TRADEMARK LAW AND CONSUMER CONSTRAINTS

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Trademark law's focus is on the consumer. Both the trademark literature and the marketing literature, however, tend to assume a consumer with few constraints on economic or cognitive processing resources. For example, scholars have argued that some confusion in the marketplace is not only inevitable but is also an overall positive in that encountering confusion trains consumers to be more resourceful and to learn how to interpret marketing communications more carefully. But not all consumers have the same level of cognitive and economic resources. Disadvantaged consumers—such as those not literate in the English language, those with lower socioeconomic status, and those who face both constraints—might benefit or be harmed by trademark law in ways that are different from the experiences of the lawyers and judges who determine the results of trademark disputes. Drawing on sociological and marketing literature to sketch a picture of the sometimes forgotten consumer, this Article encourages courts to consider whether the consumers at issue in a particular case face constraints that make it more difficult to engage with the modern marketing system. Such consideration might not change the results of any one case, but it will at least bring more attention to when some consumers are left behind.

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INTRODUCTION

Trademark law's focus is on the consumer. There are, to be sure, scholarly debates about whether trademark law serves consumers or producers in practice—in other words, whether trademark law is primarily about consumer protection, primarily about protecting property, or some combination of the two.[1] But the fact that the touchstone of any trademark infringement case is whether the defendant's activities are likely to cause confusion means that trademark cases must consider consumers' beliefs and expectations arising from their encounters with the marks at issue. Consumers are the ones who respond to trademark surveys; they are the ones who must think a bit harder when faced with a diluted mark. As Barton Beebe has written, trademark law requires the ability "to think *through* the consumer and see the marketplace only as the consumer sees it."[2]

Consumers are, of course, individually distinct, but "the consumer" in a trademark case necessarily must be defined in some way. Courts have typically used terms like "ordinary" or "reasonable" to characterize the consumer whose aptitude in the marketplace is the focus of attention.[3] Scholars have suggested, however, that courts have varying conceptions of what constitutes reasonableness[4]—for example, that courts conceive of consumers' abilities differently when consumers are female

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1. *See, e.g.*, Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007); Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547 (2006).

2. Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2022 (2005).

3. *See, e.g.*, Malletier v. Burlington Coat Factory Warehouse Corp., 426 F.3d 532, 538–39 (2d Cir. 2005); E. I. DuPont de Nemours & Co. v. Yoshida Int'l, Inc., 393 F. Supp. 502, 510 (E.D.N.Y. 1975) ("In weighing the evidence of likelihood of confusion, the court must strive to place itself in the shoes of a prospective purchaser. In this role, the court does not act as an enlightened educator of the public but takes into account the mythical ordinary prospective purchaser's capacity to discriminate as well as his propensity for carelessness."). Although I focus on judicial opinions in this Article, decisions from the Trademark Trial and Appeal Board ("TTAB") can involve the same issues.

4. *See, e.g.*, Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 835 (2004) ("[T]he worldview of the ordinarily prudent consumer is frequently based upon judicial assumptions.") (emphasis omitted); *see also* FRANK SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS 166 (1925) ("[T]he so-called ordinary purchaser changes his mental qualities with every judge . . . .") (internal quotation marks omitted).

as opposed to when they are male.[5] Sustained attention to the conception of the consumer in trademark law was given by Thomas Lee, Glenn Christensen, and Eric DeRosia, who established a model of consumer sophistication to respond to what they concluded was a lack of "any serious attempt to develop a framework for understanding the conditions that may affect the attention that can be expected to be given to a particular purchase."[6] As Barton Beebe has characterized it, courts view the consumer as either a wholly rational "sovereign" or a highly susceptible "fool."[7]

Despite this variability, it appears that most discussions of the consumer, both in the trademark literature and in the marketing literature, assume a consumer without economic or cognitive constraints.[8] (I am using the phrase "cognitive constraints" in its broadest sense to capture any challenges or constraints on information processing and not as a synonym for intellectual ability.) For example, scholars have argued—quite reasonably, as applied to some consumers—that some confusion in the marketplace is not only inevitable but is also an overall positive in that encountering confusion trains consumers to be more resourceful and to learn how to "read" trademark communications more carefully.[9] Michael Grynberg has similarly argued that "the reasonable consumer of trademark should look more like the reasonable person of tort," such that consumers who are deemed to act unreasonably when engaging with trademarks should be afforded little or no protection.[10] Such views seem to assume a baseline level of resources to engage in

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5. *See, e.g.*, Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 723 (2004) ("Why, in trademark litigation decisions, do judges so often write about representative members of the public as if we are astoundingly naïve, stunningly gullible, and frankly stupid?").

6. Thomas R. Lee, Glenn L. Christensen & Eric D. DeRosia, *Trademarks, Consumer Psychology, and the Sophisticated Consumer*, 57 EMORY L.J. 575, 575 (2008).

7. Beebe, *supra* note 2, at 2024; *see also* Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427, 437–42 (2010) (describing courts' views of consumers in trademark cases).

8. *See, e.g.*, Natalie Ross Adkins & Julie L. Ozanne, *The Low Literate Consumer*, 32 J. CONSUMER RSCH. 93, 93 (2005) (noting that "consumer researchers assume that consumers are literate, and our theories are generally developed using data from literate consumers"); *cf.* Stephanie Plamondon Blair, *Impoverished IP*, 81 OHIO ST. L.J. 523 (2020) (considering how poverty can affect the ability to engage in creative decision-making).

