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Imagined Consumers: How Judicial Assumptions about the American Consumer Impact Trademark Rights, for Better and for Worse

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IMAGINED CONSUMERS: HOW JUDICIAL ASSUMPTIONS ABOUT THE AMERICAN CONSUMER IMPACT TRADEMARK RIGHTS, FOR BETTER AND FOR WORSE

I. INTRODUCTION

The scope of trademark protection in the United States has significantly expanded since the passage of the original Lanham Act. Many trademark experts believe that this trend should be halted or even reversed.[1] These experts think that modern trademark law overprotects the owners of well-known marks, with little or no real benefit to consumers.[2] Basically, they want to see trademark law return to its roots: protecting the consumer from confusion as to the source of the products and services they purchase.[3]

One popular solution to this problem is the trademark use requirement.[4] However, recent cases and articles cast doubt upon the viability of the trademark use doctrine.[5] This Article proposes another solution, which could be easily implemented—really, it would require just that judges shift their view of the contemporary consumer. Rather than coddling consumers and reacting to their misconceptions, courts should presume that consumers hold a reasonable degree of intelligence and sophistication. This proactive, aspirational construction of the reasonable consumer would create a heavier burden for plaintiffs in infringement cases, and thereby help curb the expansion of trademark rights. Further, this shift in attitude would more accurately reflect the reality of the

1. *See* Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1715 (1999).

2. *See* Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 143 (2010).

3. *Id.* at 139.

4. Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669, 1673 (2007).

5. *See* Graeme B. Dinwoodie & Mark D. Janis, *Lessons From the Trademark Use Debate*, 92 IOWA L. REV. 1703, 1704–05 (2007); Rescuecom Corp. v. Google, Inc., 562 F.3d 123, 129–30 (2d Cir. 2009).

modern consumer, who has much greater access to information and is less reliant on the information-conveying purposes of trademarks.

This Article begins by briefly tracing the expansion of trademark rights over the years, arguing that this expansion ultimately harms consumers. Next, this Article criticizes certain judicial constructions of the consumer as inaccurate or, at best, unhelpful. Finally, this Article describes what an aspirational construction of the consumer would look like, how it would work in practice, and the positive effect it would have on trademark law and the marketplace.

II. THE COSTS OF TRADEMARK OVERPROTECTION

Since the passage of the Lanham Act, the primary purpose of trademark law has been to protect consumers from confusion.[6] This confusion can refer either to confusion as to the source of goods or confusion as to sponsorship of goods.[7] The basic idea is that consumers should be able to rely on the information-conveying function of a trademark. If a deodorant says OLD SPICE on the label or uses the OLD SPICE logo, then consumers should be confident that the deodorant is in fact manufactured or vouched for by Old Spice, Inc.

Trademark protection strengthens the incentive for Old Spice, Inc. to invest in the quality of its product.[8] If anyone could market deodorant under the OLD SPICE mark, then anyone could benefit from Old Spice, Inc.'s investment in its brand, and the incentive would be diminished.[9] These days, it is common for companies to produce a varied array of products. Likewise, trademark law would now bar a competitor from marketing OLD SPICE soap, shampoo, shaving cream, etc.

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6. 15 U.S.C. § 1125(a) (2012); Lemley, *supra* note 1, at 1695 ("We give protection to trademarks for one basic reason: to enable the public to identify easily a particular product from a particular source.").

7. 15 U.S.C. § 1125(a).

8. Lemley, *supra* note 1, at 1694.

9. *Id.* at 1695 (arguing that this increased incentive is a secondary benefit to trademark protection, whereas consumer protection is, and should remain, the Lanham Act's primary purpose).

A. The Road to Trademark Overprotection

Trademark protection has expanded on three primary fronts. First, consumers have become more prone to confusion due to aggressive marketing, licensing, and litigation by mark owners. Second, changes to the Lanham Act have added protection against trademark dilution. Third, courts have been willing to consider new types of confusion, such as initial interest confusion, post-sale confusion, and in a few instances, subliminal confusion.

How far trademark rights extend depends on whether consumers are likely to be confused. Consequently, the scope of trademark protection is contingent on the mental states of the consuming public. As Professor Barton Beebe puts it, "trademarks are a property purely of consumers' minds."[10] The strength of this standard is that it is fluid and responsive to changes in society and the marketplace. The weakness is that the standard tends to be fluid in just one direction.[11]

Professor James Gibson describes this avenue of trademark rights expansion as the "trademark feedback loop."[12] Because the scope of trademark protection is contingent on consumer confusion, the argument goes, trademark rights exist where consumers perceive them to exist.[13] However, consumers are not trademark lawyers, and they often have misconceptions about the current state of trademark law. For example, a consumer may believe that Saturday Night Live needs permission to parody Old Spice commercials when in fact SNL needs no such thing.[14] This consumer will be confused into thinking that Old Spice has sponsored, endorsed, or condoned the sketch. The misperception

10. Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2021 (2005).

11. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 908 (2007).

12. *Id.* at 907.

13. Beebe, *supra* note 10, at 2021.

14. *See* Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769, 775 (8th Cir. 1994) (finding infringement, based on survey evidence that many consumers believed that a humor magazine required Anheuser-Busch's permission to parody its advertisements).

feeds back into trademark law through the consumer confusion standard, completing the loop.

The most disturbing aspect of the feedback loop is that it gives mark owners a measure of control over trademark law which circumvents the normal legislative and judicial process. Through aggressive litigation, mark owners can influence the public's perception of what constitutes trademark infringement. Additionally, the prospect of expensive litigation can persuade a would-be defendant to concede to a trademark owner's demands either by ceasing its current practices or by purchasing unnecessary licenses.[15] As excessive licensing becomes the norm in the marketplace, this influences public perception and creates new instances of confusion, which again completes the feedback loop.[16]

Professor Mark A. Lemley points out another source of trademark rights accretion: the application of trademark principles to cutting-edge fact patterns where traditional trademark rules are ill-suited, as in keyword advertising cases and domain name disputes.[17] Once an entity manages to secure "new" trademark rights through litigation, everyone else wants to jump on board and secure this right too.[18] Mark owners then attempt to apply this newly minted trademark right to more traditional fact patterns where such rights have yet to be applied.[19]

Trademark rights have also expanded through additions to the Lanham Act.[20] Recent iterations of the Lanham Act have made

15. Gibson, *supra* note 11, at 913 (arguing that businesses tend to be risk adverse and will err on the side of purchasing unnecessary licenses, if just to avoid a lawsuit).

16. *Id.* at 923.

17. Lemley, *supra* note 1, at 1698, 1703 (Lemley calls this "doctrinal creep"); *see also* Thomas C. Folsom, *Missing the Mark in Cyberspace: Misapplying Trademark Law to Invisible and Attenuated Uses*, 33 RUTGERS COMPUTER & TECH. L.J. 137, 165–68 (2007) (arguing that the "doctrinal creep" problem outlined by Lemley is especially prevalent in cases involving the Internet and cutting edge technology).

