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Ian Ayres

Emad Atiq

Sheng Li

Michelle Lu

Tom Maher

*See next page for additional authors*

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# A Randomized Experiment Assessing the Accuracy of Microsoft's "Bing It On" Challenge

## **Authors**

Ian Ayres, Emad Atiq, Sheng Li, Michelle Lu, Tom Maher, and Christine Tsang

# A RANDOMIZED EXPERIMENT ASSESSING THE ACCURACY OF MICROSOFT'S "BING IT ON" CHALLENGE

*Ian Ayres*<sup>\*</sup>  
*Emad Atiq*<sup>\*\*</sup>  
*Sheng Li*<sup>\*\*</sup>  
*Michelle Lu*<sup>\*\*</sup>  
*Tom Maher*<sup>\*\*</sup>  
& *Christine Tsang*<sup>\*\*\*</sup>

*Abstract:* In advertisements associated with its “Bing It On” campaign, Microsoft claimed that “people preferred Bing web search results nearly 2:1 over Google in blind comparison tests.” We tested Microsoft’s claims by way of a randomized experiment involving U.S.-based Amazon’s Mechanical Turk (“MTurk”) subjects and conducted on Microsoft’s own [www.bingiton.com](http://www.bingiton.com) website. We found that (i) a statistically-significant majority of participants preferred Google search results to Bing search results (53% to 41%); and (ii) participants were significantly less likely to prefer Bing results when randomly assigned to use popular search terms or self-selected search terms instead of the search terms Microsoft recommends test-takers employ on its website. Our findings suggest that some of the claims implicit in Microsoft’s advertisements warrant legal scrutiny. The Bing It On Ad Campaign may be viewed as (falsely) implying that: (i) Microsoft’s claims about consumer preferences for search engines were based on a generalizable study; (ii) the preferences of five million individuals who have taken the Bing It On Challenge online are either consistent with or the basis for Microsoft’s claim that consumers prefer Bing

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\* William K. Townsend Professor, Yale Law School. [ian.ayres@yale.edu](mailto:ian.ayres@yale.edu).

\*\* Yale Law School, J.D. 2014.

\*\*\* Yale Law School, J.D. 2013.

“nearly 2:1”; and (iii) the search terms Microsoft recommends people use when taking the online challenge are not biased in favor of Bing. Our findings suggest that each of these implicit claims is likely false and might provide the basis for a viable Lanham Act claim by Google.

## I. INTRODUCTION

One year ago, Microsoft launched its “Bing It On” Challenge campaign. Advertisements associated with the campaign initially claimed that users prefer Microsoft’s search engine Bing over Google at a nearly 2:1 ratio.<sup>1</sup> Microsoft based this initial claim on a single, undisclosed comparison study with fewer than 1,000 participants. The advertisements continue to invite Internet users to take a blind comparison test for themselves at [bingiton.com](http://bingiton.com).<sup>2</sup>

We assess Microsoft’s claims by conducting a randomized, blind comparison study through the Bing It On webpage. We find Microsoft’s 2:1 claim to be implausible and misleading. In light of our findings, we analyze Microsoft’s potential liability to competitors under the Lanham Act for deceptive advertising. Our study offers an example of how large-scale, on-line experiments can prove to be an effective tool for detecting and deterring deceptive advertising.

### *History of Bing It On*

Announced in May of 2009, and released to the public in June of the same year, Microsoft’s *Bing* search engine is the second-most widely used online search tool in the United States (with a 2013 market share of 16.7 percent, behind market leader Google at 67 percent).<sup>3</sup> Since the search engine’s debut, Microsoft

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<sup>1</sup> Matt Wallaert, *Bing Your Brain: Test, Then Test Again*, BING BLOGS (Feb. 6, 2013), [http://www.bing.com/blogs/site\\_blogs/b/search/archive/2013/02/06/bing-your-brain-test-then-test-again.aspx](http://www.bing.com/blogs/site_blogs/b/search/archive/2013/02/06/bing-your-brain-test-then-test-again.aspx); *People Chose Bing Web Search Results Over Google Nearly 2:1 in Blind Comparison Tests – Really??*, BING BLOGS (Sept. 5, 2012), [http://www.bing.com/blogs/site\\_blogs/b/thedetails/archive/2012/09/05/bingchallenge.aspx](http://www.bing.com/blogs/site_blogs/b/thedetails/archive/2012/09/05/bingchallenge.aspx) [hereinafter *People Chose Bing*].

<sup>2</sup> Wallaert, *supra* note 1; *People Chose Bing*, *supra* note 1.

<sup>3</sup> Press Release, COMSCORE, INC., *comScore Releases February 2013 U.S. Search Engine Rankings*, (March 13, 2013), [http://www.comscore.com/Insights/Press\\_Releases/2013/3/comScore\\_Releases](http://www.comscore.com/Insights/Press_Releases/2013/3/comScore_Releases)

has initiated major marketing campaigns to promote Bing, ranging from the Bing Rewards campaign in 2010 to the more recent "Bing It On" challenge.<sup>4</sup> Modeled after the classic "Pepsi Challenge" of the 1970s, "Bing It On" challenges users to compare Bing directly against Google Search in a variety of blind searches.<sup>5</sup> Microsoft simultaneously launched the campaign through television and Internet advertising. The campaign encourages Internet users "to break the Google habit."<sup>6</sup> A few months after launching, Microsoft's television advertising urged viewers to "join the 5 million people who've visited the challenge."<sup>7</sup>

According to Dr. Harry Shum, Corporate Vice President of Bing Research and Development, the Bing It On challenge grew out of internal testing of Bing search algorithms, and a sense within the Bing research team that Bing was ready to take on Google head-to-head.<sup>8</sup> Microsoft commissioned Answers Research to conduct a study of nearly 1,000 participants directly comparing the two search engines.<sup>9</sup> The study asked participants to enter a series of ten search terms of their choosing into a single search bar and then presented the participants with two unidentifiable browser windows set next to each other, one side displaying Google search results and the other Bing search results.<sup>10</sup> Participants recorded their preferred search results. While Microsoft has not released the full methodology and analysis of the study, it reports that participants preferred Bing

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\_February\_2013\_U.S.\_Search\_Engine\_Rankings.

<sup>4</sup> Mike Nichols, *Take the Bing It On Challenge!*, BING BLOGS (Sept. 6, 2012), [http://www.bing.com/blogs/site\\_blogs/b/search/archive/2012/09/06/challenge-announce.aspx](http://www.bing.com/blogs/site_blogs/b/search/archive/2012/09/06/challenge-announce.aspx).

