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Article

*781 THE REASONABLE PERSON IN TRADEMARK LAW

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Introduction

One of the often discussed challenges of law school teaching is how to integrate the theoretical and the practical, [FN1] a challenge born, in part, from the law school's sometimes uneasy straddling of the worlds of graduate school and professional school. Like medical students, law students must learn industry-specific terminology for events that they have often experienced in their daily lives, terminology that claims to simplify analysis through precision but no doubt frequently appears to do the opposite.

There is complexity in this system, but also power. The appropriation of the facts of the world by the language of the law necessarily results in the creation of certain abstractions that tell us how we should conduct our lives. In trademark law, the "reasonably prudent consumer" [FN2] is one such abstraction. Also known as the "reasonable consumer" and occasionally simply the "reasonable person," [FN3] this individual is the yardstick against which trademark meaning is measured. And because the meaning of any trademark is ultimately determined by the consumer, the typical litigation process--quite naturally--involves trying to determine what this "reasonably prudent consumer" believes. Sometimes this is accomplished through surveys (although, as Barton Beebe has reported, [FN4] not as often as one might expect). Sometimes this ***782** is accomplished through a judge trying to determine what consumers might think. In either case, the goal is to find the meaning of the trademark, the answer to the question, and to treat any deviance from that answer as error.

But the meaning of a trademark is, at heart, an interpretive exercise, and as reader-response theory tells us, [FN5] there is no reason to prefer any particular interpretation of a text over any other, least of all the author's. Of course, some meaning must be reached at the end of the day, otherwise litigation would never end and legal rights would never be determined. But to ignore the fact that each consumer will engage with a trademark in his or her own way [FN6]--regardless of what trademark law deems legally cognizable--is to ignore the realities of the market with which trademark law is supposed to engage.

Students may be resistant to the introduction of literary theory as a lens through which to view trademark law, particularly given the economic story that now dominates the field. But since every trademark law student has, presumably, taken a class in tort law during his or her first year of law school, we might begin to think about the interpretive consumer by hearkening back to tort law's "reasonable person." These two individuals--tort law's "reasonable person" and trademark law's "reasonably prudent consumer"--are not entirely congruent,

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even though commentators may describe them as similar beings. [FN7] The reasonable person in tort law is someone who sets a standard of care, who models how the law tells us we should act as we go about our lives. But the reasonable person in trademark law is more rule-like than standard-like. [FN8] He ***783** or she doesn't embody an aspiration--our response is not to conform our activities to his perceptions--but, much like the speed limit on a highway, rather establishes the dividing line ex ante between what is legally appropriate and what is error.

Because the reasonable person in trademark law is more like a rule than like a standard, there is a tendency--in fact, a need--to treat this person as monolithic, with a certain assumed set of characteristics. A particular trademark use cannot be found infringing as to some consumers within the same geographical market and not infringing as to others, as this would cause chaos in the marketplace. [FN9] And so it probably should not be surprising that this "reasonable consumer" tends to look a lot like judges in certain respects. [FN10] In part, this is due, as commentators have remarked, to the artificial construct of the litigation process, in which courts may be overly focused by counsel on evidence of infringement. [FN11] But it is probably due in larger part to the difficulty in truly putting oneself in another's shoes, in thinking about how the world might look to someone who doesn't share one's own physical and cognitive abilities. [FN12]

***784** Tort law has habitually considered how to define its "reasonable person," in particular, which characteristics should be taken into account. Youth [FN13] and physical abilities [FN14] have been deemed legally relevant, while cognitive abilities have not. [FN15] (Gender is something of a mixed bag, a result none too surprising given the law's historical focus on the "reasonable man." [FN16]) By contrast, trademark law's analysis of the "reasonable person" seems to focus primarily on the cognitive abilities tort law eschews: how experienced the consumer is in the market; how gullible or skeptical the consumer is; how much care the consumer takes when selecting items for purchase. [FN17] (Here, too, gender is something of a mixed bag. [FN18]) And there is relatively little discussion of the characteristics with which tort law concerns itself: visual and other physical characteristics that may affect how consumers perceive and engage with trademarks. [FN19]

Of course, there is a considerable structural difference between these two "reasonable persons": in tort law, we are adjudicating the actions of one defendant, whereas in trademark law, we are considering the (re)actions of potentially millions of consumers. So it is indisputably true, as Graeme Dinwoodie has noted, that trademark law must of necessity take certain shortcuts to ensure that litigation does not devolve into a morass of evidentiary ***785** issues; [FN20] true, too, that in a field (law) that depends on precedent for efficient private ordering, there must be certain general rules that can be derived and followed. But it is worth reminding students how much one's own viewpoint can be mistaken for a general worldview (indeed, we encourage this conflation to some extent any time we ask a student in class whether she thinks two marks are confusingly similar) [FN21] and how courts' tendencies to do the same can have the effect of creating a market that is more homogeneous than reality suggests.