18. Lemley, *supra* note 1, at 1698.

19. *Id.*

20. *Id.*

"dilution" a cause of action.[21] Dilution protects the owners of famous marks from "blurring" and "tarnishment." Blurring occurs when there exists an "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark."[22] Tarnishment requires an "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark."[23] Dilution, unlike a standard infringement claim, does not require any likelihood of consumer confusion to be actionable.[24]

Further, in the trademark infringement context, judges have recognized new variations of confusion, enabling trademark owners to succeed in cases that would have been unwinnable fifty years ago.[25] Traditionally, courts linked confusion to lost sales, e.g., the case where a consumer buys Acme deodorant when he intended to buy Old Spice. Here, the harm is easy to assess: the consumer loses because he bought the wrong kind of deodorant, and Old Spice loses because (1) it lost a sale, and (2) if the consumer continues to believe that the deodorant is Old Spice after the point of sale, any negative reaction the consumer has to the imposter deodorant will be unfairly attributed to Old Spice, Inc. rather than Acme, Inc.

Today, many courts recognize initial interest confusion.[26] This occurs when a consumer is drawn to Acme deodorant falsely believing it is Old Spice, perhaps due to similar packaging or brand name, but the consumer realizes his mistake before actually

21. 15 U.S.C. § 1125(c).

22. *Id.* § 1125(c)(2)(B).

23. *Id.* § 1125(c)(2)(C).

24. *Id.* § 1125(c).

25. Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1722 (1999) ("Courts have been generous in interpreting the scope of confusion from which today's credulous purchasers must be protected: Not only must they be shielded from confusion about the source of a product at the point of sale, they must also be protected from after-market confusion, reverse confusion, subliminal confusion, confusion about the possibility of sponsorship or acquiescence, and even confusion about what confusion the law makes actionable.").

26. *See, e.g.*, Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp., 174 F.3d 1036, 1062 (9th Cir. 1999); Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 259 (2d Cir. 1987).

purchasing the Acme deodorant.[27] Initial interest confusion differs from traditional confusion because it exists even in cases where the consumer does not purchase the unwanted product.[28] The harm is more attenuated here: Old Spice did not lose a sale, and the consumer ended up with the correct product. Courts have characterized the harm in terms of "search costs," i.e., the consumer is injured because his time has been wasted.[29] In just one instance, the cost of the consumer's momentary confusion is the insignificant loss of a few seconds; in the aggregate, the argument goes, these search costs may add up to calculable economic waste.[30]

Some circuits also recognize post-sale confusion.[31] As the name implies, this confusion occurs after the point of sale, and refers to the confusion of parties other than the actual purchaser.[32] Let's say that Acme places its deodorant, which looks remarkably similar to Old Spice, in an additional layering of packaging that clearly differentiates the Acme product from Old Spice. After a consumer buys the Acme deodorant free of confusion, he would probably toss the packaging in the trash. His roommate, who did not make the purchase and thus never saw Acme's distinctive layer of outer packaging, may mistake the Acme deodorant for actual Old Spice. If the roommate secretly steals a few applications of the Acme product, and the roommate botches a job interview because he reeks of cheap deodorant, then the roommate would blame his bad experience on Old Spice, Inc. Furthermore, if this particular kind of Old Spice were very expensive and rare, the knockoff might

27. Lemley & McKenna, *supra* note 2, at 151.

28. *Id.*

29. *See generally* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 275 (1987) (arguing that search costs provide a rational economic basis for infringement actions based on initial interest confusion).

30. *See id.*

31. *See, e.g.*, Acad. of Motion Picture Arts & Sciences v. Creative House Promotions, Inc., 944 F.2d 1446, 1455 (9th Cir. 1991); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 871 (2d Cir. 1986).

32. Insty*Bit, Inc. v. Poly-Tech Indus., Inc., 95 F.3d 663, 672 (8th Cir. 1996).

harm consumers that bought the real deal by diminishing the product's perceived scarcity.[33]

The Second Circuit and a few districts courts have recognized subliminal confusion as an actionable claim.[34] Subliminal confusion occurs when a name, logo, or packaging reminds the consumer of another mark at the subconscious level.[35] The theory of harm is that the consumer will confuse the reputations and goodwill associated with the two brands.[36] Also, the owner of the more established mark suffers from some amount of freeriding by the infringer.[37] Notably, the consumer undergoes no actual confusion as to which manufacturer makes each product.[38]

B. Winners and Losers of Trademark Expansion

Who benefits from these new causes of action, new types of confusion, and increased protection of marks? Dominant, well-established trademark owners benefit, certainly. On the surface, it would seem that consumers benefit as well. With regard to initial

33. *See* Hermes Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 108 (2d Cir. 2000) (arguing that "the purchaser of an original is harmed by the widespread existence of knockoffs because the high value of originals, which derives in part from their scarcity, is lessened.").

34. Chi-Ru Jou, *The Perils of a Mental Association Standard of Liability: The Case Against the Subliminal Confusion Cause of Action*, 11 VA. J.L. & TECH. 2, 2 (2006) (citing Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 687 F.2d 563, 570 (2d Cir. 1982); Verifine Prods., Inc., v. Colon Bros., Inc., 799 F. Supp. 240, 251 (D. Puerto Rico, 1992); Suncoast Tours, Inc. v. LambertGroup, Inc., No. CIV.A.98-5627, 1999 WL 1034683, at *5 (D.N.J. 1999); Resorts Int'l, Inc. v. Greate Bay Hotel & Casino, Inc., 830 F. Supp. 826 (D.N.J. 1992); Oxford Indus., Inc. v. JBJ Fabrics, Inc., No. 84 CIV.2505, 1988 WL 9959, at *3 (S.D.N.Y. 1988)).

35. *Id.* at 6 (providing an overview of the subliminal confusion theory of harm).

36. *Id.*

37. *Id.* at 26 (stating that such freeriding "is possible because the 'commercial magnetism' of a 'congenial symbol' creates a favorable impression in the minds of consumers").

38. *Id.* at 18 (arguing that subliminal confusion can exist without source confusion, due to the fact that with the former the consumer is not consciously aware that she is mistakenly attributing certain characteristics of one brand to another).

interest confusion, courts have shielded consumers from the frustration of increased search costs. Post-sale confusion harms would-be customers dissuaded from purchasing a product that they would otherwise enjoy. As to dilution, consumers benefit from a greater enjoyment of the intangibles associated with purchasing famous brands.

So far, this all seems like great news for consumers. But there are tradeoffs. There are three principal harms associated with trademark overprotection: (1) increased monopolization and decreased competition; (2) encouragement of poor shopping habits, resulting in irrational decisions and economic waste; and (3) limitations on speech.