9. *See, e.g.*, Alfred C. Yen, *The Constructive Role of Confusion in Trademark Law*, 93 N.C. L. REV. 77, 85–86 (2014). I have made similar points in my own writing. Laura A. Heymann, *Reading the Product: Warnings, Disclaimers, and Literary Theory*, 22 YALE J.L. & HUMAN. 393 (2010) [hereinafter Heymann, *Reading the Product*]; Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 654–55 (2009) [hereinafter Heymann, *Public's Domain*] (noting that trademarks rely on the consumer's "associational dexterity"); *cf.* Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 842 (favoring a rational-audience model in First Amendment jurisprudence to set "a minimum standard of reasonableness to which all citizens are expected to conform regardless (for the most part) of their actual capacity to do so").

10. Michael Grynberg, *The Consumer's Duty of Care in Trademark Law*, *in* RESEARCH HANDBOOK ON TRADEMARK LAW REFORM 326, 327 (Graeme B. Dinwoodie & Mark D. Janis eds., 2021); *id.* at 339 (characterizing the "reasonably prudent" consumer as

a search that one can ultimately choose to deploy (or not) in the quest to minimize search costs.[11]

This view of the consumer is the natural heir to two traditions in the literature. One is what Ronald Paul Hill has termed a "transnational consumer culture"[12]—a culture that treats consumption not simply as a means of satisfying basic human needs but as an activity to be purposefully engaged in, constructed, and analyzed. (So too with advertising, which moved from simply telling consumers about the characteristics of a product and the name of its maker to a profession and the subject of scholarly attention.)[13] This culture was centrally identified in, if not born from, the work of Thorsten Veblen[14] and continues through a literature that analyzes the ways in which consumption is connected to identity development.[15]

The second tradition is the predominance in the trademark literature of a law-and-economics approach to trademark law—the idea that trademarks' primary function is to reduce search costs for consumers in the marketplace. A consumer who enjoys the taste of Pepsi can rely on the appearance of the Pepsi trademark, and its use only by the PepsiCo company, to obtain Pepsi in the marketplace; she doesn't need to verify an ingredient list, confirm the place of manufacture, or request a sample of the product before purchasing it.[16] These two traditions, taken together in terms of their relevance for trademark law, suggest that if the process of consumption itself has value, the ideal is for the search that facilitates consumption to be free from constraints.[17] In other words, trademark law, and its goal of eliminating consumer confusion in the pursuit of goods and services, implicitly embodies the idea that, free from confusion, a consumer's ability to pursue consumption can proceed unfettered.

"one who understands the market in which he shops and is familiar with the tools available to navigate it").

11. The classic description of trademarks as minimizing search costs is William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

12. Ronald Paul Hill, *Consumer Culture and the Culture of Poverty: Implications for Marketing Theory and Practice*, 2 MKTG. THEORY 273, 275 (2002).

13. *See generally* Mark Bartholomew, *Advertising and the Transformation of Trademark Law*, 38 N.M. L. REV. 1 (2008).

14. THORSTEN VEBLEN, THE THEORY OF THE LEISURE CLASS (1899); *see* Austin, *supra* note 4, at 851 n.107 (2004) (noting that the concept of conspicuous consumption existed in the literature before Veblen's work).

15. Viviana A. Zelizer, ECONOMIC LIVES: HOW CULTURE SHAPES THE ECONOMY 408 (2011) (discussing scholarship that "treats consumption as positional effort—establishment of social location, boundaries, and hierarchies through the display of goods and services" versus scholarship that "treats consumption as relational work—the creation, maintenance, negotiation, and alteration of interpersonal connections through acquisition and use of goods and services").

16. Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 73–77 (2012) (describing the broad acceptance of the search costs theory in trademark law); *id.* at 82 ("[In a traditional passing off case,] consumers do not engage trademark simply for the purpose of gaining abstract information. They *use* trademarks as shorthands for information so that they can *make purchasing decisions* in the marketplace.").

17. Hill, *supra* note 12, at 275.

Of course, for many in the United States, consumer choice is significantly limited by constraints on cognitive or financial resources. Consumers whose native language is English but who have never learned to read the language might find it difficult to locate the products they want or be reluctant to try new products. Consumers without disposable income or who rely on public assistance might be constrained in the types of products they can buy, as are consumers who have limited storage space in their dwellings, who rely on public transportation or walking to reach stores, or who can shop only during limited hours between jobs. Indeed, the lack of one set of resources can affect the other set, such as when limited financial resources create a level of stress that impedes information processing.[18] For all these consumers, the idea of "search costs" takes on a different nuance and makes what may seem unreasonable to another consumer quite reasonable under the circumstances and vice versa. Thus, while conceptualizing trademark law "as a tool for managing confusion in ways that help consumers develop the cognitive skills necessary to support a complex market economy"[19] might be entirely appropriate for most consumers, it might not work that way for those without a financial cushion for errors.

In previous work, I have noted the ways in which judges might interpret trademarks through their own lens: they might see a printed trademark as tiny if they themselves are of decreasing visual acuity or believe that two marks are not confusing as long as they are pronounced "correctly."[20] As in that work, my goal here is to broaden courts' perspectives without necessarily making claims about the results of any particular case. A broader perspective would recognize that every trademark case has the potential to reflect the bias that some lawyers and judges bring to the process of resolving disputes, even if unintended. That bias—of not having experienced constraints on financial resources and of benefiting from formal education—can be reflected in the language that is used to describe consumers, such as "reasonable" or "sophisticated," which implies that other consumers are "unreasonable" or "unsophisticated" in their interactions in the marketplace, even if those interactions are entirely rational under the circumstances.[21] My discussion in this Article is, therefore, to encourage a greater focus on variances in the purchasing

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18. *See infra* text accompanying notes 39–44.