Because courts' and commentators' discussions of trademark law's "reasonable consumer" seem to take place most often in the context of degree of care, [FN22] it is not uncommon to see warnings about courts making judgments about consumer confusion by conducting their own comparison "in the peace and quiet of judicial chambers," which is "not the context in which purchasers are faced with the marks." [FN23] The classroom setting, while perhaps not the ideal of "peace and quiet," is equally distant from the marketplace. But just as important as remembering where trademarks are encountered is remembering by whom they are encountered: not by some artificially constructed individual, but by a consumer who may have vision or hearing difficulties; by a consumer whose language doesn't sound like the unaccented speech of a television news anchor; by a consumer

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who can't read the label at all.

I want to be precise about my point here. The point is not that consumers are unsophisticated, gullible, or lack the cognitive ability to understand trademarks in the marketplace. [FN24] Indeed, the state of trademark law will be immensely improved if courts treat consumers as rational, moral, intelligent ***786** beings able to make judgments for themselves in the vast majority of cases. [FN25] Rather, the point is that as we teach students trademark law, we should remind them that, as in tort law, the "reasonable person" is a judicial construct--one purportedly based on empirical evidence, but a construct nonetheless. [FN26]

There are different ways one might sensitize students to the multiple consumers for whom the "reasonable consumer" is a proxy. One way might be to take advantage of Rebecca Tushnet's tremendous database of audiovisual materials, described elsewhere in this issue, [FN27] to assist students in engaging with these marks in ways different from their own experience. Given, as Barton Beebe has discovered, that the similarity of the marks is one of the most important factors in a judicial finding of confusion, [FN28] it would seem important for students (and courts) to consider the aspects of the "reasonably prudent consumer" that might cause that consumer to think that two marks are similar or dissimilar. [FN29] If, as is often the case, courts look to a consideration of "sound, sight, and meaning" [FN30] to determine whether two marks are similar, we might want to help students to consider to what degree there is variation in how consumers engage with trademarks in these three respects.

I. Sound

When I first moved to Williamsburg, Virginia, where I now teach, I was searching for a gas station late one evening. Having come upon a gas station that had just closed, and not yet knowing the area well, I asked the proprietor whether she knew of another station that might still be open. "Sure," she replied. "The Crayon gas station is still open, and it's just two blocks up the ***787** street." "The Crayon gas station?" I queried, imaging a service station where the gas pumps were decorated in bright primary colors with childish scrawls on the sides. "That's right," she replied. "Just a couple of blocks up the street on the right. You can't miss it." So I returned to my car and, admittedly skeptical, drove off in the direction she indicated. And, sure enough, a couple of blocks away, was the Crown gas station. My New England-bred ears had heard "Crayon" when her Southern-bred accent had said "Crown."

As courts try to determine whether the "sound" portion of the similarity trilogy is satisfied [FN31]--and as we encourage students to analyze those decisions--it is useful to remember that whether two sounds are indeed similar depends to a significant extent on where one lives (or, perhaps, on the language one has heard growing up). While having a linguistics expert testify in an infringement case is not uncommon, [FN32] it is unclear from the case law the extent to which factors such as regional variations are taken into account. [FN33] As a linguistics professor invited to speak to my trademark law class reminded us, one doesn't have to travel too far from home before one encounters difference masquerading as similarity and vice versa: the fact that "pen" and "pin" are phonetically similar in some parts of the American South; [FN34] the fact that there may be mismatches between one's spoken and written speech patterns. [FN35] It may well be worthwhile, assuming a geographically diverse classroom, to illustrate this point simply by polling one's students on their pronunciation of particular trademarks.