1. Trademark Expansion and Monopolization

Once an entity secures the right to use a trademark, it could potentially retain this right forever. This sets trademarks apart from other forms of intellectual property: both patents and copyrights are granted for a definite term. In exchange, trademark law carries with it a different set of limitations. Trademarks cannot be owned in gross; rather, they are only good insofar as they attach to specific products and services. Trademarks must be sufficiently distinctive in order to receive protection. If they are merely descriptive, a mark owner must prove secondary meaning to gain protection, and if the term is generic no protection can be afforded.[39] Likewise, if a mark is functional, it receives no protection.[40] These limitations aim to balance the goods of trademark protection—e.g., investment in brands, confidence in the source-identifying function of marks, and the joy of purchasing products from famous brands—against the harm of monopolization.

Trademark-based monopolies can manifest themselves in different ways and to varying degrees. Most fundamentally, strong brands make it more difficult for new entrants to compete in the market, especially when a court is willing to recognize initial

39. Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 10 (2d Cir. 1976).

40. TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 34 (2001).

interest confusion.[41] Professor Laura Bradford argues that, because the established brand will be more familiar and may even engender reflexive positive feelings, consumers will unconsciously favor the established brand.[42] Thus, an easy and cheap strategy for new entrants to employ is to "free ride" on the established producer's marketing campaign.

Applying this concept of freeriding to our deodorant example, the new entrant Acme might purposively use packaging or a logo that calls to mind the OLD SPICE mark. As a result, consumers would pay more attention to the Acme product than they would otherwise. This is perhaps a beneficial instance of "initial interest confusion."[43] Also, the similarity in appearance communicates to consumers that Acme is comparable to Old Spice, or is meant to appeal to a similar class of people. Additionally, customers benefit by inheriting secondhand some of the "atmospherics of the imitated trademark."[44] With Acme, the message goes, you too can be an Old Spice man, but at a discounted price.

If a court finds Acme's use to be infringing because it causes initial interest confusion, this can harm consumers. First, assuming that the product is more or less an Old Spice equivalent sold at a lesser price, a consumer would benefit from paying extra attention to the Acme product—if he takes the risk and tries it out, he might switch. Professor Ross D. Petty goes so far as to say that "courts that have adopted the initial interest confusion doctrine

41. Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1223–24 (2007).

42. Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1283 (2008).

43. Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 769 (2004) (arguing that momentary confusion may help new market entrants attract customers with little to no harm to costumers loyal to the established brand, and that such confusion is beneficial to the consumers who decide to switch to the new entrant).

44. Jou, *supra* note 34, at 3 (arguing that increased competition is one positive effect of subliminal trademark association).

have contradicted . . . the fundamental concept of consumer sovereignty that underlies a free market economy."[45]

2. Trademark Overprotection and Irrational Consumption

In addition to constraining the free market, the overprotection of trademarks encourages irrational purchasing behavior on the part of consumers.[46] When marks are given very strong protection, producers have a greater incentive to invest in their products. This investment goes beyond simply finding ways to improve the product or bettering quality control. Much of this investment relates to branding itself, through advertising.

Advertising plays two roles. On one hand, advertisements convey information concerning product features, cost, and location, etc.[47] On the other hand, advertisements aim to persuade through emotion.[48] The information-conveying function of advertising appeals to our rational side; the persuasive function appeals to our less-than-rational side. Assuming that we'd like consumers to make smart choices, the fact that it is often the persuasive function of advertising that convinces people to buy certain products is problematic. As Professor Chi-Ru Jou frames the issue, "If consumers typically make irrational purchasing decisions based upon advertising atmospherics rather than the signaling function of the trademark as to the quality of the goods, a real conundrum arises as to whether and how trademark law could conceptualize its goal of giving consumers what they really want."[49]

But what distinguishes a rational purchasing decision from an irrational one? One way to characterize this distinction is as a

45. Ross D. Petty, *Initial Interest Confusion Versus Consumer Sovereignty: A Consumer Protection Perspective on Trademark Infringement*, 98 TRADEMARK REP. 757, 787 (2008).

46. *See* Deborah R. Gerhardt, *Consumer Investment in Trademark*, 88 N.C. L. REV. 427, 448 (2010) (pointing to survey evidence suggesting that most buyers of the Toyota Prius were motivated more by the image associated with the Prius than for the Prius' fuel economy).

47. Litman, *supra* note 25, at 1719.

48. *Id.*

49. Jou, *supra* note 34, at 27.

matter of motivation. One might expect rational purchasing decisions to be based on logical considerations, whereas an irrational decision would be based on emotion. However, research suggests that many purchasing decisions rely heavily on emotional intuition, and that this process actually leads to efficient outcomes in terms of customer satisfaction.[50] On the other hand, research also suggests that materialistic individuals often maintain strong relationships with established brands because of a fear of death—such consumption is irrational in a true Freudian sense.[51] Given that a metric based on consumer motivations would be hopelessly intertwined with muddy things like human psychology, an alternate approach is desirable.

A better way to differentiate between rational and irrational consumer behavior is to focus on outcomes. Rational decisions would tend to lead to positive outcomes, whereas irrational decisions would not. The issue then becomes how to distinguish between positive and negative outcomes. There are two primary considerations: (1) the objective economic utility of the purchase, and (2) whether the consumer is subjectively satisfied (i.e. made happy) by the purchase.

From an economic utility perspective, it is easy to see how advertising can lead to wasteful outcomes. Producers attempt to persuade consumers that purchasing their product will bring all kinds of wonderful benefits, such as emotional fulfillment, better looks, sex, friends, social status, and wealth. It goes without saying that this is ridiculous, and today's consumer knows it; nevertheless, today's consumer can't help but be persuaded anyway.

Producers are especially fond of advertising irrelevant product characteristics in an effort to differentiate the brand from those of

50. Leonard Lee, On Amir & Dan Ariely, *In Search of Homo Economicus: Cognitive Noise and the Role of Emotion in Preference Consistency*, 36 J. CONSUMER RES. 173–87 (2009) [hereinafter Leonard Lee et al., *In Search of Homo Economicus*] (subjects were given a binary choice between two products in conditions designed to invoke either emotional or cognitive decision making processes, and then tested on preference consistency).