19. Yen, *supra* note 9, at 86.

20. Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781, 787–88, 790 (2008) (discussing *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A, Inc.*, 875 F.2d 1026 (2d Cir. 1989) and *SK&F, Co. v. Premo Pharm. Labs., Inc.*, 625 F.2d 1055 (3d Cir. 1980)); *see also* Bartholomew, *supra* note 13, at 22–23 (2008) (describing the move in the early- and mid-twentieth century to incorporate social science into trademark law to counter the tendency of judges to assume that typical consumers thought like judges); *id.* at 24–25 (describing how this made room for psychologists to claim the mantle of experts in trademark cases, consistent with an increase in the use of psychology in advertising).

21. John Kenneth Galbraith, *The Dependence Effect*, *in* THE CONSUMER SOCIETY READER 20–25 (Juliet B. Schor & Douglas B. Holt eds., 2000) (1958); *id.* at 23 ("The fact that wants can be synthesized by advertising, catalyzed by salesmanship, and shaped by the discreet manipulations of the persuaders shows that they are not very urgent. A man who is hungry need never be told of his need for food . . . . [Advertising is] effective only with those who are so far removed from physical want that they do not already know what they want. In this state alone, men are open to persuasion.").

experience, with particular attention to socioeconomic status and literacy, such that advocates and decision-makers might see these various experiences as lived reality rather than success or failure. The overall goal is, as Alan R. Andreasen noted in 1993, to "assume that the disadvantaged are acting rationally unless proven otherwise," given the circumstances they face.[22]

I am not suggesting, however, that trademark law can or should accommodate every consumer experience at all times. Trademark law must make some overall assumptions about how consumers will act in any given circumstance.[23] There will always be, as Michael Grynberg and Fred Yen have reminded us,[24] consumers who end up on the losing end, whether because they were never confused in the first place (and so are being deprived of the defendant's product when infringement is found) or because they are indeed confused (and so are not provided an effective remedy when infringement is not found). Trademark doctrine, like any other doctrine, cannot be tailored to provide individual results. That said, we should recognize that discussions about the breadth of trademark protection should take full account of costs and benefits, just as discussions about the "reasonable person" in tort law should acknowledge when, for example, that standard is shaped in a particular way by gender, ability status, or other characteristics.[25] Thus, rather than characterizing interactions as those of the "reasonable" consumer—which implies that other consumers are "unreasonable"—courts might instead surface the characteristics of the consumer whom the court is using as its yardstick.

I would be remiss here if I didn't acknowledge prior trademark scholarship, including my own, that has called for trademark law to recognize a model of the consumer that credits the consumer with autonomy in decision-making.[26] Such a

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22. Alan R. Andreasen, *Revisiting the Disadvantaged: Old Lessons and New Problems*, 12 J. PUB. POL'Y & MKTG. 270, 272 (1993).

23. Graeme B. Dinwoodie, *What Linguistics Can Do for Trademark Law*, *in* TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE 140, 148 (Lionel Bently et al. eds., 2008) (noting that the reasonable consumer must be "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").

24. Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60 (2008); Yen, *supra* note 9, at 85–109 (pointing out that in most litigated cases, the plaintiff has put forward a plausible claim of consumer confusion; if the defendant prevails, the court's ruling "means that those consumers [who are confused] will continue to face confusion until they figure things out for themselves").

25. Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769, 769 (2001); *cf.* OLIVER WENDELL HOLMES, THE COMMON LAW 98 (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.").

26. Heymann, *Reading the Product*, *supra* note 9; Heymann, *Public's Domain*, *supra* note 9; McKenna, *supra* note 16, at 122 ("In the advertising context, construction of consumers as autonomous agents capable of managing information leads to the conclusion that law should regulate only false statements and that it should particularly avoid regulating

consumer has the ability to learn that advertising sometimes contains puffery, that claims to be the "world's best" should be viewed with some skepticism,[27] and that communications to consumers sometimes contain jokes, humorous misdirection, and parody. But there is a difference between avoiding paternalism and recognizing the constant constraints on decision-making faced by some consumers. A theory of human dignity should recognize the value of individual autonomy, but it should also recognize the ways in which constraints affect the ability to exercise that autonomy.

Still, one might reasonably ask whether giving consideration to these issues achieves anything of value. Although trademark law is rooted to some degree in consumer protection, it can't function as a vehicle for remedying all inequities in the marketplace or substitute for broad-based social and economic policy. Additionally, taking these challenges into account might result in a narrower scope for trademark law in some instances but a broader scope in others. This might result, accordingly, in undesirable consequences if trademark holders exploit the willingness of courts to consider the socioeconomic reasons for consumer constraints to achieve unrelated goals. And finally, one might contend that litigants in trademark cases are ordinarily strategic enough that we can expect them to put forward any conception of the consumer that enhances their chances of prevailing; the courts' role is simply to choose between these competing visions.

These contentions all have merit. But they seem to offer a somewhat too sterile view of trademark law, one that can too easily gloss over consumers' lived experiences in favor of larger considerations. That is not to say the larger considerations are irrelevant; one shouldn't assume that shifting one's viewpoint will merely yield the same landscape in a different frame. But neither should one pursue the larger doctrinal goals without an honest acknowledgment of who benefits and who does not, beyond the parties on either side of the dispute.