<sup>5</sup> Salvador Rodriguez, *The Bing Challenge: Microsoft Pulls Pepsi Trick on Google*, L.A. TIMES, Sept. 6, 2012, <http://articles.latimes.com/2012/sep/06/business/la-fi-tn-bing-it-on-20120906>.

<sup>6</sup> Tom Warren, *Microsoft Launches Nationwide 'Bing It On' TV Campaign to Challenge Google*, THE VERGE (Sept. 6, 2012, 10:27 AM), <http://www.theverge.com/2012/9/6/3296562/bing-it-on-microsoft-google-challenge-ads>.

<sup>7</sup> BING, *Bing It On Challenge*, YOUTUBE (Oct. 2, 2012), <http://www.youtube.com/watch?v=KNWuOJXP-R4>.

<sup>8</sup> Harry Shum, *Search Quality Insights: Behind the Bing It On Challenge*, BING BLOGS (Sept. 6, 2012), [http://www.bing.com/blogs/site\\_blogs/b/searchquality/archive/2012/09/06/sqibehindbingchallenge.aspx](http://www.bing.com/blogs/site_blogs/b/searchquality/archive/2012/09/06/sqibehindbingchallenge.aspx).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

over Google “nearly 2:1 in the blind comparison tests.”<sup>11</sup>

Microsoft released a simplified online version of this test at [www.bingiton.com](http://www.bingiton.com), which invites users to conduct a similar blind comparison using only five queries.<sup>12</sup> Launched primarily as an advertising vehicle, [bingiton.com](http://bingiton.com) prominently featured the 2:1 claim derived from the Answers Research study when it was launched.<sup>13</sup> Microsoft representatives noted in October, 2012 that no specific comparison data from the website was being recorded. Bing General Manager Adam Sohn reported to WebProNews:

We aren't keeping track of the results from the Bing It On tool, because it's non-scientific and was intended to be a fun way for customers to experiment with both search engines, seeing web search results side-by-side from both Bing and Google, hopefully noticing the progress Bing has made over the past few years.<sup>14</sup>

As of April, 2013, however, Microsoft has altered the language on the official Bing It On website by replacing references to the near 2:1 ratio with the language, “in blind tests, people preferred Bing over Google for the web's top searches.”<sup>15</sup>

Several online blogs and news magazines have sampled the [bingiton.com](http://bingiton.com) website and shared their experiences.<sup>16</sup> *The International Business Times*, for example, ran two informal trials, with Google “[o]ming] out ahead in both cases, winning 3:2 in the first test and 4:1 in the second.”<sup>17</sup> Paul Shapiro's blog

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<sup>11</sup> *Id.*

<sup>12</sup> BING IT ON, <http://www.bingiton.com> (accessed April 6, 2013).

<sup>13</sup> *Id.*

<sup>14</sup> Chris Crum, *Bing: We Aren't Keeping Track of the Results from the Bing It On Tool*, WEBPRONews (Oct. 3, 2012), <http://www.webpronews.com/bing-we-arent-keeping-track-of-the-results-from-the-bing-it-on-tool-2012-10>.

<sup>15</sup> BING IT ON, <http://www.bingiton.com> (accessed April 6, 2013).

<sup>16</sup> See, e.g., *Bing It On Rigged?*, NYPHONEJACKS.COM (Feb. 17, 2013), <http://blog.nyphonejacks.com/2013/02/bing-it-on-rigged.html>; Tuan Mai, *Bing vs Google: The Bing It On Challenge*, TOM'S HARDWARE (Sept. 7, 2012), <http://www.tomshardware.com/news/Bing-Google-Challenge-Search,17421.html>. For a Bing victory, see Melanie Pinola, “*Bing It On*” Shows You When Bing Is Most Useful, LIFE HACKER (Oct. 3, 2012), <http://lifehacker.com/5948600/is-bing-a-better-search-engine-for-you-take-the-bing-it-on-test-to-find-out>.

<sup>17</sup> Christopher Zara, *Bing vs. Google – Microsoft's Pepsi Challenge Backfires*, INT'L BUS. TIMES ONLINE (Sept. 7, 2012, 12:32 PM), <http://www.ibtimes.com/bing-vs-google-microsoft's-pepsi-challenge-backfires-780715>.

reported an analysis of users posting their Bing It On results on Twitter—posts Microsoft itself solicited—that yielded a nearly 72% preference for Google, with a sample size of 286.<sup>18</sup> These informal trials have cast some doubt on Microsoft's original claim that consumers prefer Bing to Google 2:1.

The press and bloggers have also criticized the methodology of the Bing It On campaign. For example, PunditPress.com has noted that the search results pages generated by the Bing It On site differ slightly from the same searches run on the main bing.com and google.com web sites.<sup>19</sup> Joe Wilcox of betanews.com notes that the Bing It On site strips away location and social information, key functional components of both stand-alone search engines.<sup>20</sup> Some savvy users even claim to be able to distinguish the two search results solely on the basis of page formatting.<sup>21</sup> A study by the Catalyst Group found that users preferred Bing's visual design over Google's, but also found that most thought the two search engines produced equally relevant results, and overall, indicated a desire to continue to use Google as their primary search engine.<sup>22</sup>

The concerns raised about Microsoft's campaign warrant a systematic investigation into the reliability of its claims regarding the Bing It On challenge, and the campaign's likely effect on consumers. This paper attempts to do just this.

## II. METHODOLOGY

Our study employs MTurk to test user preferences for

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<sup>18</sup> Paul N. Shapiro, *Bing It On! Data Says Google Wins the Bing Search Challenge*, PAUL SHAPIRO'S SOC. MEDIA & TECH. BLOG (Sept. 12, 2012), <http://blog.paulnshapiro.com/bingiton-google-wins/>.

<sup>19</sup> Aureliuast, "The Bing Challenge?" *Yes, It's Rigged . . . Or, at the Very Least, Something is Very Wrong*, PUNDIT PRESS (Feb. 12, 2013, 10:37 AM), <http://www.punditpress.com/2013/02/the-bing-challenge-yes-its-rigged-or-at.html>.

<sup>20</sup> Joe Wilcox, "Bing it On" *Is a Real Turn-off*, BETANEWS (Sept. 6, 2012), <http://betanews.com/2012/09/06/bing-it-on-is-a-real-turn-off>.

<sup>21</sup> *Bingiton . . . Where's My xBox?*, A DOG'S LIFE IN PORTLAND OREGON (Sept. 16, 2012, 11:38 PM), <http://gerrrg.blogspot.com/2012/09/bingitonwheres-my-xbox.html>.

<sup>22</sup> *Google vs. Bing Search Engine Preference*, CATALYST GROUP (June 2009), <http://www.catalystnyc.com/cofactors/wp-content/uploads/2009/06/catalyst-eye-tracking-bing-vs-google-may-2009.pdf>.