When courts engage in this inquiry, however, it's unclear whether the same sensitivity is at work. Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A, Inc., [FN36] an often studied dilution case, provides one ex-

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ample. In concluding that Toyota's LEXUS mark for a luxury automobile diluted Mead's LEXIS mark ***788** for a computerized legal research service, the district court stated that "in everyday spoken English, LEXUS and LEXIS are virtually identical in pronunciation." [FN37] The appellate court, however, was not satisfied with this conclusion, preferring to make its own determination:

> [T]he two members of this Court who concur in this opinion use "everyday spoken English," and we would not pronounce LEXUS as if it were spelled LEXIS. Although our colleague takes issue with us on this point, he does not contend that if LEXUS and LEXIS are pronounced correctly, they will sound the same . . . . In short, we agree with the testimony of Toyota's speech expert, who testified:
>
> . . . [P]roperly, the distinction between unstressed I and unstressed U, or schwa, is a standard one in English; the distinction is there to be made in ordinary, reasonably careful speech. [FN38]

Unsurprisingly, the court equated "ordinary, reasonably careful speech" with the speech patterns of the members of the court itself, an equation that assumes, as the court later noted, the "careful and precise" diction of a television or radio announcer. [FN39] To the extent any consumers do not speak in the dulcet tones of a media professional--as many undoubtedly do not-- their speech is "[extra]ordinary," "[un]reasonable," and "care[less]"; in short, simply incorrect. [FN40] Thus, despite an ostensible concern with the typical consumer's reading of a mark, courts in such instances impose meaning rather than derive it.

II. Sight

Many trademarks, of course, are compared visually, particularly when the trademark at issue has a graphic element. Here, too, there is a risk of overlooking the possible diversity among the relevant consumer population in reacting to the trademark.

Libman Company v. Vining Industries [FN41] is another example of a case in which the court's preference for its own perspective appears to have driven the similarity analysis. Libman involved two manufacturers of brooms, both featuring a contrasting band of color along one vertical segment of the ***789** bristles. [FN42] Libman's broom featured a contrasting band of either red, green, or black (depending on the colors of the other bristles); it brought a trademark infringement suit against Vining, which manufactured a broom featuring light and medium gray bristles. [FN43]

The district court, after a bench trial, found that Vining had infringed Libman's trademark in the contrasting color scheme and awarded Libman nearly $1.2 million in addition to injunctive relief. [FN44] On appeal, however, Judge Posner, writing for the majority, expressed frustration with the district court's theory of the case. [FN45] The district court's finding of infringement necessarily implicated a finding of similarity, and yet the court had failed to account for the fact that the brooms were sold in dissimilar packaging, obscuring the bristles. [FN46] And, concluded the court, the unwrapped brooms were clearly not confusingly similar when placed side-by-side, as confirmed by the appellate court when it viewed the brooms during oral argument and "remarked their dissimilar appearance." [FN47] As a result, Posner noted, based on the appearance of the brooms and the advertising for them, "no reasonable person would think that there was a substantial danger of confusion," [FN48] and so the finding of infringement had to be reversed.

Thus, no matter how consumers of various types might have perceived the stripe on each of the brooms, the presentation of the brooms themselves in the appellate courtroom seems to have been the deciding factor here: Judge Posner (and Judge Bauer, the judge joining him in the majority) saw the brooms, decided that they were not similar, and then extrapolated from this view to declare that "no reasonable person" would think otherwise.

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[FN49]

***790** Of course, it is likely true in many cases that the visual similarities or differences between two marks will be equally evident to any type of consumer, and it is likely true that there is no way to avoid having the court engage in its own comparisons of the two trademarks, whether it indicates that it is doing so or not. [FN50] But the Libman court doesn't appear to recognize a consumer who may have visual impairments (such as myopia or color blindness) that may affect his or her response to a mark. Rather, to this court, the "reasonable person" in trademark law is someone who has the same visual perception abilities as the members of the court.

As such, reasonableness may be--quite literally--in the eye of the beholder. In SK&F Co. v. Premo Pharmaceutical Laboratories, the Third Circuit considered whether the similar appearance of two medications could result in consumer confusion as to source, despite the fact that each pill bore the logo of its respective manufacturer. [FN51] As between the fifteen percent of the patients in a survey submitted to the district court who had trouble reading the logos (most of whom, the court noted, were over fifty years of age) and the eighty-five percent who apparently did not, the appellate court in this case aligned itself with the group with more limited visual acuity:

> The district court, examining the capsules, specifically found that the logos were so small that they would be ineffective to prevent confusion as to source or passing off. We have also examined them, and conclude that the district court's finding is not clearly erroneous. Indeed an opposite conclusion well might be, for to our over-fifty eyes the logos are decipherable only with great difficulty. [FN52]

Once again the "reasonable person" as judicial construct surfaces. To borrow from Henry Ford, [FN53] a consumer can be as reasonable as she likes, so long as she is as reasonable as the court.