I'll begin with a note on terminology. Marketing scholars once used the term "disadvantaged consumers" to describe consumers who faced resource constraints in the marketplace. Scholars later took issue with this categorization because it implied—to the extent "disadvantage" was framed in terms of race, age, income, or other characteristics—that it was universal across the category and so suggested immutability. These scholars proposed to use instead the term "vulnerable consumers" as a way of focusing the analysis on the interactions consumers experienced rather than on the consumer categorically.[28] The term "vulnerability,"

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attempts to persuade. A similar focus on consumer autonomy in the trademark context would limit trademark law to circumstances in which use of a trademark is likely to deceive consumers in ways that will affect their purchasing decision."); *id.* at 137–38 (stating that courts should "err on the side of less protection in close cases" involving private label goods because "trademark law should not coddle consumers").

27. *Cf.* ELF (New Line Cinema 2003) ("You did it! Congratulations! World's best cup of coffee! Great job, everybody!").

28. Dennis E. Garrett & Peter G. Toumanoff, *Are Consumers Disadvantaged or Vulnerable? An Examination of Consumer Complaints to the Better Business Bureau*, 44 J. CONSUMER AFFS. 3, 5–6 (2010); Ronald Paul Hill & Eesha Sharma, *Consumer Vulnerability*, 30 J. CONSUMER PSYCH. 551, 551 (2020) (defining consumer vulnerability "as a state in which consumers are subject to harm because their access to and control over resources are restricted in ways that significantly inhibit their ability to function in the marketplace").

however, presents its own challenges, as it may connote that all consumers under constraints experience those constraints in the same way. Although I draw on the literature from which this vocabulary has emerged, my goal here is to focus on the constraints themselves.

Accordingly, in Part I of this Article, I'll provide some information about the cognitive and other constraints experienced by some consumers and describe some of the ways in which such consumers navigate the marketplace. In Part II, I'll discuss the way that trademark law has generally characterized the consumer, demonstrating that although the cases broadly categorize consumers as sophisticated or unsophisticated (owing to an unfortunate phrasing in the formulation of the likelihood of confusion tests), they do not as often discuss consumers in terms of the constraints they may experience with respect to decision-making in the marketplace. Part III considers several trademark doctrines that can be impacted by this failure to give due consideration to consumer constraints, including the similarity of the marks factor in the likelihood of confusion test, the question of private label goods, and the doctrine of post-sale confusion. The Article then concludes.

I. HOW CONSUMERS CAN EXPERIENCE CONSTRAINTS

Before one can consider how trademark law might matter to consumers who experience constraints, an acquaintance with the purchasing strategies of such consumers is needed. At the outset, it should be noted that the research around such strategies does not always reach the same conclusions and is often contextual, consistent with the approach advocated for here. Different studies use different definitions or variables for what constitutes socioeconomic status, including income, education, and occupation as primary values, with parental education occasionally thrown into the mix.[29]

I want to be clear about some points at the outset. First, neither socioeconomic status ("SES") categories nor purchasing experiences are rigid. Many higher-SES consumers engage in purchasing experiences that are motivated by obtaining value at the lowest possible cost; many lower-SES consumer experiences involve seeking status or self-fulfillment as opposed to meeting basic needs.

Second, and relatedly, I am not suggesting that even within a particular category all consumers within that group will think or act alike. Indeed, the marketing literature captures various narratives about the effects of financial or cognitive constraints on consumers, some reporting that consumers with those constraints experience difficulty in making decisions due to the cognitive stress that a lack of resources puts on them, while others report that such consumers develop strategic mechanisms to help them navigate the market given their lack of resources.[30] These two views can, of course, be reconciled to theorize a consumer

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29. *See, e.g.*, Priya Fielding-Singh, *A Taste of Inequality: Food's Symbolic Value Across the Socioeconomic Spectrum*, 4 SOCIOECONOMIC SCI. 424, 427 (2017).

30. Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 SCIENCE 976, 980 (2013) ("Being poor means coping not just with a shortfall of money, but also with a concurrent shortfall of cognitive resources. The poor, in this view, are less capable not

who succeeds in deploying coping mechanisms in some, but not all, instances, or a consumer whose poverty-influenced cognitive load leads her to focus on certain tasks or circumstances more deeply (for example, how her last twenty dollars for the month will be spent) while neglecting other tasks.[31] The descriptions in this Article attempt to reflect these divergent views.

Third, although I discuss constraints both on finances and on information processing in this Article, I am mindful that the groups of consumers who encounter these constraints are not wholly coextensive, although they do overlap. Consumers who are unable to process product labels in English because they are native speakers of another language are different from consumers who cannot process such labels because they are not literate in any language, even though they might face similar interpretive challenges. But, I suspect, consumers in the former group who have access to financial resources may be in a better position to ameliorate their processing challenges than consumers who do not have such access.

The law-and-economics literature hypothesizes a consumer as a rational actor: someone who seeks to maximize utility by acquiring desired goods at the lowest available price.[32] Such a consumer processes information efficiently and accurately, has adequate time and resources for decision-making, and is not affected by any cognitive biases or limitations. The behavioral economics literature, by contrast, highlights the way in which consumers don't always act in accordance with what is deemed to be in their economic self-interest; beset by cognitive biases and other constraints, they operate first through what Daniel Kahneman has characterized as instinctive "System 1" thinking rather than through deliberative "System 2" thinking.[33] The question thus becomes whether we base law and policy on how consumers *should* act or on how they actually *do* act—and, relatedly,

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because of inherent traits, but because the very context of poverty imposes load and impedes cognitive capacity."); Adkins & Ozanne, *supra* note 8, at 93 ("Competing perspectives of the low literate consumer as a flawed decision maker or a crafty market navigator are resolved by the data; the consumers who accept the low literacy stigma are more victimized than the consumers who fight against this label.").