51. Aric Rindfleisch, James E. Burroughs & Nancy Wong, *The Safety of Objects: Materialism, Existential Insecurity, and Brand Connection*, 36 J. CONSUMER RES. 12 (2009).

competitors.[52] These techniques, based on imaginary benefits and attributes, persuade consumers to pay more for the brand with the expensive advertisement campaign.[53] The brand owner then uses its increased profit margins to fund ever more elaborate and costly ad campaigns. Trademark overprotection fuels this process by ensuring a strong mental connection between the advertisement and the advertised product, free from interference by pesky competitors.[54] The end result is economic waste: less cash going towards the production of goods, more cash going towards clever advertising campaigns.[55]

When a mark becomes valuable in and of itself—e.g., the OLD SPICE logo licensed for use on a coffee mug—this leads to irrational consumption patterns.[56] Unless this author is missing something, there is nothing especially aesthetically pleasing about the OLD SPICE logo, especially when placed on a coffee mug. Yet, it is plausible that there would be a market for these mugs—maybe coffee-loving deodorant enthusiasts—and that interested consumers would pay a premium for them. For brand owners, this kind of licensing arrangement results in pure profit—they don't even need to make the mugs! Furthermore, even if the mugs were low quality and broke easily, there is little evidence showing that customers would blame Old Spice, Inc.[57] What consumers would

52. Gregory S. Carpenter, Rashi Glazer & Kent Nakamoto, *Meaningful Brands from Meaningless Differentiation: The Dependence on Irrelevant Attributes*, 31 J. MARKETING RES. 339 (1994).

53. Gerhardt, *supra* note 46, at 461(another survey cited by Gerhardt shows that "loyalty to self-affirming brands is so strong that consumers will stick with their chosen brands-even after experiencing alternatives that work better.").

54. Jou, *supra* note 34, at 28 ("Consumer susceptibility to persuasive advertising was once famously emphasized by Ralph Brown as a reason to strictly limit legal protection to the source-identifying function of trademarks, i.e. to the prevention of confusion.").

55. *Id.* at 27 ("[C]onsumer susceptibility to advertising would seem to be an equally compelling reason to minimize trademark protection so as to maximize the market disciplinary effects of competition.").

56. *See* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. Rev. 621, 657–58 (2004) (discussing the phenomenon where a "trademark's goodwill is commodified and sold as its own product").

57. Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 436–46 (2010) (providing an overview of market research on the

be buying, apparently, is a reminder to themselves and the world at large that they use Old Spice.

From the perspective of objective economic utility, paying extra for the logo on a mug is ridiculous. But from a subjective, customer satisfaction perspective, there is nothing inherently terrible about purchasing an Old Spice coffee mug, besides the suspicion that the Old Spice fan's money would be better spent elsewhere than Old Spice's advertising campaigns.

If it makes the customer happy, then where is the harm? One harm is that the consumer has less money. Although the customer may believe the purchase was fair, he is still a few dollars poorer than before. Most likely, he would have saved money by purchasing a coffee mug unadorned by a corporate logo. Further, the mug is unlikely to make the customer happy in the long term because consumers adapt quickly to material goods. Once the novelty wears off, the Old Spice mug melts into the background of the purchaser's habitat, and it no longer increases the purchaser's happiness.[58]

As we can see, customer satisfaction is a tough concept to pin down. Often, a consumer will make purchases that lead to an immediate spike in happiness, but which he later regrets. Consumers are very good at determining which familiar purchases will increase their happiness in the short term.[59] However, if this happiness stems just from the atmospherics associated with a brand and its advertising then the happiness is illusory, economically wasteful, and will likely be fleeting. Trademark overprotection exacerbates this problem by amplifying the efficacy of advertising and strengthening the mental association between the brand and product in the mind of the consumer.

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topic of sponsorship and consumer perception of brand quality; ultimately, the authors conclude that negative brand publicity stemming from the brand's mere sponsorship of a bad product is negligible).

58. Leonardo Nicolao, Julie R. Irwin & Joseph K. Goodman, *Happiness for Sale: Do Experiential Purchases Make Consumers Happier than Material Purchases?*, 36 J. CONSUMER RES. 188-89 (2009) (arguing that experiential purchases tend to have a greater and more lasting impact on a person's happiness than material purchases).

59. *See* Joel Waldfogel, *Does Consumer Irrationality Trump Consumer Sovereignty?*, 87 REV. ECON. & STAT. 695-96 (2005).

3. Speech Issues

Increasingly, trademark law is brushing up against free speech issues.[60] We live in a world dominated by brand names and logos. Reference to these words and images can be important to self-expression and identity.[61] As Professor John Tehranian points out, "[t]rademark law can proscribe the use of a single word as a designation of the source or origin of a product in a way that is likely to cause consumer confusion or dilution (through either blurring or tarnishment)."[62] The prevalence of product placement in the entertainment industry will likely create a greater potential for confusion as to sponsorship or endorsement across a variety of artistic mediums.[63] Even with the availability of fair use defenses, the prospect of costly and unpredictable litigation can have a chilling effect on speech.[64] As Professor Lemley puts it, "our ability to discuss, portray, comment, criticize, and make fun of companies and their products is diminishing."[65]

III. MORONS IN A HURRY

This Article argues that one solution to the problem of trademark overprotection is for the law to take a proactive stance when it comes to judging the sophistication and intelligence of consumers. This will allow courts to hold trademark plaintiffs to a stricter standard without having to adopt controversial doctrines like the trademark use requirement. Additionally, this aspirational construction of the consumer will more accurately reflect the modern consumer. Today's consumers have much greater access

60. *See* John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 45 (2011).

61. Gerhardt, *supra* note 46, at 459–60.

62. Tehranian, *supra* note 60, at 45.

63. For example, in *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769, 775 (8th Cir. 1994), survey evidence showed that the public believed that a satirical magazine required the beer manufacturer's permission in order to parody a Michelob advertisement.

64. Lemley, *supra* note 1, at 1712.

65. *Id.* at 1711.

to information, and are thus less reliant on the information-conveying purposes of trademarks. Before detailing this approach, it is necessary to summarize where conceptions of the consumer fit into the trademark infringement analysis.

In a standard action for trademark infringement, the plaintiff trademark owner must prove likelihood of confusion.[66] This can exist where an "appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question or when consumers are likely to believe that the challenged use of a trademark is somehow sponsored, endorsed, or authorized by its owner."[67] Different circuits look to a (slightly) different set of factors in making this determination. Many, but not all, circuits explicitly include the sophistication of the product's customer base among these factors;[68] however, assumptions about the intelligence and shopping habits of potential customers permeate any trademark infringement analysis.

In the Second Circuit, the factors for determining likelihood of confusion include the strength of the mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.[69] But it is often unclear which factors should be weighed most heavily, and the factors themselves vary from circuit to circuit.[70] Professor Beebe's empirical study of the multifactor test concludes that courts tend to decide cases based on just five core factors, listed here in order of importance: (1) the

66. 15 U.S.C. § 1115(a).

67. Meaghan E. Goodwin, *Pricey Purchases And Classy Customers: Why Sophisticated Consumers Do Not Need The Protection Of Trademark Laws*, 12 J. INTELL. PROP. L. 255, 261 (2004) (internal quotations omitted).

68. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1591 (2006) (providing a table showing which circuits use the various factors; ten circuits consider customer sophistication).

69. Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961).

70. *See* Beebe, *supra* note 68, at 1596 (providing a table demonstrating which factors are weighed most heavily in different circuits).

similarity of the marks, (2) the existence of defendant's bad intent, (3) the proximity of the goods, (4) the strength of the plaintiff's mark, and (5) evidence of actual confusion.[71] This list can be further narrowed to the first three factors, given that survey evidence of actual confusion "is in practice of little importance, and . . . the doctrine of trademark strength, particularly as it relates to the concept of inherent distinctiveness, has broken down."[72]

Interestingly, the customer sophistication prong is absent from the multifactor test in some circuits, and even in circuits that do include this factor, it is sometimes ignored.[73] This is unfortunate, because sophistication often affects case outcomes when explicitly considered.[74] Customer sophistication is the only factor that compels the judge to explicitly analyze the "consumer" element of the infringement analysis. This would seem to be a crucial part of the test, given that the standard for infringement is whether consumers are likely to be confused.

The multifactor test often serves to obfuscate what is a primary motivator behind a judge's decision, which is whether the judge thinks that consumers are likely to be confused based on the judge's own perception of the consuming public. Professor Ann Bartow argues that, in practice, such a standard is overly lenient towards trademark plaintiffs: "If the judges assume the average shopper is rather guileless and simpleminded, then anything that is even arguably mildly perplexing can be understood to meet this low threshold."[75] Others agree: "The courts rarely evaluate the consumer confusion inquiry in light of 'specific and persuasive evidence about consumer behavior, relying instead on precedent built 'on personal intuition and subjective, internalized stereotypes.'"[76]

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71. *Id.* at 1623–42.

72. *Id.* at 1623.

73. *Id.* at 1643 (Beebe's empirical analysis shows that this factor is left out of approximately sixteen percent of opinions from circuits that include a customer sophistication prong).

74. *Id.* at 1642–43.

75. Bartow, *supra* note 43, at 747.

76. Thomas R. Lee, Eric D. DeRosia & Glenn L. Christensen, *Sophistication, Bridging the Gap, and the Likelihood of Confusion: An Empirical and Theoretical Analysis*, 98 TRADEMARK REP. 913 (2008) [hereinafter Thomas R.

A. Judicial Presumptions Concerning Consumer Behavior Affect Case Outcomes

Because the metric of trademark infringement is consumer confusion, trademark law is reactive to consumer intelligence and behavior. But it would be more accurate to say that trademark law is reactive to how courts perceive consumer intelligence and behavior. Trademark cases tend to fall into two categories: those where consumers are said to be dumb and inattentive, and those where consumers are viewed as intelligent and discerning.[77] Courts find the former to be easily confused, and the latter less so.[78]

Florence Manufacturing Co. v. J.C. Dowd & Co.,[79] a case from 1910, is an oft-cited example of a court treating consumers as what Beebe calls "the fool."[80] In *Dowd*, Judge Frankfurter wrote that "the law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions."[81] This sentiment is echoed in *Stork Restaurant, Inc. v. Sahati*, a Ninth Circuit case from 1948, which stated that one of the purposes of trademark law is to "safeguard from deception . . . the ignorant, the inexperienced, and the gullible."[82]

Other cases view the consumer as more of a mall-dwelling, George A. Romero-style zombie. In *Pikle-Rite Co. v. Chicago Pickle Co.*, the court described the typical consumer as one who wanders the aisles of supermarkets in a state "not unlike that of hypnosis."[83] Similarly, in a 1942 Supreme Court case, *Mishawaka Rubber & Woolen Manufacturing Co. v. S.S. Kresge Co.*, the court

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Lee et al., *An Empirical and Theoretical Analysis*] (citing to Bartow, *supra* note 43, at 772).

77. *Id.* at 917.

78. *Id.*

79. Florence Mfg. Co. v. J.C. Dowd & Co., 178 F. 73 (2d Cir. 1910).

80. Beebe, *supra* note 10, at 2023.

81. *Dowd*, 178 F. at 75.

82. Stork Rest., Inc. v. Sahati, 166 F.2d 348, 359 (9th Cir. 1948).

83. Pikle-Rite Co. v. Chicago Pickle Co., 171 F. Supp. 671, 676 (N.D. Ill. 1959).

stated that a customer does not buy what he wants, so much as "what he has been led to believe he wants."[84]

These cases were decided many decades ago, which perhaps accounts for the extreme condescension and paternalism present in the language. Although more recent cases tend to give consumers a bit more credit,[85] negative views of consumer sophistication still permeate decisions and affect case outcomes.[86] For example, in *Frank Brunckhorst Co. v. G. Heileman Brewing Co.*, the court stated that "with respect to consumers, the products at issue here, while potentially high in quality, are low cost food and beverage items 'not conducive to the exercise of careful selectivity by purchasers.'"[87]

A finding that consumers are sophisticated also affects case outcomes. In *Versa Products Co. v. Bifold Co.*, the great care taken by purchasers of the product in question contributed to the court finding against any likelihood of confusion.[88] The court in *Perini Corp. v. Perini Construction, Inc.* went so far as to say: "Although no one factor is dispositive of the 'likelihood of confusion' inquiry, the sophistication and expertise of the usual purchasers can preclude any likelihood of confusion among them stemming from the similarity of trade names."[89]

To summarize, the cases above show how judges have imagined consumers in the past, and that these conceptions affect decisions. Although many of the most egregious examples are from a number of years ago, they are still useful in illustrating how central assumptions about consumer behavior are to the trademark infringement analysis.

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84. Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942).

85. *See, e.g.*, Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171, 1176 (9th Cir. 2010) (discussed in more detail below).

86. *See* Beebe, *supra* note 68, at 1643–44 (stating that negative or positive views of consumer sophistication tend to affect case outcomes, in circuits where consumer sophistication is considered).

87. Frank Brunckhorst Co. v. G. Heileman Brewing Co., 875 F. Supp. 966, 983 (E.D.N.Y. 1994).

88. Versa Prods. Co. v. Bifold Co., 50 F.3d 189, 213 (3d Cir. 1995).

89. Perini Corp. v. Perini Const., Inc., 915 F.2d 121, 127 (4th Cir. 1990).

B. Presumptions about Consumer Behavior on the Web

Presumptions about consumer behavior can be especially important in cyberspace infringement cases, because the ever-evolving Internet is new territory for both judges and consumers alike. For an example of how assumptions about consumer behavior on the Internet influence case outcomes, a useful comparison is found in *Brookfield Communications, Inc. v. West Coast Entertainment* and *Toyota Motor Sales, U.S.A., Inc. v. Tabari.*

In *Brookfield*, the court found the defendant movie rental store's use of the URL <moviebuff.com> to infringe the plaintiff software manufacturer's MOVIEBUFF mark.[90] Central to the court's analysis were a number of assumptions about consumer behavior on the Internet. First, the court assumed that Internet users would try to guess at a company's URL a number of times before resorting to a search engine.[91] This may have been accurate in the mid-1990s when much of the public began using the Internet for the first time. However, even then this behavior was undesirable: it wasted time, ignored the existence of search engines, and was a boon to Internet cybersquatters.