III. Meaning

Trademark law as applied to word marks assumes a literate public. The standard economic explanation--that trademark protection reduces consumer search costs by maintaining a system in which words and symbols have ***791** consistent source references--necessarily envisions a consumer who sees the word PEPSI and can make the cognitive leap to the source of the cola product. The process of trademark recognition thus has a symbolic or abstract dimension, requiring interpretive skills similar to the abstract skills developed through literacy. This is particularly true given the move of the trademark from a brand on the product serving, among other functions, to assist illiterate workers in identifying a particular product, [FN54] to a representative symbol embodying the product's actual and intended characteristics.

But this modern level of engagement with trademarks may not always map precisely onto the experiences of a functionally illiterate population. [FN55] Marketing scholars have suggested that some consumers who are functionally illiterate engage with trademarks in a different way from consumers who are literate. For example, functionally illiterate consumers may not treat a word mark as a word but rather as a pictorial image, recognizable in subsequent encounters only if the mark appears in the same color and font as in the previous encounter. [FN56] Any alteration to the brand's reference may result in the functionally illiterate consumer perceiving the brand as attached to an entirely new referent, such that "ZEEM cola with lime" indicates a different source from "ZEEM cola." [FN57] This type of reasoning "reflects a primitive ability to process information with a one-on-one correspondence to the physical world that is available to the senses rather than to the symbolic world that develops with literacy." [FN58] Thus, for the functionally illiterate consumer, trademarks may not, in fact, reduce search costs--indeed, they may do just the opposite. [FN59]

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***792** It is therefore worth reminding students that there may be instances when it is particularly important to consider how a claimed trademark visually functions to identify a source. [FN60] Qualitex Co. v. Jacobson Products Co. [FN61] is an example of a case in which it is useful to note the range of potential beneficiaries of the Court's decision. The claimed trademark in that case was a gold-green color as applied to dry cleaning press pads. [FN62] Although the opinion of the Court made no mention of it, the district court suggested that the reason that Qualitex might have sought promotion of the color of the press pads as a trademark was that its market consisted primarily of dry cleaning establishments, many of which were run by families the members of which were "foreign speaking with limited skills in reading or speaking English," [FN63] and therefore potentially dependent on visual cues (such as color) to engage in source identification. [FN64]

Judges are, of course, literate individuals, and so, as with the personal characteristics described earlier, courts may make certain unwarranted assumptions about the literacy of the relevant consumer market. [FN65] Because ***793** achieving a seat in a law school classroom also requires literacy, students may do the same. But there are ways to remind students that not every consumer is so fortunate. In discussions of Internet-related cases, for example, there is bound to be at least one student in the classroom who can describe a relative who has used a computer but a handful of times, who might not understand how a search engine works or how to extricate oneself from an undesired website. As students analyze the opinions of courts declaring what kinds of confusion are justified, and therefore legally redressable, and what kinds of confusion are simply user error, knowing someone who will fall on the "unreasonable" side of the line makes clearer the practical effect of judicial assumptions.

Conclusion

Recognizing that the construction of the "reasonable consumer" does not typically take into account physical characteristics such as visual acuity, literacy, and other characteristics that consumers bring to their interpretive effort has implications beyond the courtroom or classroom. It may also affect how we think about trademark meaning more broadly. [FN66] Trademark meaning may be created by consumers, but the words of the definition are written by judges.

I don't propose in this Essay to offer a normative proposal as to whether, or to what extent, trademark law should look more like tort law in its consideration of the "reasonable person." Indeed, as noted earlier, I think trademark law should expect consumers to exercise a fair amount of discretion and judgment, even if this expectation is aspirational. But I do think it's useful, at the very least, to remember when teaching trademark cases what Edward Rogers wrote almost one hundred years ago: Trademark's "reasonable person" is "a real person . . . . He is the average individual endowed with certain faculties and possessed of certain failings." [FN67] Thus, when students read cases in which courts claim to be divining the beliefs of the typical consumer, they would do well to consider to what extent this view of what is reasonable is shaded by the court's own experience. [FN68] The necessities of litigation may require judicial abstractions, but the realities of the marketplace persist.

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[FN1]. Articles containing such discussions abound; a personal favorite is James Boyle, The Anatomy of a Torts Class, 34 Am. U. L. Rev. 1003 (1985).

[FN2]. Surfvivor Media, Inc. v. Survivor Prods., 406 F.3d 625, 630 (9th Cir. 2005).

[FN3]. 2 Anne Gilson LaLonde, et al., Gilson on Trademarks § 5.08[3] (2007 ed.) ("Courts generally test their impressions of the trademarks at issue against a kind of 'reasonable person,' a purchaser composite with an assumed level of education, intelligence, awareness, and ability to differentiate between trademarks.").