31. Anuj K. Shah et al., *Some Consequences of Having Too Little*, 338 SCIENCE 682 (2012); *see also* Rebecca Hamilton et al., *The Effects of Scarcity on Consumer Decision Journeys*, 47 J. ACAD. MKTG. SCI. 546 (2019) (providing a robust overview of the literature on scarcity); Eldar Shafir, *Decisions in Poverty Context*, 18 CURRENT OP. PSYCH. 131, 132 (2017) ("Living in a context of scarcity and chaos, with no slack, where income instability requires a constant juggling of pressing tasks, affects people's attentional resources and decisions. When you manage scarce resources, you need to do so with great care. You do not have the luxury that abundance brings of being able to make mistakes.").

32. Stacey Dogan, *Bounded Rationality, Paternalism, and Trademark Law*, 56 HOUS. L. REV. 269, 277 (2018) ("In particular, the [economic model of trademark law] fails to contemplate that trademarks might influence people to make purchasing decisions that might not bring them the highest quality goods at the lowest available price—i.e., the selection of the hypothetical rational actor.").

33. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011). *See generally, e.g.*, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

whether basing legal rules on how consumers should act is intended to educate consumers through norm development.[34]

But even if norm development is the goal of trademark law, such an effort needs to take into account the constraints that consumers can have when engaging in the marketplace, constraints that can serve as a limiting force on a consumer's ability to adopt such norms. The marketing literature reveals several ways in which such consumers can experience setbacks in the consumption process.[35] One is that such consumers "may lack the skills, education, literacy or experience to gather the requisite information to evaluate the relative quality of competitive products and vendors in the market."[36] In the United States, more than 30 million adults don't have basic literacy skills in English, and more than 38 million individuals live in poverty.[37] (There has been, of course, a longtime, considerable overlap between the two groups.[38]) These resource constraints can have multiple effects on the purchasing experience. I describe a few of them below.

A. Valuation and Decision-Making

Stressors and concern over scarcity can create significant cognitive load and negative psychological states, such as worry and guilt, that then have an effect on decision-making.[39] This, in turn, can result in a decreased ability to effectively use working memory and engage in executive functions and may result in a tendency toward impulsive decision-making.[40] And because a trademark's ability to function as a cognitive shortcut depends on information retrieval from memory, increased cognitive load can have an effect on an individual's ability to recall details of a trademark correctly, resulting in higher information-processing costs.[41] As one team

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34. Yen, *supra* note 9, at 119–24 (applying Kahneman's taxonomy to trademark law).

35. As discussed *infra* text accompanying notes 79–80, many marketing studies are based on experiments or surveys conducted among a respondent group of university students, who may or may not be representative of the populations about whom the studies ultimately draw conclusions.

36. Garrett & Toumanoff, *supra* note 28, at 7.

37. NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., ADULT LITERACY IN THE UNITED STATES, https://nces.ed.gov/pubs2019/2019179.pdf [https://perma.cc/KWU8-PKJM]; JESSICA SEMEGA ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018, https://www.census.gov/library/publications/2019/demo/p60-266.html [https://perma.cc/MJT6-KVHH].

38. *See, e.g.*, Adkins & Ozanne, *supra* note 8, at 94; Louise G. Richards, *Consumer Practices of the Poor*, 3 WELFARE REV. 1, 5 (1965).

39. Shmuel I. Becher, Yuval Feldman & Orly Lobel, *Poor Consumer(s) Law: The Case of High-Cost Credit and Payday Loans*, *in* LEGAL APPLICATIONS OF MARKETING THEORY (Jacob Gersen & Joel Steckel eds.) (forthcoming 2022–23) (noting that "scarcity has been shown to significantly reduce bandwidth and thus has implications on other cognitive activity").

40. Matúš Adamkovič & Marcel Martončik, *A Review of Consequences of Poverty on Economic Decision-Making: A Hypothesized Model of a Cognitive Mechanism*, 8 FRONTIERS PSYCH. 1, 8–9 (2017).

41. Noel Capon & Marian Burke, *Individual, Product Class, and Task-Related Factors in Consumer Information Processing*, 7 J. CONSUMER RSCH. 314, 315 (1980); *see*

of researchers has noted, a comparison of brand preferences is fairly complex—it requires that "equal amounts of information must be accessed on each brand, a series of preferences developed, preferences stored on early searched brands while later brands are searched, and, finally, a choice made among all brands."[42] This process may also increase the importance of the trademark to the process of selecting goods or services because investigating other sources of information (such as product reviews) may prove to be too much of a resource drain on already overtaxed cognitive loads. As a result, such consumers "may reduce their processing cost by using brand name[s] as an information chunk"[43] rather than relying on additional sources of information. This might mean, for example, that once a reliable and trustworthy brand has been found, consumers then rely on known food brand names or known restaurant franchises to limit cognitive load or reduce the risk of spending limited resources on an untested good or service.[44]

The consumer decision-making process may also be impacted by methods of valuation related to one's socioeconomic status. Researchers have determined, for example, that scarcity of economic resources can affect the way that individuals value items.[45] Higher-SES individuals might rely more on external context to assess

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also M. Viswanathan et al., *Understanding the Influence of Literacy on Consumer Memory*, 19 J. CONSUMER PSYCH. 389, 396 (2009) ("[C]onsumers at the lowest level of literacy are more sensitive to deviation from 1-to-1 correspondence with the real world than consumers at higher levels of literacy.").

42. Capon & Burke, *supra* note 41, at 316; *see also* Lee et al., *supra* note 6, at 585 (noting that the consumer behavior literature identifies three steps in making a source-identification decision: (1) "gather product information that she considers of potential relevance to the source-identification judgment"; (2) "comprehend the information"; and (3) "identify the implications of the environmental information and integrate the implications to form the source-identification judgment").

