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### **In Search of Mr. Average: Attempting to Identify**

## **The Average Consumer and His Role within Trade Mark Law**

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### **Introduction**

When assessing infringement claims within trade mark law reference is made to the legal construct of the average consumer. Under article 5(1) (b) of Directive 2008/95 infringement by a sign identical or similar to a registered trade mark, used in relation to identical or similar goods or services to those for which the mark is registered, on the grounds that there exists a likelihood of confusion is assessed by whether the average consumer is likely to be confused. Following the CJEU ruling in *Google France v Louis Vuitton*<sup>1</sup> it is clear that the average consumer now plays a key role in relation to infringement under article 5(1) (a) Directive 2008/95 when assessing whether there is a risk of harm to the core functions of a trade mark when a sign identical to the registered trade mark is used in relation to identical goods or services.

The average consumer was employed in *Interflora v. Marks & Spencer*<sup>2</sup> and it is due in part to the arguments about evidence, burden of proof and the correct interpretation of the test set out by the CJEU that has led to the need to re-assess this issue. Due to *Interflora v Marks & Spencer* being a case concerning infringement via keyword advertising the average consumer became the average internet user. At first glance he appeared a character with whom trade

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<sup>1</sup> Google France Sarl v. Louis Vuitton Malletier SA (C-236/09)

<sup>2</sup> *Interflora v. Marks & Spencer plc* [2013] EWHC 1291 (Ch.) this is the decision by Arnold J., implementing the CJEU ruling at (C-323/09). This first instance decision has subsequently been successfully appealed at the Court of Appeal at [2014] EWCA Civ. 1403. It is currently set for retrial.

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mark lawyers are familiar. However, upon reflection questions about the average consumer need to be answered. He appears to have originated, in trade mark disputes at least, in relation to assessing the likelihood of confusion under article 5(1) (b) yet following the legal test formulated by the CJEU in *Google France* and *Interflora v. Marks & Spencer* he plays a role in relation to article 5(1) (a). Therefore, what is his role in relation to article 5(1) (a)? Are there differences between the way he is employed and the role that he fulfils under articles 5(1) (a) and 5(1) (b)? Furthermore to what extent has the use of the average consumer in relation to article 5(1) (a) caused an overlap with article 5(1) (b), and if so, what will be the impact upon the overall scheme of protection.

Although these questions have been raised in the context of keyword advertising, the answers will impact across all trade mark infringements under article 5 Directive 2008/95. Therefore it is time to re-examine this legal construct and the way in which he is utilized. This article seeks to do this by firstly asking who is he, and following the recent decisions, what are his characteristics? Secondly, the article will explore his dual roles in relation to article 5(1) (a) and article 5(1) (b) and ask what roles does he now play? Thirdly, the article will seek to outline what his possible future role will be and the extent to which he may have a role within article 5(1) (a) which stretches beyond keyword advertising cases. Through these questions the article will analyse the current state of the legal tests for trade mark infringement before drawing conclusions as to possible future developments.

## The Average Consumer

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That the average consumer has a role within trade mark law stems from the infringement provisions contained in article 5 Directive 2008/95 which reads as follows;

*“5 (1) The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:*

*(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;*

*(b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark.*

*(2) Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.”*

In article 5(1) (b) there is reference to the likelihood of confusion on the part of the public and the CJEU ruled in *Sabel v. Puma*<sup>3</sup> that this would be assessed globally whereby the court would take into account all of the relevant circumstances in making one overall assessment of the likelihood of confusion. Sabel wanted to register as a trade mark for sportswear a sign

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<sup>3</sup> Sabel BV v. Puma AG Rudolf Dassler Sport (C-251/95)

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consisting of a picture of a bounding cheetah over the top of the word Sabel. The sportswear giant Puma objected believing this would cause confusion with their trade mark of the silhouette of a puma. Whilst both devices consisted of images of giant cats, they were different species and one device had a word element therefore the court had to address the issue of how to assess them. By utilizing the global appreciation approach they avoided the difficulties of how much weight should be afforded to the distinctive and dominant components of a sign and mark enabling an overall assessment of the likelihood of confusion to be gauged from the standpoint of the average consumer. In *Sabel v. Puma* the CJEU also held that the words including a likelihood of association extended this provision to include the likelihood of confusion in a wider economic sense, that on encountering the sign the average consumer would likely be confused into believing in the existence of an economic link, for example that they were sister companies or part of a franchise. Such reasoning was perceived as necessary in order to reflect the reality that consumers are increasingly aware of companies branching out into neighbouring markets albeit under the same or similar trade mark. The CJEU further elaborated upon the average consumer in *Lloyd Schuhfabrik*<sup>4</sup> where Lloyd Schuhfabrik, the proprietor of the mark “Lloyd” for footwear, claimed that Klijsen’s use of “Loint’s” for the same goods constituted trade mark infringement. Once more the global appreciation approach was employed. It is not necessary for there to be actual confusion for an infringement action to be successful, what is necessary is that there exists a likelihood of such confusion on the part of the public. Therefore in making this assessment the court must view matters from the standpoint of the average consumer.