For a more detailed discussion of the Catalyst Group study, see Section I.B of the Web Appendix, available at <http://islandia.law.yale.edu/ayres/Bing-It-On-Web-Appendix.pdf>.

Bing and Google in the Bing It On challenge. MTurk is an online crowdsourcing forum developed and operated by Amazon in which “requesters” pay human “workers” for human intelligence tasks (HITs).<sup>23</sup> These tasks vary in content and have included proofreading, sorting photographs, and completing questionnaires. MTurk payments generally range from \$0.05 to \$5 per task and vary in accordance with the duration and complexity of the task completed.<sup>24</sup> We restricted participants to MTurk participants who were aged 18 and above, had U.S. IP addresses, and an MTurk reliability rating of at least 80%. We tracked the unique MTurk IDs of survey respondents to eliminate the possibility of duplicate sampling. We initially offered 40 cents per survey and were able to obtain about 400 responses before the response rate slowed. Thereafter, we increased the payment to \$1 and rapidly reached our target sample size of 1,000. We conducted the study between January 23 and March 1, 2013.

The study employed a 3x1 design. The study randomly assigned MTurk participants to one of three experimental groups, asked them to take the “Bing It On challenge” on [www.bingiton.com](http://www.bingiton.com), and asked them to fill out a questionnaire reporting their results. Members of the first group were asked to input search terms that were randomly generated from the top 25 Google keywords from 2012.<sup>25</sup> Members of the second group were asked to input the search terms suggested by [bingiton.com](http://www.bingiton.com), while members of the third group were asked to use self-selected terms. All groups entered five search terms into the [bingiton.com](http://www.bingiton.com) site. The website generates panels of Bing and Google search results, juxtaposed and stripped of identifying features. The panels for

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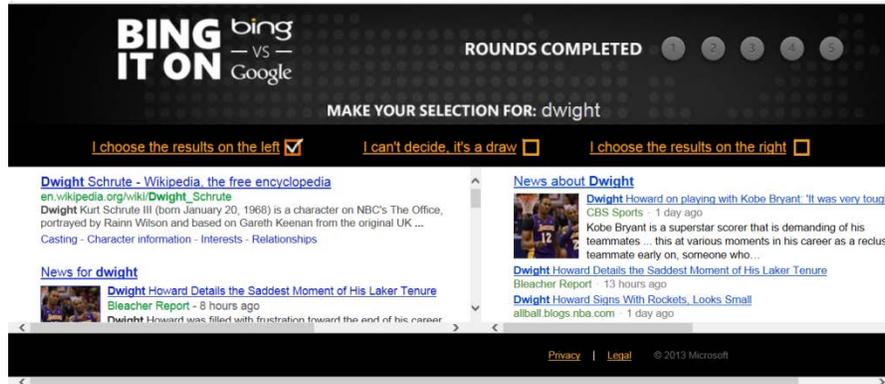
<sup>23</sup> AMAZON MECHANICAL TURK, <http://www.Mturk.com/mturk>. (last visited October 15, 2013).

<sup>24</sup> *Id.*

<sup>25</sup> Brandon, *Top Google Searches in 2012: The Most Popular Keywords Study v3*, SEATTLE ORGANIC SEARCH ENGINE OPTIMIZATION (April 7, 2012), <http://seattleorganicseo.com/sosblog/top-google-searches-in-2012-the-most-popular-keywords-study-version-3/>. Our study did not include search terms related to pornography. Another company conducted its own analysis of top search terms and reported similar results. *Consumer Search Engine Trends*, Experian, <http://www.experian.com/hitwise/online-trends-search-engine.html> (last updated July 13, 2013); Matt Tatham, *Facebook Was the Top Search Term in 2012 for Fourth Straight Year*, Experian (Dec. 20, 2012), [http://www.experian.com/blogs /marketing-forward/2012/12/20/facebook-was-the-top-search-term-in-2012-for-fourth-straight-year/?WT.srch=PR\\_EMS\\_TopSearchTerms\\_122012](http://www.experian.com/blogs /marketing-forward/2012/12/20/facebook-was-the-top-search-term-in-2012-for-fourth-straight-year/?WT.srch=PR_EMS_TopSearchTerms_122012).

each search randomly placed the Bing and Google results on the right or left side of the screen, as shown in Figure 1 below. Participants reported to the Bing It On site whether they preferred one panel over the other or preferred the two panels equally (a "tie").

Figure 1: Bing It On Website Search Results Panels



At the end of five searches, the Bing It On site revealed the preferred search engine for each of the five searches.<sup>26</sup> The study asked participants to report their final results and to submit a screenshot of the results page for confirmation. At the end of the survey, participants were asked to report demographic information, including gender, age, race, education, political ideology, and religious identity.

### *Reliability & Representativeness*

The use of MTurk for social and behavioral science research has led to several investigations into the reliability of responses, with encouraging conclusions. These efforts found that demographic responses were largely truthful,<sup>27</sup> that differences in compensation do not affect the quality of data,<sup>28</sup> and that MTurk

<sup>26</sup> The web appendix includes an example of the search screen, the individual search results screen and the screen showing the identity of the search that produced the preferred result. See Web Appendix, Section II, available at <http://islandia.law.yale.edu/ayres/Bing-It-On-Web-Appendix.pdf>.

<sup>27</sup> D.G. Rand, *The Promise of Mechanical Turk: How Online Labor Markets Can Help Theorists Run Behavioral Experiments*, 299 J. THEORETICAL BIO. 172 (2012).

<sup>28</sup> M. Buhrmester et al., *Amazon's Mechanic Turk: A New Source of*

workers are as attentive as non-Internet participants of studies involving short tasks (defined as tasks that take no more than five minutes).<sup>29</sup> One recent study cautioned that MTurk workers perform more poorly than college students on tasks that take longer than fifteen minutes and require attentive reading and English comprehension.<sup>30</sup> The study found that MTurk workers perform equally well on such tasks in comparison to community members from a middle class urban neighborhood.<sup>31</sup> Additionally, the failure rates of MTurk workers have been found to be correlated with IP addresses from outside of the United States.<sup>32</sup> By limiting our sample to U.S. residents and requesting a comparatively simple task, our analysis should not suffer from a deficit of attention or comprehension.

To assess the degree to which our sample represents the population from which Bing could have plausibly collected data, we compared the demographic make-up of our MTurk sample with (1) the general U.S. population, and (2) a large Internet sample gathered by Gosling et. al. in 2004.<sup>33</sup> The comparison with a large Internet sample is useful because a large Internet sample might better represent search engine users who are the target of Bing's advertisements. The results of this comparison are summarized in Table 1 below:

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*Cheap, Yet High-Quality Data?*, 6 PERSP. ON PSYCHOL. SCI. 3 (2011).