43. Capon & Burke, *supra* note 41, at 316; *see also* Adkins & Ozanne, *supra* note 8, at 98 (quoting a respondent describing her uncle's habitual buying patterns: "He's used to buying Tide. And, if the store is out of Tide, and if he don't see the box — he knows what the color of the box is. But, if it's not sitting on the shelf, he'll just walk on by").

44. *Cf., e.g.*, Douglas B. Holt, *Does Cultural Capital Structure American Consumption?*, 25 J. CONSUMER RSCH. 1, 13 (1998) (discussing differences between individuals who "find comfort in objects that are familiar" and consumers who "seek out and desire exotic consumption objects"); *see also* Maxim's Ltd. v. Badonsky, 772 F.2d 388, 392–93 (7th Cir. 1985) ("[T]he reputations of expensive restaurants are largely made by critics and guides. When a traveler visits a McDonald's in Cincinnati, on the other hand, he is unlikely to consult a guide; he relies on the reputation McDonald's has acquired, its advertising and his experience elsewhere."). For a discussion on how a lack of formal education and evaluative skills can affect the interpretation and understanding of product warnings, see Howard Latin, *Good Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1226–27 (1994).

Brand loyalty can also derive from other types of lived experience. *See* Tressie McMillan Cottom (@tressiemcphd), TWITTER (Jan. 26, 2021, 12:34 PM), https://mobile.twitter.com/tressiemcphd/status/1354120500704927744 [https://perma.cc/R3DJ-AVET] ("I also think about the unflagging generational inheritance of brand loyalty among Black people, like that Esso example. The one shop or store or brand that half treated us human one time becomes an institution.").

45. Anuj K. Shah, Eldar Shafir & Sendhil Mullainathan, *Scarcity Frames Value*, 26 PSYCH. SCI. 402 (2015).

willingness to pay—for example, they would be willing to pay more for a bottle of wine ordered at a restaurant than they would for that same bottle of wine purchased at a supermarket. But for individuals with fewer economic resources, valuation might depend on internal guidelines, such as trade-offs. That individual's willingness to pay may be less likely to differ based on where the purchase takes place; because they think of the purchase as involving a trade-off (in terms of other uses of that money), they are likely to have more consistent internal valuation of the purchase.[46] In this sense, an individual experiencing scarcity is making a more economically rational choice than the individual who does not; after all, why should one experience a dramatically different willingness to pay for the same item depending on where it is purchased?

Additionally, the time spent on decision-making in the marketplace may be influenced not only by actual constraints on time—for example, limited nonworking hours or the need to arrange shopping around bus schedules—but also by cognitive pressures that constrain long-term decision-making and planning. Many are familiar, for example, with the "marshmallow test," conducted at Stanford University in the early 1970s, which purported to test the ability of young children to delay gratification.[47] The children in the experiment were told that they could have a single treat (such as a marshmallow) immediately; however, if they waited for a period of time, they would get two treats. The researcher then left the room, and the children were observed to see whether they would wait or not. The original study concluded that children who were able to delay gratification demonstrated enhanced willpower and so tended to have better life outcomes as determined by a variety of measures.[48] A 2018 revisiting of the marshmallow test, however, concluded that the ability to delay gratification was not itself a predictor of life outcomes; it was a reflection of them.[49] Children from lower-SES families, as one writer summarizing the study wrote, "would be less motivated to wait for that second marshmallow" because "[f]or them, daily life holds fewer guarantees: There might be food in the pantry today, but there might not be tomorrow, so there is a risk that comes with waiting."[50]

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46. *See id.* at 404–06; Hamilton et al., *supra* note 31, at 546 ("[B]ecause consumers who experience resource scarcity of money are more sensitive to opportunity costs than affluent consumers, they may scrutinize deals more carefully . . . .").

47. Walter Mischel & Ebbe B. Ebbesen, *Attention in Delay of Gratification*, 16 J. PERSONALITY & SOC. PSYCH. 329 (1970).

48. *Id.*

49. Tyler W. Watts et al., *Revisiting the Marshmallow Test: A Conceptual Replication Investigating Links Between Early Delay of Gratification and Later Outcomes*, 29 PSYCH. SCI. 1159, 1175 (2018).

50. Jessica McCrory Calarco, *Why Rich Kids Are So Good at the Marshmallow Test*, ATLANTIC (June 1, 2018) https://www.theatlantic.com/family/archive/2018/06/marshmallow-test/561779/ [https://perma.cc/EG5M-DRSA]; *see also* Edna R. Sawady & Jennifer Tescher, *Financial Decision Making Processes of Low-Income Individuals*, *in* BORROWING TO LIVE: CONSUMER AND MORTGAGE CREDIT REVISITED 92, 96–97 (Nicolas P. Retsinas & Eric S. Belsky eds., 2008) ("We observed poverty to be accompanied by constantly changing and frequently unpredictable circumstances. Incomes fluctuate, permanent assets are few, jobs change, work availability often changes, family structures