*“For the purposes of that global appreciation, the average consumer of the category of products concerned is deemed to be reasonably well informed and reasonably observant and*

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<sup>4</sup> Lloyd Schuhfabrik Meyer & Co GmbH v. Klijsen Handel BV (C-342/97)

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*circumspect. However, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.”*<sup>5</sup>

This sets out the formula for ascertaining the likelihood of confusion on the part of the average consumer. If the product in question is a niche product then the court will make its global assessment from the standpoint of the average consumer of that niche market and not the average consumer amongst the general public as a whole. The court also notes that the average consumer will pay more attention when making important or expensive purchases such as a fitted kitchen, as in *Premier Brands v. Typhoon Europe*<sup>6</sup> where the proprietor of Ty.Phoo for tea alleged that the use of Typhoon for fitted kitchens would infringe their mark. He will pay less attention when purchasing mundane items as illustrated in *Kimberley Clark v. Fort Sterling*<sup>7</sup> where it was remarked that the average supermarket shopper takes approximately ten seconds to select toilet paper. Due to the CJEU's formulation being based upon the imperfect pictures of these marks which the average consumer carries in his mind, the end result is that a mark which is more highly distinctive, be it inherent or acquired from extensive marketing, is perceived as being more likely to be recalled when he encounters a similar sign. This means it enjoys a wider scope of protection under article 5(1) (b) than a sign which is less distinctive despite the fact that such reasoning is disputed because the more

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<sup>5</sup> Ibid at paragraph 26.

<sup>6</sup> Premier Brands UK Ltd v. Typhoon Europe Ltd [2000] E.T.M.R. 1071.

<sup>7</sup> Kimberly Clark Ltd v. Fort Sterling Ltd [1997] F.S.R. 877.

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well-known the trade mark the more likely that a consumer will spot the differences between a similar sign and the mark with which they are so familiar.

The average consumer in his current guise may have originally been formulated by the CJEU when dealing with infringement under article 5(1) (b) but in more recent decisions he has been employed in relation to article 5(1) (a) and it is here that he has encountered some difficulties.

#### His current role under article 5(1) (a)

In *Google France v. Louis Vuitton*<sup>8</sup> the CJEU had to grapple with the application of article 5(1) (a) in relation to keyword advertising and in the process created a new legal test. The facts were that the famous fashion house Louis Vuitton, the proprietor of that trade mark, alleged that Google were infringing their trade mark via their search engine because when an internet user entered the words Louis Vuitton as a keyword in their search engine, the results page displayed links to websites offering counterfeit Louis Vuitton items. The very nature of keyword advertising presented the court with a unique set of problems. There are three main players involved in this scenario, the search engine operator, the third party advertiser and the trade mark proprietor. Search engines obtain their revenue through advertising whereby they allow advertisers to purchase keywords as adwords, meaning that when that term is entered as a search term the search engine will display that advertiser's link in the sponsored link section of the search engine results page (SERP). Advertisers pay for these adwords on a cost per click basis meaning that multiple advertisers can purchase the same keyword as an

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<sup>8</sup> Google France Sarl v. Louis Vuitton Malletier SA (C-236/09)

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adword and he who pays most per click will have his sponsored link displayed in the most prominent position on the SERP. The SERP also contains organic links, which are generated as a result of the keyword but which have not been paid for, and as a result these are displayed so as to be less alluring to internet surfers. This means that third party advertisers have been free to purchase as adwords keywords which are identical to their rivals' trade marks. In *Google France* the CJEU held that the search engine operator was not liable for infringement as they were not the party deemed to be using the sign in the course of trade. The party using the sign and therefore potentially liable was the third party advertiser who selected that keyword as an adword and paid for it. Liability under article 5(1) (a) is said to be absolute because where a third party uses in the course of trade a sign identical to a registered trade mark, in relation to goods or services which are identical to those for which the mark is registered, there will be harm caused to the core function of the trade mark which is deemed to be its function of indicating origin, investment and advertising. In setting out how the courts ought to determine the advertiser's liability the CJEU set out a new test.