<sup>29</sup> G. Paolacci et al., *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411 (2011).

<sup>30</sup> Joseph K. Goodman et al., *Data Collection in a Flat World: The Strengths and Weaknesses of Mechanical Turk Samples*, 26 J. BEHAV.. DECISION MAKING 213 (2012).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Samuel D. Gosling et al., *Should We Trust Web-Based Studies?*, 59 AM. PSYCHOLOGIST 93 (2004).

Table 1: Demographic Comparison

	<b>MTURK SAMPLE (N=984)</b>	<b>U.S. Population (N &gt;300 million)</b>	<b>Gosling Internet Sample (N=361,703)<sup>34</sup></b>
<b>AGE</b>	78% younger than 35	48% younger than 35 <sup>35</sup>	81% younger than 30
<b>GENDER</b>	40% Female	51% Female <sup>36</sup>	57% female
<b>RACE</b>	76% White <sup>37</sup>	63% White <sup>38</sup>	77% White
<b>EDUCATION</b>	47% with 4-year degree or higher	29% with 4-year degree or higher <sup>39</sup>	Not reported
<b>RELIGION</b>	54% non-religious	10% non-religious <sup>40</sup>	Not reported
<b>POLITICS</b>	48% liberal, 17% conservative	21% liberal, 40% conservative <sup>41</sup>	Not reported

We find that our sample over-represents younger people, whites, and males relative to the general U.S. population. Except for an overrepresentation of men, the sample is consistent with a large Internet sample along relevant demographic dimensions.

<sup>34</sup> *Id.*

<sup>35</sup> Lindsay M. Howden & Julie A. Meyer, U.S. Census Bureau, *Age and Sex Composition: 2010, 2010 Census Briefs*, U.S. DEP'T COM. (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> Asians are also over represented at 12% compared to 5% in the U.S. population

<sup>38</sup> Howden & Meyer, *supra* note 35.

<sup>39</sup> U.S. Census Bureau, *Table 1: Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2012: All Races*, U.S. DEP'T COM., <http://www.census.gov/hhes/socdemo/education/data/cps/2012/tables.html> (last updated Jan. 7, 2013).

<sup>40</sup> *U.S. Religious Landscape Survey: Religious Affiliation: Diverse and Dynamic*, PEW F. ON RELIGION & PUB. LIFE 5 (Feb. 2008), <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>. (includes respondents who are categorized as atheist (1.6%), agnostic (2.4%), or secular unaffiliated (6.3%). The other categories included Christian (78.4%), other religion (4.7%), religiously unaffiliated, (5.8%) and "don't know/refused" (0.8%).)

<sup>41</sup> Lydia Saad, *Conservatives Remain the Largest Ideological Group in the U.S.*, GALLOP.COM (Jan. 12, 2012), <http://www.gallup.com/poll/152021/conservatives-remain-largest-ideological-group.aspx>.

We also find that our MTurk sample is more educated than the U.S. population. While the Gosling Internet survey did not measure education attainment, it did use socioeconomic class as a proxy for education and concluded that higher socioeconomic groups are “somewhat overrepresented.”<sup>42</sup>

Finally, we find large political and religious affiliation gaps between our sample and the U.S. population. This gap is likely a byproduct of our sample’s youth bias, and therefore would show up in Internet samples generally because they also exhibit a youth bias.<sup>43</sup> Overall, we conclude that while our data is not fully representative of the United States population, its demographic characteristics are generally consistent with online samples of the type that Microsoft relied upon in its Bing It On studies.<sup>44</sup> Our later regressions investigate whether demographics subgroups exhibit different search preferences.

### III. FINDINGS

We obtained 1,008 Bing It On challenge responses from the MTurk platform and narrowed our analysis to 985 respondents who submitted screen shots for 4925 searches. The preference results analyzed at both the respondent level and the search level for each of the three experimental groups are summarized below:

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<sup>42</sup> Gosling, *supra* note 33, at 98 (finding that 32% identified as upper or upper-middle class, while only 15% identified as working-class and only 1% identified as being poor). Sociologists Thompson and Hickey estimate 16% of America falls in the upper or upper-middle classes and 40-50% fall into the working or lower class. WILLIAM THOMPSON & JOSEPH HICKEY, SOCIETY IN FOCUS (2005).

<sup>43</sup> Younger Americans tend to be more liberal, *see* David Leonhardt, *Old vs. Young*, N.Y. TIMES, (June 22, 2012), <http://www.nytimes.com/2012/06/24/opinion/sunday/the-generation-gap-is-back.html>, and less religious, *see* Dan Gilgoff, *Study: Young Americans Less Religious Than Their Parents*, CNN, (Feb 17, 2010), <http://www.cnn.com/2010/US/02/17/report.millennials.faith/index.html>.

<sup>44</sup> Wallaert, *supra* note 1; *People Chose Bing*, *supra* note 1.

Table 2: Search Engine Preference for 3 Different Types of Search Terms

Unit of observation = respondent:

PREFERENCE	ALL SEARCHES	POPULAR SEARCHES	SELF-SELECTED SEARCHES	BING-SUGGESTED SEARCHES
<b>Bing Wins</b>	400 (41%)	129 (39%)	112 (35%)	159 (48%)
<b>Tie</b>	61 (6%)	19 (6%)	24 (8%)	18 (5%)
<b>Google Wins</b>	524 (53%)	184 (55%)	183 (57%)	157 (47%)
<b>Total</b>	985	332	319	334

Unit of observation = search:

PREFERENCE	ALL SEARCHES	POPULAR SEARCHES	SELF-SELECTED SEARCHES	BING-SUGGESTED SEARCHES
<b>Bing Wins</b>	2072 (42%)	673 (41%)	632 (40%)	767 (46%)
<b>Tie</b>	399 (8%)	129 (7.8%)	138 (9%)	132 (8%)
<b>Google Wins</b>	2454 (49%)	858 (52%)	825 (52%)	771 (46%)
<b>Total</b>	4925	1660	1595	1670

Our sample group generally preferred Google to Bing analyzed at both the respondent level (53% to 41%) and the individual search level (49% to 42%). The preference for Google was most pronounced when respondents used popular search terms or selected their own search terms. Respondents who used Bing-suggested search terms preferred Bing and Google in nearly equal numbers.

Table 3 reports, at both the respondent and individual search level, t-tests of the following null hypotheses:

The frequency of Bing wins is equal to the frequency of Google wins. The hypothesis tests Microsoft's current claim that "in blind tests, people prefer Bing to Google for the web's top searches."<sup>45</sup>

The frequency of Bing wins outnumbers the frequency of Google wins by a 2-to-1 margin. The hypothesis tests Microsoft's initial claim that "people choose Bing web search results over

<sup>45</sup> Wallaert, *supra* note 1.

