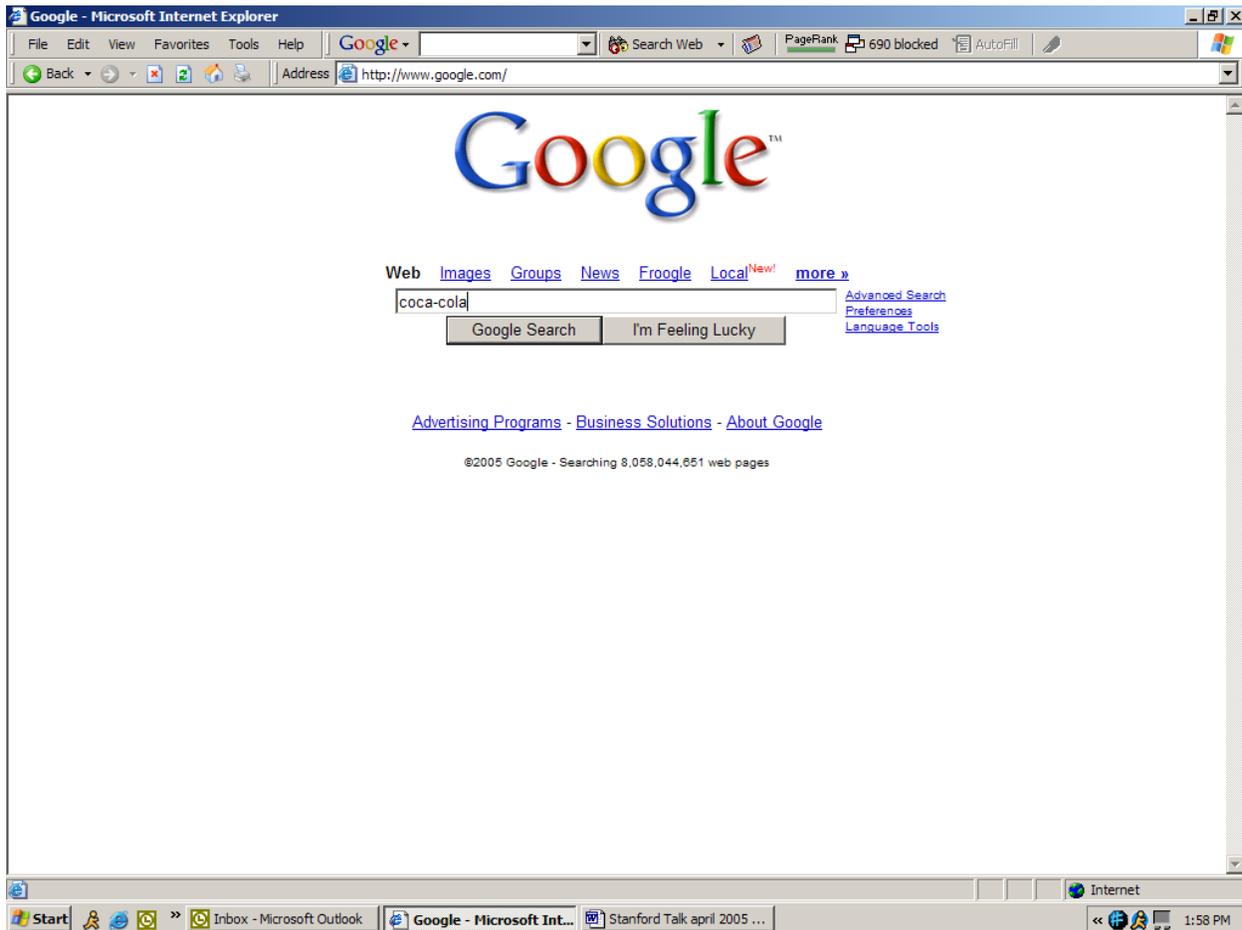


## Stanford Talk

- 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,<sup>1</sup>

<sup>1</sup> 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 logic<sup>2</sup> or advanced searching functionality offered by search providers.<sup>3</sup>
- 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

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(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)

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

<sup>3</sup> 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