*"83. The question whether that function of the trade mark is adversely affected when internet users are shown, on the basis of a keyword identical with a mark, a third party's ad, such as that of a competitor of the proprietor of that mark, depends in particular on the manner in which that ad is presented.*

*84. The function of indicating the origin of the mark is adversely affected if the ad does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party."*<sup>9</sup>

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<sup>9</sup> Ibid at paragraphs 83 and 84.

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This new test may have been formulated in *Google France* but it was the case of *Interflora v Marks & Spencer* which presented the court with the opportunity to apply it to determine the liability of the defendant advertiser. Interflora, the proprietor of that trade mark, issued proceedings against Marks & Spencer for their use of the adword Interflora, which when entered as a search term triggered a sponsored link in the SERP for Marks & Spencer's own flower delivery service. The resumption of this case, following the preliminary ruling by the CJEU ought to have provided the opportunity to witness the application of *Google France* upon a defendant advertiser, Marks & Spencer. However, due to the trial judge misinterpreting the CJEU rulings causing him to mistakenly place the burden of proof upon the defendant to prove his use of the sign caused no harm to the registered trade mark, this judgment was successfully appealed by Marks & Spencer with the Court of Appeal ordering a re-trial<sup>10</sup>. In the course of his judgment Kitchin L.J. found it necessary to re-examine the test formulated by the CJEU in order to identify where Arnold J. had erred at first instance, and how the test ought to be correctly applied. It is by this method that Kitchin L.J. provides some much needed clarity.

*“129. As we have seen, the average consumer does not stand alone for it is from the perspective of this person that the court must consider the particular issue it is called upon to determine. In deciding a question of infringement of a trade mark, and determining whether a sign has affected or is liable to affect one of the functions of a trade mark in a claim under Article 5(1) (a) of the Directive (or Article 9(1) (a) of the Regulation), whether there is a likelihood of confusion or association under Article 5(1) (b) (or Article 9(1) (b)), or whether there is a link between the mark and the sign under article 5(2) (or Article 9(1) (c)), the*

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<sup>10</sup> *Interflora v. Marks & Spencer* (CA11) [2014] EWCA Civ. 1403.



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*national court is required to make a qualitative assessment. It follows that it must make that assessment from the perspective of the average consumer and in accordance with the guidance given by the Court of Justice. Of course the court must ultimately give a binary answer to the question before it, that is to say, in the case of Article 5(1) (b) of the Directive, whether or not, as a result of the accused use, there exists a likelihood of confusion on the part of the public. But in light of the foregoing discussion we do not accept that a finding of infringement is precluded by a finding that many consumers, of whom the average consumer is representative, would not be confused. To the contrary, if having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then we believe it may properly find infringement.”<sup>11</sup>*

This re-affirmation of the test is important for it details how and why the average consumer is so useful. The average consumer is not a mathematical formula and there is no need for statistics<sup>12</sup>. There is also no need for the court to have recourse to consumer surveys and expert evidence<sup>13</sup>. There will be occasions where such evidence will be welcomed and provide guidance, in accordance with established rules of court procedure and rules on evidence, however, it means that the court retains the freedom to determine the matter for itself and do what it considers right in that particular case. Kitchin L.J.’s judgment also highlights that the question is ‘binary in nature’ in that the average consumer is either confused or he is not. There is no ambiguity or middle ground. Also it does not matter whether the court refers to the average consumer, singular, as an individual, or average

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<sup>11</sup> Ibid. at paragraph 129.

<sup>12</sup> Ibid. at paragraph 128.

<sup>13</sup> Ibid. at paragraph 118.

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consumers, plural, for the key is that there is only one reaction and not a range of reactions<sup>14</sup>.

They will either be confused or they will not. By his judgment Kitchin L.J. in effect pressed the re-start button to take the test back to what the CJEU had formulated in *Google France* prior to Arnold J. muddling it in the High Court. Kitchin L.J. demonstrates that whilst the test utilises the average consumer and asks whether he would be likely to be confused by the end advert the adword shows in the SERP and its sponsored link, that it is not a conventional formulation of a likelihood of confusion test. For that test is found under article 5(1) (b) and is assessed by the global appreciation approach as set out by the CJEU in *Sabel v. Puma*. Kitchin L.J. carefully examines articles 5(1) (a) and 5(1) (b) and sets out their differences, which in itself is difficult because they now share many similarities and it was this aspect which led Arnold J. to error.