Google nearly 2-to-1 in blind comparison tests.”<sup>46</sup>

Table 3: Statistical Tests of Equal or 2:1 Preference Hypotheses

Unit of observation = respondent:

	TYPE OF SEARCH TERMS			
	ALL TERMS	POPULAR	SELF-SELECTED	BING-SUGGESTED
<b>TEST OF NULL HYPOTHESIS 1: FREQUENCY OF BING WINS = FREQUENCY OF GOOGLE WINS</b>				
t-stat	-4.11***	-3.15***	-4.25***	0.1123
P(Bing => Google)	0.0000	0.0009	0.0000	0.5447
<b>TEST OF NULL HYPOTHESIS 2: FREQUENCY OF BING WINS = TWICE THE FREQUENCY OF GOOGLE WINS</b>				
t-stat	-14.29***	-9.11***	-10.11***	-5.78***
P(Bing=>2x Google)	0.0000	0.0000	0.0000	0.0000

Unit of observation = search:

	TYPE OF SEARCH TERMS			
	ALL TERMS	POPULAR	SELF-SELECTED	BING-SUGGESTED
<b>TEST OF NULL HYPOTHESIS 1: FREQUENCY OF BING WINS = FREQUENCY OF GOOGLE WINS</b>				
t-stat	-5.70***	-4.76***	-6.00***	-.10
P(Bing=> Google)	0.0000	0.0000	0.0000	0.4594
<b>TEST OF NULL HYPOTHESIS 2: FREQUENCY OF BING WINS = TWICE THE FREQUENCY OF GOOGLE WINS</b>				
t-stat	-28.11***	-17.84***	-17.88***	-13.11***
P(Bing=>2x Google)	0.0000	0.0000	0.0000	0.0000

Note: \*, \*\*, and \*\*\* denote statistical significance to the 0.10, 0.05 and 0.01 levels, respectively.

Our analysis strongly rejects the possibility that web-users prefer Bing search results to those of Google by a 2-to-1 margin in

<sup>46</sup> *People Chose Bing*, *supra* note 1.

general, and for subjects in each of the three test groups. Subjects who used popular search terms or self-selected search terms had a statistically significant preference for Google over Bing. Subjects who employed search terms suggested by Bing did not exhibit a statistically significant preference for either of the two search engines.

Table 4 reports the results of probit regressions<sup>47</sup> at the individual-search level (dropping "ties") testing whether the type of search term used, demographic factors, and payment made to respondent (\$0.40 through the initial phase versus \$1.00 through the second) had statistically significant effects on the likelihood of preferring Bing over Google. The omitted variable for the treatment group is the popular search term group. The omitted variables for demographic characteristics are: Gender: Male, Age: 18-25, Race: White, Politics: Liberal, Religion: None, and Ed: 4yr College.

*Table 4: Probit Regression of Bing Preferred Indicator ("tie" observations excluded)*

	(1)	(2)	(3)
Bing_Sug	0.059 (2.64)***	0.066 (2.94)***	0.065 (2.91)***
Self_Sug	-0.006 (0.26)	-0.001 (0.04)	-0.002 (0.11)
Female		0.058 (3.05)***	0.058 (3.07)***
Age_26to34		0.037 (1.73)*	0.025 (1.16)
Age_35to54		0.046 (1.68)*	0.035 (1.28)
Age_55to64		0.089 (1.35)	0.058 (0.91)
Age_Over65		0.122 (1.05)	0.104 (0.84)
Race_AfAm		0.079 (1.99)**	0.069 (1.75)*

<sup>47</sup> A probit regression estimates the effect that various variables have on the likelihood that an observation would take one of only two possible outcomes. In this case, the two possible outcomes were whether or not a person would prefer Bing-generated search results.

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Race_Hispanic	0.003 (0.05)	-0.010 (0.22)	
Race_Asian	0.049 (1.54)	0.045 (1.40)	
Race_NativeAm	0.203 (2.06)**	0.183 (1.95)*	
Race_PacIslander	0.313 (1.54)	0.323 (1.68)*	
Race_Other	0.071 (1.15)	0.049 (0.78)	
Pol_Moderate	0.001 (0.05)	0.004 (0.18)	
Pol_Conservative	0.036 (1.27)	0.042 (1.48)	
Pol_Unaff_Indiff	0.034 (1.09)	0.033 (1.06)	
Politics_Other	0.060 (0.78)	0.053 (0.69)	
Rel_Christian	0.011 (0.49)	0.004 (0.20)	
Rel_nonChristian	0.051 (1.45)	0.041 (1.17)	
Ed_LessthanHS	-0.044 (0.68)	-0.023 (0.38)	
Ed_HSorGED	-0.005 (0.17)	-0.004 (0.12)	
Ed_SomeCollege	-0.017 (0.74)	-0.011 (0.48)	
Ed_2YrCollege	0.037 (1.19)	0.043 (1.40)	
Ed_Master	0.012 (0.33)	0.003 (0.08)	
Ed_DocProf	0.024 (0.39)	0.023 (0.37)	
Wave		-0.085 (4.49)***	
<i>N</i>	4,526	4,449	4,449
Pseudo R <sup>2</sup>	.0025	.0134	.0182

*Note:* z-statistics in parentheses; \*, \*\*, and \*\*\* denote statistical

significance to the 0.10, 0.05 and 0.01 levels, respectively. Standard errors are clustered by respondent. The table reports the marginal effects derived from probit coefficients (using STATA's dprobit procedure) and thus represent the predicted percentage-point effect on Bing preference of changing a right-hand indicator from 0 to 1 (while evaluating all other independent variables at their mean).

We find across our three nested specifications that using Bing-suggested terms (relative to popular terms) results in a statistically significant, 6 percentage point increase in the predicted likelihood of preferring Bing over Google. Females are estimated to be about 6 percentage points more likely than males to prefer Bing, although they still favored Google over Bing on average across all experimental groups.<sup>48</sup> African-Americans, Asians, Native Americans and Pacific Islanders were statistically more likely to prefer Bing than Whites. Overall, the regressions suggest a broad consensus among demographic groups in their general preference for the Google panel over the Bing panel, and in the raw data, there were no substantial race,<sup>49</sup> age, gender or level-of-payment subgroups that displayed an average preference for Bing.<sup>50</sup>

In summary, our findings strongly reject the possibility that internet users would prefer Bing search results to Google search results at anywhere near a 2-to-1 ratio. We also statistically reject the weaker claim of people preferring Bing over Google, except when using search terms suggested by the Bing website, which appear to be biased in favor of Bing when compared to both popular and self-selected search terms. Even when subjects used Microsoft-selected terms, our analysis did not find statistically significant evidence of a preference for Bing. In light of these results, the next section analyzes whether Bing's initial claim of a 2-to-1 preference as well as other explicit and implicit claims represent proscribed deceptive advertisements under Section 43(a) of the Lanham Act.