[FN4]. Barton Beebe, An Empirical Study of the Multifactor Tests for Trademark Infringement, 94 Cal. L. Rev. 1581, 1641-42 (2006).

[FN5]. Linda M. Scott, The Bridge from Text to Mind: Adapting Reader-Response Theory to Consumer Research, 21 J. Consumer Res. 461, 474 (1994).

> ... [R]esearchers regularly try to match respondents' interpretations to a single correct meaning or answer as articulated in a questionnaire .... Then we treat the variation from the preconceived correct meaning as a form of error. What is missing ... is the rather humbling realization that the "right answer" is simply a case of privileging one reader's experience over another.

Id. (citation omitted).

[FN6]. Recent commentary has focused on the psychological dimensions of this question. See, e.g., Jacob Jacoby, The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion, and Dilution, 91 Trademark Rep. 1013 (2001); Jerre B. Swann, An Interdisciplinary Approach to Brand Strength, 96 Trademark Rep. 943 (2006).

[FN7]. See, e.g., 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 8:18 (4th ed. 2007) ("In deciding likelihood of confusion, the courts are in effect setting up a standard of consumer care similar to the familiar 'reasonable person' standard in torts.").

[FN8]. Cf., e.g., Louis Kaplow, Rules versus Standards: An Economic Analysis, 42 Duke L.J. 557, 561-62 (1992) ("One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider."). The description of the "reasonable person" in trademark law as rule-like is not a perfect fit; unlike the same character in tort law, he is not being used as a yardstick for the appropriateness of the defendant's actions. Graeme Austin distinguishes the two by noting that the reasonable person in tort law is an "analytical tool," while the reasonable person in trademark law is "a proxy for real people." Graeme W. Austin, Trademarks and the Burdened Imagination, 69 Brook. L. Rev. 827, 832 (2004). While this is true as a descriptive matter, it still seems useful to consider trademark's "reasonable person" as a yardstick against which conduct is measured--only here, the conduct is of parties not directly before the court.

[FN9]. See, e.g., Grupo Gigante S.A. de C.V. v. Dallo & Co., Inc., 391 F.3d 1088, 1108 (9th Cir. 2004) (Graber, J., concurring) (criticizing attempt to limit relevant customer base to a particular ethnic group "[b]ecause a conclusion that Plaintiffs have a protectable [trademark] interest would prohibit Defendants from selling groceries under that mark to any residents of San Diego County--not just to Mexican-Americans"). But see Bayer Co., Inc. v. United Drug Co., 272 F. 505, 515-16 (S.D.N.Y. 1921) (enjoining use of "aspirin" by defendant when marketing to druggists and physicians but not when marketing to consumers):

> Of course, we must not attempt too fine an application of such divisions.... For example, in the case at

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bar it is impossible to provide for such rare retailers as may not, and such rare customers as may, know that "Aspirin" is a trade-mark. We can cut only so fine as our shears permit, and there will be ragged edges on either side.

Id. at 514.

[FN10]. See William E. Gallagher & Ronald C. Goodstein, Inference Versus Speculation in Trademark Infringement Litigation: Abandoning the Fiction of the Vulcan Mind Meld, 94 Trademark Rep. 1229, 1230 (2004).

[FN11]. Id. at 1231.

[FN12]. This is also true, of course, with respect to many other characteristics, including education and income level. Id. at 1232.

If in a particular case the fact finder is more educated and affluent than the average relevant consumer, his or her subjective impression in a case may be that a purchase decision of the kind at issue is routine and inconsequential, whereas the average relevant consumer may associate a material level of financial risk with the purchase.

Id.

[FN13]. Restatement (Second) of Torts § 283A (1965) ("If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.").

[FN14]. Restatement (second) of Torts § 283C cmt. a (1965).

So far as physical characteristics are concerned, the hypothetical reasonable man may be said to be identical with the actor. Physical handicaps and infirmities, such as blindness, deafness, short stature, or a club foot, or the weaknesses of age or sex, are treated merely as part of the "circumstances" under which a reasonable man must act.

[FN15]. Vaughan v. Menlove, (1837) 132 Eng. Rep. 490, 493 (C.P.), is probably the best-known case for the proposition that the claimed intelligence of the defendant should not be taken into account. See also, e.g., Restatement (Second) of Torts § 289 cmt. n (noting that the "reasonable person" standard makes allowances for age and physical disability but not "attention, perception, memory, knowledge of other pertinent matters, intelligence, and judgment"); Oliver Wendell Holmes, The Common Law 108 (Little, Brown, & Co. 1881) ("The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.").

[FN16]. Margo Schlanger, Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law, 45 St. Louis U. L.J. 769, 769 (2001).