*“148. In our judgment it is important always to have in mind that, despite the “absolute” nature of the protection afforded by Article 5(1) (a) (and Article 9(1) (a)) against the use of signs identical to the trade mark in relation to identical goods or services, the court has consistently held that it is limited to those cases in which the use of the sign by a third party adversely affect or is liable adversely to affect one of the functions of the trade mark. Those functions are not limited to the essential function of indicating origin. By contrast, Article 5(1) (b) (and Article 9(1) (b)) has a wider ambit in that it extends to the use of similar signs in relation to similar goods or services. But it only affords protection if there is a likelihood of confusion.”*<sup>15</sup>

Therefore, the protection afforded by article 5(1) (a) is absolute but only if the defendant’s use affects the core function of the trade mark. That core function is in effect three-fold as it comprises the trade mark’s ability to signal trade origin, investment and advertising. This list

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<sup>14</sup> Ibid. at Paragraph 126.

<sup>15</sup> Ibid. at paragraph 148.

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is not exhaustive but it is the one that the CJEU have repeatedly mentioned in their judgments, most notably in *Arsenal v. Reed*. By contrast, article 5(1) (b) is wider in scope as it encompasses the use of signs which are similar to the trade mark used in relation to goods or services that are similar to those for which the trade mark is registered. Here there needs to be a likelihood of confusion on the part of the public, which includes the likelihood of association which has been held to mean confusion in a wider economic sense, for example, there being a link between the two economic undertakings.

It is the overlap created by the use of the average consumer and the likelihood of his being confused as to the message of trade origin being signalled by the trade mark, its core function, under article 5(1) (a), which led Arnold J. into serious error in his first instance decision in *Interflora v. Marks & Spencer*. The CJEU decisions in *Google France* and *Interflora v. Marks & Spencer* mean that there are now strong similarities between the methodology employed when deciding issues of infringement under articles 5(1) (a) and 5(1) (b). There are differences between these two provisions but it was in his attempt to outline the key differences between the two provisions and their respective legal tests that Arnold J. fell into error. Arnold J. thought that the difference between the legal test and the use of the average consumer when used at article 5(1) (a) was that the defendant had to prove that the average consumer would not be confused by his use of the sign. This reasoning led Arnold J. to reverse the burden of proof and place it upon the defendant. In overturning this judgment in the Court of Appeal Kitchin L.J., set out that the difference between articles 5(1) (a) and 5(1) (b) is more subtle. The real difference is that whilst both articles use the average consumer is that article 5(1) (b) is about the likelihood of confusion and that this is an end in itself. Whereas under article 5(1) (a) the court is assessing whether there is harm caused to

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the core function of a trade mark and is therefore only interested in the average consumer to the extent that he allows them to gauge the likelihood of such harm. This is a very subtle distinction and by outlining this Kitchin L.J. showed that whether an action is brought under article 5(1) (a) or 5(1) (b) it is always the claimant who must prove the likelihood of such harm being caused to his mark and not for the defendant to prove that his use of a sign did not harm the claimant's mark.

However, there still remains an overlap between article 5(1) (a) and 5(1) (b). Whilst this may initially appear to be of purely academic significance, upon reflection its practical significance is to widen the scope of article 5(1) (a) and offer greater protection to trade marks, a protection which more closely fits with the reality of the threats with which trade marks are faced. The test as formulated by the CJEU in *Google France* and re-stated by Kitchin L.J. in *Interflora v Marks & Spencer (CAII)* focuses on the possible harm caused to a mark rather than upon the types of use and whether they ought to be permissible or not. By their focus on the core function of a trade mark and whether the defendant's use is likely to cause an impediment to the mark achieving its aim the courts give their interpretation of this provision legitimacy. The average consumer always lends trade mark protection an air of legitimacy as it conjures arguments as to consumer protection against being misled to source or quality of the goods or services purchased. It is by focussing on the likelihood of the harm caused and thus acquiring this consumer protection legitimacy that acts as such a strong counterbalance to the arguments about free markets and promoting competition by allowing rival traders to advertise their alternative products and services. The need to facilitate free and fair competition is as important in the offline world as in the online one and

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perhaps the use of the average consumer in this way is the base way to achieve this balance

between promoting competition yet protecting the monopoly rights of trade mark proprietors.

Will the average consumer under article 5(1) (a) be confined to adword cases or play a greater role?