#### IV. LEGAL IMPLICATIONS

##### The Lanham Act and the Federal Trade Commission Act

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<sup>48</sup> Overall, non-tying female respondents still preferred Google. Of our 393 non-tying female respondents, 52.7% preferred Google.

<sup>49</sup> Two small racial respondent subgroups (Pacific Islanders and Native Americans) show a slight, non-statistical preference for Bing.

<sup>50</sup> However, in the individual search results, African-Americans displayed a slight overall preference for Bing over Google (121 vs. 107 searches).

(FTC Act) govern false advertising at the federal level. Section 43(a) of the Lanham Act proscribes “false or misleading description . . . [or] representation of fact” in commercial advertisements and creates a right of action for competitors.<sup>51</sup> The FTC Act authorizes the Federal Trade Commission (FTC) to regulate advertisements in order to protect consumers from false advertisements.<sup>52</sup> In addition, numerous state legislatures have passed so called “baby FTC” acts prohibiting unfair and deceptive trade practices, which include provisions against false or misleading advertisements.<sup>53</sup> This Section focuses on Microsoft’s potential liability as a result of the Bing It On campaign under the Lanham Act.<sup>54</sup>

### *The Lanham Act*

Section 43(a) of the Lanham Act creates a private cause of action against false or misleading advertising.<sup>55</sup> Though the statutory text reads that “any person who believes that he or she is or is likely to be damaged” by false or misleading advertisements can bring suit, federal courts have held that consumers lack standing to sue because the act was enacted “to protect persons engaged in . . . commerce against unfair

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<sup>51</sup> Lanham Act (Trademark Act of 1946) § 43(a), 15 U.S.C. § 1125(a) (2006) (providing that “(a)(1) Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device or any combination thereof, or any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person’s goods, service or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”). The Supreme Court in the coming term’s *Lexmark v. Static Control*, 387 F.3d 522 (6th Cir. 2004), *cert. granted*, 133 S. Ct. 2766 (2013), may determine whether other economic actors have standing to bring Lanham Act deceptive advertising claims.

<sup>52</sup> Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (2006).

<sup>53</sup> *See, e.g.*, Colorado Consumer Protection Act, COLO. REV. STAT. ANN. §§ 6-1-101 to 6-1-115 (West 2013); CONN. GEN. STAT. § 42-110a to -110g; Uniform Deceptive Trade Practices Act, GA. CODE ANN. §§ 10-1-370 to 10-1-375 (West 2013); OHIO REV. CODE ANN. §§ 41.4165.01-4165.04 (West 2013); Oklahoma Deceptive Trade Practices Act, OKLA. STAT. ANN. tit. 78, §§ 51–55 (West 2013); OR. REV. STAT. ANN. §§ 646.605-656 (West 2013).

<sup>54</sup> Microsoft’s liability under the FTC Act and baby FTC acts are considered separately in a web appendix, available at <http://islandia.law.yale.edu/ayres/Bing-It-On-Web-Appendix.pdf>.

<sup>55</sup> Lanham Act (Trademark Act of 1946) § 43(a), 15 U.S.C. § 1125(a) (2006).

competition.”<sup>56</sup> The most obvious plaintiff to bring a Section 43 case against Microsoft for its Bing It On campaign is Google, the target of the disfavoring comparison. Other search engine providers, such as Yahoo or Baidu, might also have standing as competitors of Microsoft.<sup>57</sup> In order to prevail in a Section 43(a) action, the plaintiff must show that defendant’s advertisement falls under interstate commerce and communicates a false or misleading message that materially deceives consumers.<sup>58</sup>

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<sup>56</sup> Lanham Act § 45, 15 U.S.C. § 1127 (2006). For cases denying consumers the right to sue, see, for example, *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 n.5 (5th Cir. 1996) (“[W]e have found no case which suggests that ‘consumers’ as such have standing under § 43(a).”); *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995) (“[T]hus, to have standing for a false advertising claim, the plaintiff must be a competitor of the defendant and allege competitive injury.”); *Serbin v. Ziebart Int’l Corp.*, 11 F.3d 1163, 1177 (3d Cir. 1993) (holding that the consumers, as noncommercial plaintiffs, do not have standing under the Lanham Act); *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686 (2d Cir. 1971) (analyzing the legislative history and purpose behind § 43(a) and concluding that consumers lacked standing to bring action under the Lanham Act); *Bacon v. Southwest Airlines Co.*, 997 F. Supp. 775, 780 (N.D. Tex. 1998) (holding that there is no private cause of action for consumers under the false advertising prong of the Lanham Act).

<sup>57</sup> Some Circuits have held that direct competition is not necessary for standing. See *Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d 164 (3d Cir. 2001) (“Section 43(a) is intended to provide a private remedy to a commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor’s false advertising. This is not to say that a non-competitor never has standing to sue under this provision; rather the focus is on protecting commercial interests [that] have been harmed by a competitor’s false advertising and securing to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not.”) (citations and internal quotation marks omitted); *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 130 (2d Cir. 2000). Other Circuits have held that plaintiffs have standing only against “competitive injuries.” See *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995); *Stanfield*, 52 F.3d at 873; *L.S. Heath & Son, Inc. v. AT&T Info. Sys. Inc.*, 9 F.3d 561 (7th Cir. 1993) (denying standing to a non-competitor).

<sup>58</sup> Federal courts repeatedly enumerated the elements of a Section 43(a) claim as “(1) a false statement of fact by the defendant in a commercial advertisement about its own or another’s product; (2) the statement actually deceived or has the tendency of deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.” See, e.g., *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F. 3d 24, 33 n.6 (1st Cir.

Under section 43(a), plaintiffs must show that the allegedly false advertisement *actually* deceives, or has the potential to deceive, consumers regarding a relevant quality of the product.<sup>59</sup> In assessing the degree of deception, courts first identify the express and implied “claims” of an advertisement, and then determine whether these claims are false or misleading. A claim is (1) false if it contains representations that are literally false; and (2) misleading if it contains representations that, while not literally false, nonetheless generate implications that have a tendency to mislead consumers.<sup>60</sup> The actual deception requirement is obviated upon a finding of literal falsity.<sup>61</sup> In other words, literally false advertisements are treated as *per se* deceptive, and courts do not require evidence of actual consumer deception to prove liability under the Lanham Act.<sup>62</sup> Where the advertised claim is merely misleading, a plaintiff must meet the materiality requirement by showing that the advertisement actually or likely causes consumers to hold a misconception.<sup>63</sup>

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2000); *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000); *Balance Dynamic Corp. v. Schmitt Indus.*, 204 F.3d 683, 689 (6th Cir. 2000); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 922-23 (3d Cir. 1990).