[FN17]. See, e.g., Gilson, supra note 3, at § 5.08[1][b].

[FN18]. See, e.g., Ann Bartow, Likelihood of Confusion, 41 San Diego L. Rev. 721, 777 (2004) (contending that the "most demeaning conceptions of consumers, and of their intelligence and discriminatory powers" tend to be trademark cases involving female consumers).

[FN19]. Cf. Wesley E. Forte, The Ordinary Purchaser and the Federal Food, Drug and Cosmetic Act, 52 Va. L.

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Rev. 1467 (1966) (advocating that the FDCA's false and misleading labeling cases should be more sensitive to purchaser traits).

[FN20]. Graeme B. Dinwoodie, What Linguistics Can Do for Trademark Law, in Trade Marks and Brands: An Interdisciplinary Critique (J. Ginsburg, et al. eds., Cambridge University Press forthcoming 2007) (manuscript at 8, on file with author), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1044&context=graeme_dinwoodie (last visited Jan. 15, 2008); see also Austin, supra note 8, at 904.

[FN21]. Cf. Elizabeth Mertz, The Language of Law School 132 (Oxford University Press 2007):

> [L]aw professors direct their students' attention to the oddly abstract conceptions of people and contexts provided by layered readings of legal texts. The people in these landscapes, as well as the landscapes themselves, are configured around points of legal argumentation, around strategically structured dialogue .... When students speak this language, they operate in a world in which important aspects of social context and identity have become invisible.

[FN22]. See, e.g., Mark Bartholomew, Advertising and the Transformation of Trademark Law, 38 N.M. L. Rev. (forthcoming 2007) (manuscript at 15-16), available at http://ssrn.com/abstract=1023930 (last visited Jan. 15, 2008).

[FN23]. 4 McCarthy, supra note 7, § 23:58.

[FN24]. Bartow, supra note 18, at 817 ("[C]ourts should consistently embrace something along the lines of the 'reasonably careful purchaser,' with the approximate purchasing sophistication of the judge deciding the issue--a creature far more intelligent and discerning than the consumers currently manifest in trademark jurisprudence.").

[FN25]. See Laura A. Heymann, The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer (unpublished manuscript, on file with author). Mark Bartholomew has argued that courts required a higher degree of judgment on the part of consumers before advertising's growth in the twentieth century. Bartholomew, supra note 22 (manuscript at 10-12).

[FN26]. Dinwoodie, supra note 20, at 8 ("[O]n the whole, trademark law deals with a rough reality.... [The reasonably prudent purchaser] is in large part a legal fiction that implements a vision of the degree of consumer protection regulation that Congress and the courts think appropriate without rendering commerce inefficient.").

[FN27]. Rebecca Tushnet, Sight, Sound, and Meaning: Teaching Intellectual Property with Audiovisual Materials, 52 St. Louis L.J. 891, 891 (2008).

[FN28]. Beebe, supra note 4, at 1600, 1623-26; see also, e.g., Daniel J. Howard et al., The Effects of Brand Name Similarity on Brand Source Confusion: Implications for Trademark Infringement, 19 J. Pub. Pol'y & Marketing 250, 250-51 (2000).

[FN29]. Of course, even having considered such aspects, there remains the fact that the concept of "similarity" in trademark law is largely undefined. See, e.g., Beebe, supra note 4, at 1625.

[FN30]. See, e.g., Henri's Food Products Co., Inc. v. Kraft, Inc., 717 F.2d 352, 355 (7th Cir. 1983); see also id. at 354 ("[T]o the extent the determination is predicated on the similarity of the marks themselves, this Court is in as good a position as the trial judge to determine likelihood of confusion.").

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[FN31]. One group of marketing scholars has suggested that the comparison of the sound of two marks is key. See Howard et al., supra note 28, at 262 ("[E]ven when brand names are visually presented, name sound is the causative element in brand source confusion. This evidence of subvocalization and its effect on confusion indicates the importance of testing brand names not only for connotation and appearance but also for how consumers might say the name, which may differ from the intended brand name pronunciation.").

[FN32]. See generally Roger Shuy, Linguistic Battles in Trademark Disputes (Palgrave Macmillan 2002).

[FN33]. For example, in Bell v. Starbucks U.S. Brands Corp., 389 F. Supp. 2d 766, 777 (S.D. Tex. 2005), aff'd, 2006 U.S. App. LEXIS 27961 (5th Cir. Nov. 10, 2006), the court's conclusion that "Star Bock" and "Starbucks" are "remarkably similar in sight and sound" might well have been influenced by the court's location in Galveston, Texas. Cf. Ralph Blumenthal, Scholars of Twang Track All the "Y'Alls" in Texas, N.Y. Times, Nov. 28, 2003, at A1.