In *Interflora v. Marks & Spencer (CAII)* Kitchin L.J. appears to imply that the test set out by the CJEU in *Google France* is restricted to keyword advertising cases. Whilst the specifics of this test relate to ascertaining whether or not the use of a trade mark as an adword constitutes an infringement, the jurisprudence underpinning this formula is not necessarily restricted to these scenarios. It seems far more likely that the jurisprudence underpinning the test in *Google France* will be subsequently expanded and re-fashioned in order to be useful in relation to article 5(1) (a) claims which range beyond the use of adwords. There is a strong possibility that the average consumer and the test set out in *Google France* could have a wider impact on article 5 (1) (a). The test as formulated in *Google France* linked the need to prove a likelihood of confusion in those particular circumstances to the need to ensure that the trade mark could fulfil its core function. The CJEU have repeatedly held that the core function of a trade mark is threefold, that it acts as an indicator of origin, investment and advertising. This core function is threatened and the trade mark proprietor's exclusive rights infringed, when the adword identical to a registered trade mark triggers a sponsored link advert that is vague or misleading to such an extent that there is a likelihood of confusion on the part of the average consumer that the two economic undertakings are one and the same or share an economic link. This reasoning could easily be applied to other factual situations giving rise to an infringement action under article 5 (1) (a) other than keyword advertising.

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The crux of the matter in *Google France* was the need to protect the trade mark's ability to signal trade origin, for if that were harmed the very essence of the mark would be undermined.

The core functions of a trade mark can just as easily be harmed in the offline world as in the online one. When the CJEU were called upon to clarify the correct interpretation of article 5(1) (a) in *Arsenal v. Reed*<sup>16</sup> they were mindful of the need to avert this same kind of danger even though the infringement took place in the real world and concerned the sale of goods from a market stall. Mr. Reed sold both official and unofficial Arsenal Football Club merchandise from his stall outside Highbury football ground. His stall contained a large disclaimer notice which informed consumers that only items marked as being official Arsenal Football Club merchandise were the official goods and that all other items did not have any link to the football club. The disclaimer notice was so clear that at first instance the action for passing off failed due to lack of sufficient evidence<sup>17</sup>. The defendant argued that he was not using the Arsenal Football Club's trade marks as trade marks but rather that they were being used as badges of allegiance and that they were not viewed by his customers as acting as badges of origin but as an embellishment on the product which allowed them to signal their support to their team. The issue of what constituted trade mark use was sent to the CJEU for a preliminary ruling in which they set out the core function of a trade mark and that this extended beyond merely acting as an indicator of trade origin. The need for the mark to be able to clearly signal this core message to the consumer meant that even here the average consumer was present albeit not centre stage. In order to protect this core function the Court was mindful of the way in which the mark was perceived and at one stage the point was made

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<sup>16</sup> *Arsenal Football Club v. Reed* (C-206/01)

<sup>17</sup> *Arsenal Football Club v. Reed* (No.1) [2001] 2 C.M.L.R. 23.

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that once the goods had been removed from Mr. Reed's stall, and the disclaimer notice, other people subsequently encountering the goods may mistakenly view the marks as signalling trade origin. There existed a possibility of post-sale confusion. The phrase use in the course of trade was held to mean use in an economic context and use of a sign identical to a trade mark in relation to the identical goods or services would mean damage to the core function of the mark which had to be prevented. Perhaps it is here that the seeds were first sown for making reference to the average consumer and his likelihood of being confused or misled about the core function of the mark in relation to claims brought under article 5 (1) (a).

The debate about the future role of the average consumer has been re-opened with Davis<sup>18</sup> questioning whether his days are numbered and analysing the arguments that predict his demise. Davis questions the foundations on which he is based and doubts whether the average consumer actually exists, not only because of the difference between real consumers and the legal fiction of the average consumer but also because the law has many guises for the average consumer. Davis views the average internet user found in *Google France* as being a variation of the average consumer and therefore she poses the question of whether there are other variants on the average consumer depending upon the mode of sale<sup>19</sup>. There could be the average internet user, mail order customer and high street shopper.

*"It has been argued here that despite the apparent centrality of the average consumer to European trade mark law, his or her position is by no means secure. There are two reasons for this. The first is that the neo-classical economic model that gave birth to the utility*

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<sup>18</sup> Davis, J., Revisiting the average consumer: an uncertain presence in European trade mark law, [2015] I.P.Q. 15.