Second, an implicit assumption made by the Ninth Circuit was that momentary initial interest confusion in the context of the Internet could lead to appreciable search costs or frustration for the consumer.[92] Surely, if websites were like brick-and-mortar stores, where consumers had to drive from one to another, initial interest confusion might indeed cause frustration.[93] On the Internet, however, all one has to do is click the mouse to get back on track. As Professor Petty points out, "[n]ot all situations involving possible initial interest confusion involve coercive costs for consumers seeking to resume their original brand search."[94]

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90. Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp., 174 F.3d 1036, 1057, 1066 (9th Cir. 1999).

91. *Id.* at 1044–45.

92. *Id.* at 1062.

93. Niki R. Woods, *Initial Interest Confusion in Metatag Cases: The Move from Confusion to Diversion*, 22 BERKELEY TECH. L.J. 393, 401–02 (2007).

94. Petty, *supra* note 45, at 766.

A related assumption made by the *Brookfield* court is that consumers are more likely to be confused by the ownership of a website, as compared to the ownership of brick-and-mortar stores. The court reasoned that consumers are less likely to take the time to discern ownership on the Internet, where travelling from site to site is as easy as pressing a button.[95]

At one point in the opinion, the court recognized that the likelihood of confusion depended on the sophistication of the visitors to <moviebuff.com>.[96] The court felt that this analysis would be complicated in this case, because different classes of consumers with varying degrees of sophistication were likely to visit the site.[97] Although the *Brookfield* court failed to endorse a particular approach to the problem, it did note favorably that other circuits have judged consumer sophistication based on the *least* sophisticated class of consumer likely to buy the product or services in question.[98] This is not surprising, given the court's assumptions about consumer behavior discussed above. Rather than promote good shopping habits, the *Brookfield* court seems to have had in mind the *very least* intelligent and attentive person likely to visit <moviebuff.com> as it went through the multifactor infringement analysis.

Ultimately, *Brookfield* imposed upon trademark law a revitalized initial interest confusion doctrine. Given that the initial interest confusion problems identified by the *Brookfield* court solved themselves as consumers became better acquainted with the Internet, the question becomes whether the decision was necessary at all.

A more realistic approach was taken in *Toyota Motor Sales, U.S.A., Inc. v. Tabari*.[99] There, the court held that the defendant's use of the domain names <buy-a-lexus.com> and <buyorleaselexus.com> did not infringe upon the LEXUS mark

95. *Brookfield*, 174 F.3d at 1057.

96. *Id.* at 1060.

97. *Id.*

98. *Id.* (citing Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 283 (3d Cir. 1991)).

99. Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171, 1176 (9th Cir. 2010).

because of the defendant's nominative fair use defense.[100] Courts in the Ninth Circuit apply the test found in *New Kids on the Block v. News America Publishing, Inc.* to assess likelihood of confusion in the nominative fair use context.[101] This test requires the court to assess (1) whether the product was readily identifiable without use of the mark, (2) whether the defendant used more of the mark than necessary, and (3) whether the defendant falsely suggested he was endorsed by the trademark holder.[102] Applying this test, Judge Kozinski made a number of assumptions about consumer behavior that were not supported by evidence. For example, Kozinski stated, "[w]hen people go shopping online, they don't start out by typing random URLs containing trademarked words, hoping to get a lucky hit."[103] Rather, Kozinski knew from his own experience that online shoppers tend to use search engines to find particular websites.[104] Additionally, he assumed that "reasonable, prudent, and experienced internet consumers are accustomed to . . . exploration by trial and error," and would therefore not give up on finding a manufacturer's website after one or two missteps.[105] Ultimately, these assumptions—that consumers are reasonably sophisticated, and possess the patience for some increase in search costs—helped lead the court to grant the defendant's appeal and remand the case for further proceedings.[106]

Interestingly, echoes of the *Brookfield* decision can be seen in Judge Fernandez's concurring opinion in *Toyota*. In his concurrence, Fernandez criticized Kozinski for making assumptions about consumer behavior that were absent from the factual record.[107] Like in *Brookfield*, Fernandez was unwilling to assume that Internet-bound consumers are unlikely to associate a particular URL with a brand before actually going to the website

100. *Id.* at 1183.

101. *Id.* 1175–76 (citing New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302 (9th Cir. 1992)).

102. *Id.*

103. *Id.* at 1178.

104. *Id.*

105. *Toyota*, 610 F.3d at 1179.

106. *Id.* at 1182–83.

107. *Id.* at 1185–86.

and glancing over it.[108] Although Kozinski's opinion took a forward-looking, pro-competitive, aspirational approach to the consumer, Fernandez's concurrence demonstrates that many judges are more comfortable with the hands-on, paternalistic, and conservative view towards the contemporary consumer, just like in *Brookfield.*

C. The Shortcomings of the Customer Sophistication Prong

On the surface, it might seem that wider adoption of (and greater emphasis on) the customer sophistication prong of the multifactor infringement test would solve many of the problems identified in this paper. At the very least, this approach does have the benefit of bringing the implicit, hidden biases of judges into the light of day.

But the problems with this solution are many. First, research suggests that presumptions about the relationship between consumer sophistication and consumer confusion are inaccurate. Second, this prong tends to limit competition for many, if not most products on the market. Finally, the consumer sophistication prong fails to implement the central argument of this paper: that trademark law ought to encourage *all* consumers to become more sophisticated.

Positive factors relating to sophistication include the price of the product, the complexity of the transaction, the infrequency of the purchase, and the education, age, and income of the product's typical purchaser.[109] However, these judicial assumptions regarding sophistication can turn out to be inaccurate. One study identified two primary antecedents for the exercise of consumer care: the motivation to expend energy discerning one product from another and the requisite mental ability to make this determination.[110] A sophisticated consumer tends to have more experience purchasing branded products; this experience becomes

108. *Id.*

109. Thomas R. Lee, Glenn L. Christensen & Eric D. DeRosia, *Trademarks, Consumer Psychology, and the Sophisticated Consumer*, 57 EMORY L.J. 575, 602 (2008) [hereinafter Thomas R. Lee et al., *Consumer Psychology*].