<sup>59</sup> Lanham Act § 45, 15 U.S.C. § 1127 (2006).

<sup>60</sup> *SC Johnson & Sons, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001); *Johnson & Johnson v. GAC Int’l Inc.*, 862 F.2d 975, 977 (2d Cir. 1988) (outlining the two different theories of false advertising as either “(1) an advertisement must be false on its face; or (2) the advertisement may be literally true, but given the merchandising context, it nevertheless his likely to mislead and confuse consumers”).

<sup>61</sup> *Pizza Hut Inc. v. Papa Johns Inter., Inc.*, 227 F.3d 489, 497 (5th Cir. 2000) (“With respect to materiality, when the statements of fact at issue are shown to be literally false, the plaintiff need not introduce evidence on the issue of the impact the statements had on consumers.”).

<sup>62</sup> *Cashmere & Camel Hair Mfr. Inst. v. Saks Fifth Ave.*, 284 F. 3d 302 (1st Cir. 2002) (finding a presumption of consumer deception when garments with less than 1% cashmere were labeled as 10% cashmere and where garments labeled “cashmere” were actually “recycled cashmere”); *Coca-Cola Co. v. Tropicana Prods. Inc.*, 690 F.2d 312, 317 (2d. Cir. 1982) (holding that when a challenged representation is shown to be “literally or explicitly false, the court may grant relief without referencing to the advertisement’s impact on the buying public”).

<sup>63</sup> *Sandoz Pharms. Corps. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228-29 (3d. 1990); *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165-66 (2d Cir. 1978). Litigants typically employ surveys to demonstrate, or rebut, consumer deception. Courts have found material deception when 15% to 20% of respondents report being misled. See *Novartis Consumer Health, Inc. v.*

In recent years, several circuits have embraced a third category of false advertising, whereby an advertisement is offensive if it is "literally false by necessary implication."<sup>64</sup> Such advertisements contain statements that, while true, have unambiguous implications that are literally false. Courts define unambiguous implications as unstated claims that an audience nonetheless would unmistakably recognize, as if those claims had been explicitly made. Where this is the case, under the Lanham Act, plaintiffs need not produce explicit, extrinsic evidence of actual consumer deception.<sup>65</sup>

Our study indicates that, while Microsoft makes no literally false claims, several of its implicit representations may be found to be either literally false by necessary implication or otherwise misleading. The following subsections analyze Microsoft's express and implied claims under the Lanham Act.

#### A. Analysis of Microsoft's Express Claims

Microsoft expressly claimed (1) "[i]n blind tests, people choose Bing search results over Google" results at a nearly 2-to-1 ratio,<sup>66</sup> and (2) "[i]n blind tests, people preferred Bing over Google

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Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 594-95 (3d Cir. 2002) (finding that a material deception rate of 15% was sufficient to demonstrate a likelihood of substantial consumer confusion); However, a misconception rate of less than 10% has been held to be insufficient evidence. See Johnson & Johnson-Merck Consumer Pharms., Co. v. Rohne Poulenc Rorer Pharms., Inc., 19 F.3d 125, 135-36 (3d Cir. 1994) (holding that a misconception rate of only 7.5% was insufficient evidence).

<sup>64</sup> A total of six federal circuits have affirmed the doctrine, including the First, Second, Third, Fourth, Ninth and Tenth Circuits. See, e.g., Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144 (2d Cir. 2007); Zoller Labs. LLC v. NBTY, Inc., 111 F. App'x 978 (10th Cir. 2004); Scotts Co. v. United Indus. Corp., 315 F.3d 264 (4th Cir. 2002); Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578 (3d Cir. 2002); Clorox Co. P.R. v. Procter & Gamble Commercial Co., 228 F.3d 24 (1st Cir. 2000); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997).

<sup>65</sup> *Time Warner Cable, Inc.*, 497 F.3d at 158 (stating that, for a "necessary implication" to occur, an implied claim must be "unmistakable" and "susceptible to no more than one interpretation."). See also Johnson & Johnson-Merck Consumer Pharms. Co. v. Procter & Gamble Co., 285 F. Supp. 2d 389, 391 (S.D.N.Y. 2003). *Clorox Co. P.R.*, 228 F.3d at 35 (ruling that an implication is unambiguous "when, considering the advertisement in its entirety, the audience would recognize the claims as readily as if it had been explicitly stated.").

<sup>66</sup> *People Chose Bing*, *supra* note 1.

for the web's top searches."<sup>67</sup> Both claims are based on actual tests that Microsoft commissioned. Presuming that Microsoft had indeed conducted blind comparison tests and did not falsify results, it is unlikely that plaintiffs can show that these claims are literally false.<sup>68</sup>

#### B. Analysis of Representations Implicit in Microsoft's Express Claims Regarding Consumers' General Preferences

Implicit in the reporting of test results is the representation that the results, rather than being specific to participants who took the test, are appropriately generalizable. In *Southland Sod*, a Ninth Circuit panel held that a chart depicting that "Bonsai" turf grass grew slower in "an independent comparison test" than other fescues necessarily implied (falsely) a general claim about the growth rates of different grasses.<sup>69</sup> By the Ninth Circuit's logic, implicit in Microsoft's reporting of test results is the representation that Internet users generally prefer Bing over Google by a ratio of 2:1, and this preference holds true for the "web's top searches." The generalized implication is strengthened by Microsoft's current representation, "Wherever we go, people prefer Bing over Google for the web's top searches."

Microsoft's implied claim regarding the preferences of consumers generally can be judged false by demonstrating that the supporting tests were not sufficiently reliable to permit one to conclude with reasonable certainty that the general proposition holds true.<sup>70</sup> A Ninth Circuit panel declared that, "plaintiff[s] may meet this burden either by attacking the validity of the defendant's tests directly or by showing that the defendant's tests are contradicted or unsupported by other scientific tests."<sup>71</sup> Effective attacks against the validity of Microsoft's commissioned study require more information about how it was conducted. Even if the original study was internally valid, the implied claims would still be vulnerable to contradicting scientific tests. Our research indicates that the likelihood of people in the general population preferring Bing over Google at a

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<sup>67</sup> Wallaert, *supra* note 1.

<sup>68</sup> However, as discussed in the Web Appendix, the second statement's express claim of applicability to "the web's top searches" raises the possibility of a misleading finding.

<sup>69</sup> *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997).

<sup>70</sup> *Id.* at 1139.