Trademarks can also play a particular role in the communication of status for some consumers. The phenomenon that the acquisition and possession of certain goods indicates one's social status relative to others is as old as sumptuary codes.[51] Thorsten Veblen is typically credited with giving this acquisition process a name when he referred to it as "conspicuous consumption" in 1899,[52] and much scholarly attention has been devoted since then to discussing its effects and value. In thinking about consumers in this regard, it is useful to pay attention to the intersectionality between status and limited financial resources.[53] For example, one researcher who investigated parents' practices around the purchase of food for their children found that for the low-SES parents she studied, "food serves as a symbolic antidote to a context of deprivation."[54] Such parents are often not able to provide their children with particular desired goods, but acquiescing to their children's requests for certain brands of food products (such as going to Starbucks rather than purchasing coffee drinks at a less expensive establishment) is seen as a way to communicate care and love and provide a measure of dignity to their children, even if that means going without other purchases. For example, in discussing the practices of one woman in the study, the researcher wrote:

> A key component of Nyah's survival involved consistently denying her adolescents' requests for indulgences. Within this context of ongoing refusals of larger purchases and investments—such as enrollment in sports camps and arts programs—Nyah found that food offered a chance to say "yes" to her adolescents. Thus, Nyah and other low-SES parents aspired to grant their adolescents' food requests often.[55]

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change, money comes and goes. Within this context, it is not surprising that short-term focus prevails.").

51. *See, e.g.*, Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 812 (2010) ("A society's sumptuary code is its system of consumption practices, akin to a language (or at least 'a set of dialects'), by which individuals in the society signal through their consumption their differences from and similarities to others.") (footnotes omitted).

52. VEBLEN, *supra* note 14.

53. One study used Google Correlate to identify 40 search terms most positively correlated with the study's measure of income inequality and 40 terms most negatively correlated; using Amazon Mechanical Turk, the researchers then asked respondents whether those terms were related to status goods (defined to respondents as "things that show how rich or successful [people] are compared to other people"). The researchers concluded that "search terms that occur with relatively higher frequency in states with greater residual income inequality are more likely to concern status goods—designer brands, expensive jewelry, and so forth—than no status goods." The researchers acknowledged that search may not lead to purchase, but they concluded that search does involve the cost of "additional cognitive resources and time" at the expense of other activities. Lukasz Walasek & Gordon D.A. Brown, *Income Inequality and Status Seeking: Searching for Positional Goods in Unequal U.S. States*, 26 PSYCH. SCI. 527, 528–29, 532 (2015).

54. Fielding-Singh, *supra* note 29, at 424. The study concluded that access to sources of healthy food was not a contributing factor in the population studied. *Id.* at 431.

55. *Id.* at 433; *see also* Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1727 (1999) ("Ask a child, and he'll persuade

By contrast, this researcher continued, high-SES parents use the denial of their children's requests for particular food items as a way of enacting what they see as good parenting practices, teaching their children better nutrition habits and the value of delayed gratification.[56] (The study concluded that middle-SES parents engage in both strategies.[57]) For example, in describing the practices of another woman in the study, identified as high-SES, the researcher wrote:

> Similar to Nyah, Heather cared about the food that her adolescents consumed and derived a sense of worth as a caregiver from her food provisioning. However, Heather's socioeconomic position altered the symbolic meanings she attached to food. Absent concerns about providing enough, Heather derived feelings of provider worth through teaching Jane and Evan how and when to eat the "right" foods for the "right" reasons. Food was less so a compensatory medium and more so a means through which to instill in her adolescents classed values about restraint and delayed gratification.[58]

Thus, comparing the two women in the study, the parent identified as high-SES did not use food brands as a way of communicating caring to her children; her concern was about the nutritional composition of the food her children ate (although perhaps mediated through trademarks—i.e., "We don't eat food from McDonald's in this family"[59]). But for the parent identified as low-SES, the trademark was the way that her child communicated her emotional needs and the way that the parent responded to those needs. In that family relationship, no generic substitute would suffice.

This plays out in other areas as well. Although some scholars have written about the way that purchases of branded status goods can work as a "compensatory behavior aimed at restoring self-integrity" and ameliorating psychological pain,[60] such activity is not always (and perhaps not often) purely about aspirational social positioning—the psychological rewards that motivate a "desire to be thought of as a member of a higher social class."[61] It is, instead, about strategically engaging the presumptions and prejudices of others to achieve employment or other outcomes. Sociologist Tressie McMillan Cottom has written compellingly about how, for some individuals, wearing a recognizable designer outfit or carrying a particular handbag

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you that the difference between a box of Kellogg's Corn Flakes with a picture of Batman on it and some other box without one is real. There is nothing imaginary about it. It has nothing to do with the way the cereal tastes. What kids want isn't a nutritious part of a complete breakfast; they want Batman to have breakfast with them.").

56. Fielding-Singh, *supra* note 29, at 436.

57. *Id.*

58. *Id.* at 436.

59. For the complicated interrelationship between McDonald's and Black communities, see MARCIA CHATELAIN, FRANCHISE: THE GOLDEN ARCHES IN BLACK AMERICA (2020).

60. Niro Sivanathan & Nathan C. Pettit, *Protecting the Self Through Consumption: Status Goods as Affirmational Commodities*, 46 J. EXPERIMENTAL SOC. PSYCH. 564, 569 (2010).

61. Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1408 (2005) (discussing Veblen).

is a way to signal to gatekeepers that you are acceptable—that you are entitled to a certain job, to benefits, or to other things that would otherwise be denied to you.[62] She writes, relating her own experience:

> [A] hiring manager at my first professional job looked me up and down in the waiting room, cataloging my outfit, and later told me that she had decided I was too classy to be on the call center floor. I was hired as a trainer instead. The difference meant no shift work, greater prestige, better pay, and a baseline salary for all my future employment.[63]

This may also explain, for example, parents of more limited means who nevertheless buy each of the branded products on the elementary school back-to-school shopping list. Having those items is not a matter of satisfying psychological desires; it is seen as the line between success and failure for their child in the classroom in an environment lacking other safety nets.[64] Decision-making for some consumers is, therefore, more complicated than a basic model of "search costs" might suggest.