[FN34]. David Williford, A Pin Is Not a Pen; Is a Pan? Is Southern Pronunciation Incorrect?, 77 Eng. J. 25, 25 (1988).

[FN35]. See, e.g., Anne H. Charity et al., Familiarity with School English in African American Children and Its Relation to Early Reading Achievement, 75 Child Dev. 1340, 1353 (2004).

[FN36]. 875 F.2d 1026 (2d Cir. 1989).

[FN37]. Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc., 702 F. Supp. 1031, 1037 (S.D.N.Y. 1988), rev'd, 875 F.2d 1026 (2d Cir. 1989). The district court noted that "[t]he most tangible evidence of the aural similarity of the two marks was the need of counsel to spell them out in order to clarify the record at various points throughout the trial." Id. at 1037 n.2.

[FN38]. Mead Data Central, Inc., 875 F.2d at 1029-30.

[FN39]. Id. at 1030.

[FN40]. Cf. Posting of Geoffrey K. Pullum to Language Log, http://itre.cis.upenn.edu/~myl/languagelog/archives/000728.html (Apr. 8, 2004, 16:14) (last visited Jan. 15, 2008) ("[T]he fact is that whether you pronounce Lexis the same as Lexus is in fact a dialect difference.").

[FN41]. 69 F.3d 1360 (7th Cir. 1995).

[FN42]. Id. at 1361.

[FN43]. Id.

[FN44]. Id.

[FN45]. See id. 1361-64.

[FN46]. Libman, 69 F.3d at 1361-62. The Seventh Circuit went on to articulate a theory in which the "undressed state of the broom" would be relevant (that a returning consumer seeking to buy another broom would have long ago thrown away the wrapper) but noted that the district court had not proffered such a theory. Id. at 1362.

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[FN47]. Id. at 1362-63.

[FN48]. Id. at 1363-64. Indeed, Judge Posner wrote, “We take the district judge to have acknowledged this in the passage we quoted earlier from his opinion.” Id. at 1364.

[FN49]. See id. at 1364. The dissenting judge characterized the majority's approach similarly. Id. at 1367, 1368 (Coffey, J., dissenting). This practice is not, of course, a new one. See, e.g., Liggett & Myers Tobacco Co. v. Finzer, 128 U.S. 182, 184 (1888) (comparing the plaintiff's and defendant's use of a star logo and concluding that “[t]he two stars ... are so different in form and surroundings that it would not be possible for any person, not afflicted with color-blindness, to mistake the one for the other.”). Indeed, noted the Liggett Court, “[t]he judgment of the eye upon the two is more satisfactory than evidence from any other source as to the possibility of parties being misled ....” Id. But see Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1429 (7th Cir. 1985) (Easterbrook, J.) (“It would be little short of arrogation for an appellate court to claim that just because every judge can bring to bear his own view of what is similar and what is not, the appellate judges' view must be the right one.”).

[FN50]. There are other ways in which to compare, for example, two colors. See Lawrence B. Ebert, Trademark Protection in Color: Do It by the Numbers!, 84 Trademark Rep. 379, 404-05 (1994) (proposing use of scientific method of color comparison in trademark infringement cases).

[FN51]. 625 F.2d 1055, 1057-58 (3d Cir. 1980).

[FN52]. Id. at 1061.

[FN53]. Henry Ford was reported to have said, touting the benefits of mass production, that a customer could have any color of car he wanted as long as it was black. See, e.g., The Yale Book of Quotations 282 (Fred R. Shapiro ed., Yale University Press 2006).

[FN54]. Frank I. Schechter, The Historical Foundations of the Law Relating to Trade-Marks 21 (Columbia University Press 1925).

[FN55]. The 2003 National Assessment of Adult Literacy indicates that twelve percent of the participants studied exhibited “below basic” literacy skills in interpreting documents such as bills or prescription labels. See National Center for Education Statistics, Fast Facts, http:// nces.ed.gov/fastfacts/display.asp?id=69 (last visited Dec. 26, 2007). One should be careful in any such consideration to distinguish illiteracy from other educational issues. See, e.g., Charity et al., supra note 35, at 1340-41 (discussing the difference between African American Vernacular English and “School English”).

[FN56]. Madhubalan Viswanathan et al., Decision Making and Coping of Functionally Illiterate Consumers and Some Implications for Marketing Management, 69 J. Marketing 15, 21 (2005).