110. Thomas R. Lee et al., *An Empirical and Theoretical Analysis*, *supra* note 76, at 926.

entrenched in the consumer's memory.[111] Consequently, consumers more readily identify marks and logos as belonging to the brand with which they are familiar. Given that sophisticated consumers may have less motivation to shop carefully, this could lead to a greater potential for confusion. This comports with Professor Bartow's intuition "that individuals with few economic resources pay careful attention to how they spend their scarce and highly-valued dollars, while wealthy people are comparatively more apt to spend small amounts of money somewhat carelessly or recklessly."[112]

Moreover, this prong leads to decreased competition in markets for lower priced goods. On one hand, the presumption that, say, yacht purchasers are sophisticated will lead to less successful infringement suits against yacht manufacturers. In fact, "[s]ome courts have gone so far as to suggest that a high degree of consumer sophistication in a target market may trump all other factors, virtually eliminating the likelihood of consumer confusion in the case of a professional or highly sophisticated buyer."[113] This presumption would allow new entrants in sophisticated markets much more leeway in mimicking the trade dress of established manufacturers, improving competitiveness by leeching a certain amount of goodwill. On the other hand, manufacturers of cheap products are subject to the standard likelihood of confusion analysis. This creates an odd double standard, whereby consumers deemed sophisticated benefit from increased competition for the expensive products they purchase, yet consumers deemed unsophisticated suffer from less choice and relatively higher prices.

Furthermore, customer sophistication fails to take into account many of the reasons why a consumer may or may not pay close attention to his purchase. Consumers tend to pay close attention to purchases they perceive as "risky," such as purchases of unfamiliar brands or new technologies, regardless of their sophistication.[114]

111. *Id.* at 948.
112. Bartow, *supra* note 43, at 772.
113. Thomas R. Lee et al., *Consumer Psychology*, *supra* note 109, at 581.
114. *Id.* at 649–50.

At a personal level, consumers tend to pay attention to the brands of things they care about.[115]

There appears to be advantages and disadvantages to placing greater emphasis on the consumer sophistication prong. On one hand, this would be a good way to force judges to explicitly consider their own presumptions about the consuming public. However, it would do little to benefit unsophisticated consumers in terms of trademark overprotection and monopolization. Trademark law should instead presume that all consumers possess some basic level of reasonableness, sophistication, and intelligence.

IV. TOWARDS THE (IMAGINARY) PRUDENT CONSUMER

As we have seen, the multifactor likelihood of confusion test is difficult to apply. Courts disagree which factors deserve the most weight and whether certain factors ought to be included at all.[116] The multifactor test pushes to the background what is often the most important determination that a court makes: whether a product's customer base is smart and attentive enough to notice the difference between the plaintiff and defendant's respective marks. Courts should instead place this element at the forefront of their analysis as Judge Kozinski did in *Toyota*. Courts should follow their own advice, and truly apply the standard of the "reasonably prudent consumer" to the infringement analysis.

The "reasonably prudent consumer" would be more than just a reflection of reality. Courts should feel free to lecture the consuming public on their poor shopping habits and tell consumers

115. *See generally* Susan Fourier, *Consumers and Their Brands: Developing Relationship Theory in Consumer Research*, 24 J. CONSUMER RES. 343–53 (1998) (presenting research showing that consumers develop emotional bonds to products related to their interests and perceived identities). That consumers care about brands relating to things they care about is an interesting insight because it suggests that a consumer is less likely to be harmed in those instances where she truly cares about being harmed. Conversely, if it matters little to her which particular brand she is buying, and she ends up being confused, is any real harm done to the consumer, given that she could care less?

116. *See supra* Part III.

how they ought to behave.[117] This approach would slow or even scale back the scope of trademark protection and force courts to keep up to speed with the ever-increasing sophistication of the contemporary consumer.

A. The Aspirational Consumer

The aspirational consumer standard advocated here would have a number of positive effects on the current trademark landscape. First, it would impede the expansion of trademark rights through the trademark feedback loop. Second, this presumption would encourage consumers to exercise greater care when making purchases, thereby favoring efficient, rational spending of money.

The aspirational consumer standard would halt or reverse the recent trend of courts recognizing new forms of confusion. As Professor McKenna argues, "not all confusion actually interferes with the consumer's ability to make decisions in the marketplace."[118]

Regarding initial interest confusion, courts should presume that consumers are willing and able to do some comparative shopping when they visit the grocery store. The aspirational consumer is smart enough to spot a specific brand he wants, but he is also willing to consider cheaper alternatives. The aspirational consumer does not let minor inconveniences, such as visiting the wrong website, cause her to throw her hands in the air and give up the search.

As for post-sale confusion, courts worry that consumers will mistakenly purchase a low quality knock-off, or that a flood of counterfeits will reduce the value of the original by decreasing its scarcity.[119] The aspirational consumer knows that there is a

117. For an example of a court lecturing consumers about poor shopping habits, see *Conopca, Inc. v. May Department Stores, Co.*, 46 F.3d 1556, 1563–64 (1994). There, the court stated that the testimony from an individual consumer was insufficient to show actual confusion, because the consumer's confusion was counterintuitive to the court. *Id.*

118. Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 117 (2009).

119. *See* Hermes Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 108 (2d Cir. 2000).

widespread black market for counterfeit goods. For instance, she would not assume that her friend's Prada purse is the genuine article. Furthermore, the fact that there is a widespread black market does not upset the aspirational consumer who has purchased a real Prada purse. She knew what she was getting into.

The aspirational consumer model would encourage good shopping habits. Research suggests that consumers expend more cognitive effort while shopping when coaxed.[120] By freeing up the market by allowing more mimicry by competitors, consumers will be forced to think about their purchases. Throw in some initial interest confusion and it is easy to see how a less stringent infringement standard would encourage consumers to become thorough, comparative shoppers. Consider the shopper who has been using Old Spice for decades: he likely grabs his next stick of Old Spice off the shelf with little thought at all. If the Acme brand was packaged in such a way as to cause a hint of initial interest confusion, then this shopper might take notice of the cheaper Acme brand and consider whether the increased price for Old Spice is worth it. In the end, he might still choose Old Spice, but at least in the latter scenario his decision was an informed one.

Finally, if the aspirational consumer model were made into a legal presumption, then parties could use this as a tool to help dismiss baseless litigation on summary judgment. This is especially beneficial to new entrants in a market who might not have the resources necessary to pursue litigation to trial.

B. Has the Aspirational Consumer Become Reality?

Consumers are becoming increasingly sophisticated. A large part of this has to do with the availability of information on the Internet. Professor Deborah R. Gerhardt argues that the Internet has played a dual role of empowering consumers and loosening dominant mark owners' hold on the marketplace.[121] In the online shopping context, consumers can compare similar products side by side, read reviews from experts or fellow consumers, and easily

120. Thomas R. Lee et al., *An Empirical and Theoretical Analysis*, *supra* note 76, at 926.

121. Gerhardt, *supra* note 46, at 456–57.

locate the cheapest seller.[122] Goodwill and reputation take a backseat to accurate information about the actual product. For example, if you have had good experiences with Old Spice products, but its new shampoo is getting terrible user reviews, which source of information is the contemporary consumer likely to trust most?