<sup>71</sup> *Id.*

2:1 ratio is virtually nil, and the likelihood of people preferring Bing over Google for the most popular web searches is less than 1%.<sup>72</sup> Our results undermine the validity of Microsoft's tests, and create a strong presumption that an implicit claim of generalizability was false.

### C. Analysis of Microsoft's Implicit Representation that Its Express Claims were Based on a Sample Size of 5 Million

After making the "nearly 2:1" claim that the results of blind comparison tests favor Bing over Google, *bingiton.com* invites visitors to "[d]ecide for yourself which search engine you prefer"<sup>73</sup> by taking the online Bing It On challenge. The proximity of the two phrases on the website, combined with Microsoft's encouragement to "join the 5 million people who've visited the challenge," may be viewed as implying (falsely) that Microsoft's claims regarding people's preference for Bing over Google are substantiated by data collected from five million Bing It On challenge takers, rather than data from a single, independent study commissioned by Bing with slightly less than one thousand participants.

A court might find that the advertisement *necessarily* implies that Microsoft's claims were based on the larger sample or, alternatively, that the results from the five million blind challenge takers are consistent with the results from the (significantly smaller) commissioned study. Even if a court does not find the representation to be necessarily and unambiguously implied, it might still find that Microsoft's failure to adequately distinguish the different blind tests has a tendency to mislead consumers. The confusion caused by this failure is likely substantial—the results of our independent study provide strong evidence that the preferences of the five million online challenge takers are not in fact consistent with the purported results of Microsoft's commissioned study.

The Bing It On website includes a disclaimer in small text at the bottom of the webpage, as well as a hyperlink that takes the visitor to another webpage that provides limited details ("using a representative online sample of nearly 1,000 people, ages 18 and older, from across the US") about the commissioned study.<sup>74</sup> However, courts have often found corrective disclaimers

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<sup>72</sup> See *supra* Section III.

<sup>73</sup> BING IT ON, <http://www.bingiton.com> (last visited October 17, 2013).

<sup>74</sup> *Id.*

inadequate when they are not readily accessible to consumers.<sup>75</sup> For example, in *American Home Products v. Johnson & Johnson*, the Southern District of New York held, “If the advertisement contains a definition or disclaimer [that] is so inconspicuously located or in such a fine print that readers tend to overlook it, it will not remedy the misleading nature of the claim.”<sup>76</sup> Furthermore, the Third and Fourth Circuits have voiced doubts over whether disclaimers can ever correct for a literally false claim, whether it is explicitly false or false by necessary implication.<sup>77</sup>

The Bing It On disclaimer is particularly weak; it only clarifies that the reported test was “[b]ased upon a comparison of web search results panes only; excludes ads, Bing’s snapshots and Social Search panes and Google’s Knowledge graph.”<sup>78</sup> The disclaimer merely describes the testing conditions employed by the commissioned study, which appear to be identical to the conditions employed by Microsoft to test the preferences of five million online users who took the Bing It On Challenge. The disclaimer does not indicate that the “blind test” that the 2:1 claim refers to was based on data collected independently of the online Bing It On Challenge, and on a sample size considerably smaller than five million.

The second sentence of the disclaimer references a “study,” but it is the only use of the word in the entire advertisement, leaving readers unclear as to what is being referenced. Only after clicking on the hyperlink and reading several paragraphs does the visitor learn that the study refers to a series of blind tests that were distinct from the Bing It On challenge.<sup>79</sup> The necessary information is hidden away on a separate website. As a result, Microsoft’s disclaimer is likely to be judged inadequate.

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<sup>75</sup> See, e.g., *Giant v. FTC*, 322 F.2d 977 (D.C. Cir. 1963) (finding that the term “manufacturer’s list price” in an advertisement misled consumers to believe that the price was the competitive sales price and holding that a small print disclaimer explaining the meaning of “manufacturer’s list price” was insufficient to correct for consumer deception).

<sup>76</sup> *Am. Home Prod. v. Johnson & Johnson*, 654 F. Supp. 568, 590 (S.D.N.Y. 1987).

<sup>77</sup> *Scott v. United Indus. Corp.*, 315 F.3d 264, 276 n.4 (4th Cir. 2002) (“If the graphic conveyed a literally or impliedly false claim, then the disclaimer might not be sufficient to eliminate the confusion.”).

<sup>78</sup> BING IT ON, <http://www.bingiton.com> (last visited October 17, 2013).

<sup>79</sup> Wallaert, *supra* note 1.

#### D. Analysis of Microsoft's Unstated Implication that the Bing It On Challenge is Free from Bias

The Bing It On Challenge is advertised as a "Bing vs. Google" comparison test available to visitors. An implicit claim imbedded in this invitation is that the comparison tests will not be biased—that the suggested search terms on bingiton.com were not chosen to favor Bing. This implication of lack of bias is clear from the description of the test as "blind" and the disclaimer emphasizing that search results strip away identifying characteristics.<sup>80</sup> Yet our analysis of MTurk data indicates that the search terms suggested by Microsoft were likely biased in favor of Bing. As a result, Microsoft's representation regarding the impartiality of its testing procedure is likely false.

We found that the preference for Google over Bing was significantly higher when subjects used popular search terms (55% to 39%) and self-selected search terms (57% to 35%) rather than Bing-suggested terms (47% to 48%). Regression analysis indicates (at the 95% confidence level) that using Bing-suggested terms significantly increased the likelihood of preferring Bing search results in the Bing It On Challenge. These findings create a strong presumption that Microsoft made strategic choices regarding the search terms that were recommended on the Bing It On website. Though the unbiased nature of suggested terms is only implied by the advertisement, courts are likely to find it to be a necessary implication, as the Bing It On Challenge's advertised message of Bing being superior to Google would be undermined without it.<sup>81</sup>

### V. CONCLUSION

This article reports the results of a randomized experiment assessing the robustness of Internet-user preferences for Bing or Google search results on the www.bingiton.com challenge site. Although Microsoft has claimed that in an independent study nearly two out of three users preferred Bing, this article performed a similarly sized study and was not able to replicate the Microsoft result. On the contrary, we found a statistically significant preference for Google results over Bing results using

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<sup>80</sup> BING IT ON, *supra* note 79.

<sup>81</sup> See *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1144 (9th Cir. 1997) (stating that a claim is a necessary implication where alternative meanings are "nonsensical").

Microsoft's own challenge site. Moreover, the results of our study suggest that Microsoft recommends that online users taking the Bing It On challenge employ search terms that are statistically more likely to produce user preferences for Bing than terms chosen by the users or those that appear on a list of popular search terms. Google likely has a viable Lanham Act claim against Microsoft for making advertising claims with misleading "necessary implications."