[FN57]. See id. at 27.

[FN58]. Id. at 22 (citation omitted).

[FN59]. Haeran Jae & Devon DelVecchio, Decision Making by Low-Literacy Consumers in the Presence of Point-of-Purchase Information, 38 J. Consumer Aff. 342, 351 (2004) (noting need of consumers with low literacy for visual descriptions of product qualities); Linda M. Scott, Spectacular Vernacular: Literacy and Commer-

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cial Culture in the Postmodern Age, 10 Int'l J. Res. Marketing 251, 257 (1993) ("It is not very much of a stretch to say that good consumers must first be readers; in the modern era, the drive to market the plethora of new goods has relied heavily on textual means of solicitation."); Viswanathan et al., supra note 56, at 27 (noting that functionally illiterate consumers often "cannot readily engage in the abstract and analogical thinking that makes cognitive miserliness possible").

One study illustrates the similar effect that culture can have on the interpretation of advertising. In the study, respondents were shown an advertisement for a motion sickness remedy in which the box took the place of a buckle on a seat belt. The American respondents understood that the visual metaphor was meant to communicate safety, while some respondents from countries other than the United States interpreted the presence of a seat belt as communicating anxiety (i.e., that the user of the medication had to be strapped down). Edward F. McQuarrie & David Glen Mick, Visual Rhetoric in Advertising: Text-Interpretive, Experimental, and Reader-Response Analysis, 26 J. Consumer Res. 37, 50-51 (1999) (suggesting that consumers lacking relevant cultural backgrounds may have difficulty interpreting advertisements that rely on visual tropes).

[FN60]. See, e.g., Finn v. Cooper's Inc., 292 F.2d 555, 558 (C.C.P.A. 1961) (noting that a symbol is "readily recognized by both literate and illiterate prospective purchasers.... It requires no translation into the words of other languages before it can be recognized as a symbol indicating source or origin of the goods with which it is used").

[FN61]. 514 U.S. 159, 167 (1995).

[FN62]. Id. at 161.

[FN63]. Qualitex Co. v. Jacobson Prods. Co., Inc., No. CV 90 1183 HLH (JRX), 1991 U.S. Dist. LEXIS 21172, at *2 (C.D. Cal. Sep. 5, 1991), aff'd in part and rev'd in part, 13 F.3d 1297 (9th Cir. 1994), rev'd, 514 U.S. 159 (1995); see also Stephen J. Newman, Comment, Kill the "Mere Color" Rule: Equal Protection for Color under the Lanham Act, 61 U. Chi. L. Rev. 1595, 1620 (1994).

[FN64]. Unfortunately, the district court then went on to conflate a limited ability to read English with a lack of care in purchasing decisions. See Qualitex, 1991 U.S. Dist. LEXIS 21172, at *13-14 ("Korean and other foreign speaking purchasers of press pads are unlikely to exercise a sufficiently high degree of care to avoid purchasing a Jacobson pad when they are shown a green-gold pad which they naturally assume to be the Qualitex pad that they have come to recognize. The law protects such purchasers.").

[FN65]. See, e.g., Merriam-Webster, Inc. v. Random House, Inc., 35 F.3d 65, 72 (2d Cir. 1994) (assuming purchasers of dictionaries are "generally literate"); Girl Scouts of the U.S. v. Bantam Doubleday Dell Publ'g Group, Inc., 808 F. Supp. 1112, 1130 (S.D.N.Y. 1992) ("As is the case of purchasers of dictionaries ... purchasers of children's books are undoubtedly literate ....").

[FN66]. For example, as Melanie Wallendorf notes, what might otherwise be characterized as brand loyalty might more correctly be a coping mechanism to avoid having to memorize a new brand name. Melanie Wallendorf, Literally Literacy, 27 J. Consumer Res. 505, 508 (2001).

[FN67]. Edward S. Rogers, The Unwary Purchaser, 8 Mich. L. Rev. 613, 621 (1910).

[FN68]. See Austin, supra note 8, at 922 ("Courts are likely to continue to construct 'ordinarily prudent consumers,' shaping the characteristics they ascribe to them out of assumptions, general observations, truisms, pre-

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judices, and hunches."). The marketing literature reflects a similar recognition. See, e.g., A. Fuat Firat & Alladi Venkatesh, Liberatory Postmodernism and the Reenchantment of Consumption, 22 J. Consumer Res. 239, 258 (1995) ("[T]he notion of an individual consumer is as much a construction of the social system as it is a product of the knowledge system that claims to study consumers objectively from a distance, but is, in fact, constructing her/him from this imaginary distance.").
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