Tellingly, research suggests consumers are less likely to make repeat purchases of a particular brand on the Internet than they would be in the context of brick-and-mortar shopping.[123] When robbed of the atmospherics associated with brick-and-mortar shopping consumers are more willing to take a risk on something new based on information garnered online. This is because consumers are more likely to rely on emotion when making purchases at a physical store, and emotion is intertwined with brand preference consistency.[124] Perhaps this phenomenon is related to observations that the Internet has accelerated market fragmentation, and that the resulting increase in variety of consumption styles might free up the market and decrease the dominance of famous brands.[125]

This online behavior may have spillover effects into the physical realm of brick-and-mortar shopping. Before making a purchase that a customer finds significant, either on account of the price of the good in question or because the consumer truly cares about the quality of the particular good, the consumer is liable to do at least a few minutes of research on the Internet. With the advent of smartphones and the ubiquity of Internet access, this research can be completed in the checkout aisle. Now that many smartphones come equipped with quick and easy-to-use barcode scanners, it seems reasonable that shoppers may engage in some Internet-based, comparative shopping even for relatively minor purchases

122. *Id.* at 463–64.

123. *See generally* Leonard Lee et al., *In Search of Homo Economicus*, *supra* note 50, at 173–87 (arguing that consumers are more likely to make repeat purchases when surrounded by brick-and-mortar store atmospherics, which tend to have an emotional impact on consumers).

124. *Id.* at 185.

125. *See generally* Douglas B. Holt, *Why Do Brands Cause Trouble? A Dialectical Theory of Consumer Culture and Branding*, 29 J. CONSUMER RES. 70–90 (2002).

like deodorant. It seems intuitive that consumers will become less reliant on the information-conveying role of advertisements of trademarks as they gain access to more accurate, easily available information online.

It may be that trademark law has already begun reflecting the increased sophistication of the contemporary consumer. In particular, the *Toyota* decision from the influential Ninth Circuit shows that at least some judges are becoming skeptical of infringement claims with little evidence of consumer harm. If this is indeed the case, it is good news for consumers and the trend should be encouraged.

C. Responses to Potential Criticism

One criticism of this approach is that the aspirational consumer model will lead to more confusion and higher search costs. Concededly, the initial shift to an aspirational consumer standard may result in a spike in confusion in the short term. Luckily, as demonstrated in the study conducted by Professor Thomas R. Lee, consumers adapt.[126] Consumers will exert cognitive effort in identifying brands when motivated.[127] Thus, with a little prodding and a little confusion, courts can push consumers towards the aspirational model. When consumers are coddled, on the other hand, they have less motivation to think about their purchases, and the presumption that consumers are "morons in a hurry" becomes self-fulfilling.

As for higher search costs, this is a necessary tradeoff for adoption of the aspirational consumer model. However, higher search costs help promote competition by forcing consumers to spend slightly more time finding the product they were originally looking for. A reasonable balance must be struck between these two interests. As discussed above, many commentators feel that

126. Thomas R. Lee et al., *An Empirical and Theoretical Analysis*, *supra* note 76, at 927 ("With past experience, knowledge structures develop in memory that lay the foundation for expertise . . . [and] [t]hese extended knowledge structures are then available to the consumer when exerting cognitive effort as part of mental processes.").

127. *Id.* at 926.

trademark law has traditionally placed too much emphasis on protection, without due consideration given to competition. What the aspirational consumer model hopes to do is help courts shift the balance towards competition. In cases where significant search costs are likely, even the aspirational consumer would be confused.

Another potential criticism of the aspirational consumer approach is that it requires judges to make judgments about consumer behavior.[128] How accurate would these judgments be, especially considering that the average age of federal judges is slightly over 60?[129] Critics might point to the evolution of caselaw from *Brookfield* to *Toyota* as evidence that judges are slow to react to changes in consumer behavior. After all, these cases were decided a decade apart. However, this evolution occurred precisely because Judge Kozinski wasn't afraid to tell consumers how to behave. Without much in the way of factual support, Kozinski acknowledged that consumers use search engines (and if they don't, they should!).[130] It turns out that Kozinski's assumptions were a good reflection of how consumers behave in practice. It is important to keep in mind that judges make assumptions about consumer behavior in any infringement case; the aspirational model merely nudges these assumptions in a particular direction and ensures that these assumptions are outlined explicitly in opinions.

One might also argue that the aspirational consumer model is unjust in that it would harm consumers who are truly unsophisticated, particularly in the context of online shopping.

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128. *See* Michael Rappeport & Sandra Kornstein-Cohen, *When Consumer Beliefs Are Based on a Court's "Intuition"—One More Issue Arising From Conopco*, 87 TRADEMARK REP. 218, 221 (1997) (arguing that consumer confusion should be proved only by survey or testimony evidence from actual consumers, and that such evidence should trump judicial intuition, even if the consumers' mistake was based on faulty assumptions unrelated to the trademark or trade dress in question).

129. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 400 (2012).

130. Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171, 1178 (9th Cir. 2010).

The poor, uneducated, or elderly may not have the same opportunities as the rest of society to familiarize themselves with the conventions of online shopping. Without strong trademark protections in place, these individuals could become ripe targets for scams and counterfeiters. Even with the "aspirational consumer" standard in place, however, trademark law can protect against cases of sellers who purposively victimize unsophisticated consumers. According to Beebe, bad intent is almost always dispositive in favor of infringement.[131] Although the aspirational consumer model may result in greater confusion and search costs for unsophisticated consumers in particular, there are existing safeguards present in the law to keep things from getting out of hand. Meanwhile, the gains had by unsophisticated consumers due to increased competition and lower prices should help offset any increase in search costs.

Due to the rapid evolution of the marketplace and advances in technology, a "proactive" approach to the consumer may end up as a mere reflection of reality, depending on whether a particular judge is up to speed with the rest of society. In order to avoid trademark law becoming weighed down by obsolete decisions, it might be best to err on the side of being ahead of the curve, rather than behind it.

V. CONCLUSION

The expansion of trademark rights over the past century is well documented. Famous brands have used these rights to harass smaller competitors with dubious litigation and to achieve monopoly-like positions in the marketplace. The aspirational consumer standard would be a simple means to scale back trademark protection and promote healthy competition. Happily, the *Toyota* case suggests that this approach has already caught on. This trend will hopefully continue into the future, if just to keep pace with a consuming public that is becoming ever more informed, sophisticated, and empowered. Although this approach is aspirational, it may simply reflect the reality of the modern consumer, who has access to much more information than in years

131. Beebe, *supra* note 68, at 1629.

past and is less reliant on the information-conveying purpose of trademarks. At the very least, trademark law should neither impede Internet innovation nor greater consumer participation in the marketplace that such progress allows.

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