<sup>19</sup> Ibid. at page 16

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*maximising average consumer no longer holds the same unassailable position that it did among economists and indeed politicians during the period in which the TM Directive was framed and implemented...*

*Secondly, the courts themselves at both the national and European level have found it difficult to cleave to the conviction that the average consumer is solely a legal construct and hence that there is no need to take account of the actual number of consumers who might be confused when assessing conflict between marks and signs.”<sup>20</sup>*

Due to imagining a world in which the average consumer was no longer central to European trade mark law Davis outlines how the void created by his departure might be filled.

*“The question then arises: if the putative average consumer is displaced from trade mark law, how will a court judge issues of distinctiveness and conflict between marks? This article will conclude by asking whether the answer inevitably lies in a return to a more evidence based approach to assessing confusion and related consumer behaviour, such as was traditionally to be found in the laws of passing off in the UK and unfair competition in Germany.”<sup>21</sup>*

Whilst this certainly remains a possibility, the recent decisions in *Interflora v. Marks & Spencer* and *Google France* may have actually strengthened the position of the average consumer due to the fact that these judgments have in effect expanded his role. A return to a more evidence based approach in order to assess the likelihood of confusion under article 5(1) (b) would certainly help solve some of the current arguments about how much weight a

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<sup>20</sup> Ibid. at page 28

<sup>21</sup> Ibid. at page 16



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court ought to attach to survey evidence and whether such evidence should be admitted at trial. However, given that the average consumer now plays a role in relation to article 5 (1) (a) it seems unlikely that the trade mark proprietors would welcome the addition of such practices in relation to infringement proceedings under this provision which was designed to be absolute. It is also unlikely that the likelihood of confusion under article 5(1) (b) would be decided without the average consumer whilst the likelihood of such confusion under article 5(1) (a) remained decided by reference to him. Surely if the average consumer were now to be replaced he would need to be replaced in relation to both provisions. Once again this may be problematic for even though the average consumer is used under both articles 5(1) (a) and 5(1) (b) there are subtle differences as to the task being performed. Whilst under article 5(1) (b) the court is assessing the likelihood of confusion, including the likelihood of association in the economic sense, this is the end in itself. The damage here is that the consumer is likely to be confused because the distance between the sign and the mark, on the scale of similarity, is too small. However, under article 5(1) (a), the likelihood of confusion is being used in relation to a sign and mark which are identical and where the goods and services are identical. The court here is using the likelihood of confusion to ascertain if there is any damage likely to be caused to the three-fold core function of the trade mark. Here the court is focussing on the harm to the mark, and whilst reference is made to the average consumer one feels that the court is less interested in his plight than in the core function of the trade mark, viewing it as the potential victim in need of legal protection. By focussing on the harm to the mark itself the legal test for this provides a better fit with current trade mark jurisprudence which seems to be moving in the direction of protecting marks because the law views them as items worthy of protection in their own right rather than only being entitled to protection via the subterfuge of the average consumer. Under article 5(2) the consumer along with his

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likelihood of being confused, disappears from view altogether. Article 5(2) is only available to trade marks deemed to have a reputation, but it is the leading brands within their product class which are the ones most likely to be targeted by rival brands, in the way that Interflora was by Marks & Spencer, so as to lead to the test developed by the CJEU in *Google France* being needed in an article 5(1) (a) infringement action. It is precisely these marks, because of their leading brand status, which are most at risk. Given that the CJEU remains focussed on protecting the three-fold core function of a trade mark it seems unlikely that a retreat from the test outlined in *Google France* is likely. What appears to be most likely is that the role of the average consumer will continue to evolve as the courts seek to offer greater protection to trade marks in ways that provide an ever closer fit with the reality of the harms they face. Whilst it is timely to question the role of the average consumer and consider alternatives it seems unlikely that his role will be reduced given that it has so recently been expanded. Furthermore the way in which his role has been expanded provides scope for him to play a wider role in relation to article 5(1) (a) and therefore continue to grow.

### Conclusion

The average consumer plays a key role in enabling the courts to assess the likelihood of confusion within trade mark law. It is apparent that following *Google France* the likelihood of confusion will at times need to be assessed in relation to infringement claims under article 5(1) (a) and therefore given that the average consumer is central to this legal test it would appear somewhat inevitable that the average consumer will be called upon in relation to this provision. The full extent of his role in relation to article 5(1) (a) has yet to be ruled upon by

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the CJEU. However, it would not be unreasonable to assume that his role will at some point in the future be extended beyond the matter of keyword advertising.