B. Access to Modes of Shopping

An additional challenge for some consumers is that they "may lack the mobility to travel to shop at more attractive and desirable stores."[65] The relatively

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62. TRESSIE MCMILLAN COTTOM, *The Price of Fabulousness*, *in* THICK 152, 165 (2019) ("Why do poor people make stupid, illogical decisions to buy status symbols? For the same reason all but only the most wealthy buy status symbols, I suppose. We want to belong. And, not just for the psychic rewards, but belonging to one group at the right time can mean the difference between unemployment and employment, a good job as opposed to a bad job, housing or a shelter, and so on."). By focusing on income inequality here, I do not intend to diminish the intersectionality at work in some of these interactions. *See, e.g.*, Sterling A. Bone et al., *Rejected, Shackled, and Alone: The Impact of Systemic Restricted Choice on Minority Consumers' Construction of Self*, 41 J. CONSUMER RSCH. 451, 460 (2014) (describing strategies used by Black and Hispanic consumers in visiting banks to secure business loans, including "dressing up, wearing a suit, wearing a tie, and carrying a briefcase to signal to lenders their professionalism and credit worthiness") (internal quotation marks omitted).

63. COTTOM, *supra* note 62, at 166.

64. *See, e.g.*, Janice Posada, *The Brand-Name Game*, HARTFORD COURANT (Aug. 23, 2006, 12:00 AM), https://www.courant.com/news/connecticut/hc-xpm-2006-08-23-0608230159-story.html [https://perma.cc/UJ37-ZR5D] ("School officials in West Hartford say they will sometimes recommend a brand-name item based on its perceived quality and a desire for classroom standardization, which can make some tasks, from writing to calculating, easier.") Perhaps relatedly, one Idaho school district in 2017, in response to a court ruling holding certain public-school fees to violate the Idaho Constitution's requirement of a "general, uniform and thorough system of public, free common schools," revised its school supply list to eliminate brand names. Joki v. Idaho, No. CV OC 2012 17745 (4th Dist. Ct. Nov. 2015); Julie Wootton-Greener, *School Supply Lists: Fewer Classroom Items and Brand Names*, MAGIC VALLEY (Aug. 2, 2017), https://magicvalley.com/news/local/education/school-supply-lists-fewer-classroom-items-and-brand-names/article_63044a3e-505d-56a6-92df-0ca7460c0bbd.html [https://perma.cc/DFH2-7XV7].

65. Garrett & Toumanoff, *supra* note 28, at 7 (noting that interactions in the market for vulnerable consumers may involve "discriminatory practices, higher prices and lower levels of customer service").

low number of supermarkets in or near low-income neighborhoods has been documented enough to earn the name "food deserts" for such areas.[66] Consumers living in those areas without access to means of traveling elsewhere must rely on smaller convenience stores or groceries without the same range of products that one would find in a larger supermarket.[67] Additionally, without access to transport by car, purchases must be limited to what can be carried while walking or traveling on a bus, which both limits the nature of one's purchases and makes one disinclined to return items mistakenly acquired.

Considerations of purchasing experiences must also include what happens when a purchase is unsatisfactory. While the typical consumer might be expected to have some agency in pursuing resolution for dissatisfaction, other consumers "may lack the resources needed to seek appropriate redress" for any dissatisfaction with the purchasing experience.[68] For example, returning to a store to exchange or complain about a mistaken or unsatisfying purchase requires an additional investment of time and resources that might not be available; a consumer who has spent an hour on a bus to make the purchase in the first place may well be disinclined to spend another hour returning to the store to exchange the product she didn't want—putting aside the additional time spent standing in line.[69] Such consumers might also, as a psychological matter, resign themselves to expect different treatment based on previous interactions with merchants, government officials, and the like[70] or may lack a sense of self-identity that fosters the ability to think of oneself as an individual entitled to assert preferences.[71]

The move in recent years to e-commerce has not necessarily made things more equitable. While online shopping may help a consumer to avoid the indignities

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66. *See, e.g.*, Hamilton et al., *supra* note 31, at 533.

67. Kelly J. Clifton, *Mobility Strategies and Food Shopping for Low-Income Families: A Case Study*, 23 J. PLAN. EDUC. & RSCH. 402, 403 (2004).

68. Garrett & Toumanoff, *supra* note 28, at 7; *id.* at 8 (noting that "[a] number of prior studies have shown that lower-income consumers are less likely than higher-income consumers to engage in any form of complaining behavior"); *id.* at 17 (believing income to be "the primary determinant of complaining behavior" as a result of the article's study).

69. On the socioeconomic and psychological effects of waiting (and the relationship of waiting to power), see Barry Schwartz, *Waiting, Exchange, and Power: The Distribution of Time in Social Systems*, 79 AM. J. SOC. 841 (1974).

70. Madhubalan Viswanathan et al., *Decision Making and Coping of Functionally Illiterate Consumers and Some Implications for Marketing Management*, 69 J. MKTG. 15, 26–27 (2005) (concluding that low-income, literate consumers are "more willing to be confrontative and to demand different treatment from store personnel" than functionally illiterate consumers, who tend to "accept[ ] the status quo of being treated differently as a metalevel coping strategy").

71. Adkins & Ozanne, *supra* note 8, at 98–99 (characterizing some low-literate consumers as isolated and dependent on others, and thus "disempowered in the marketplace . . . making mistakes" and others as adopting a strategy of concealing their illiteracy to fit in; "[their] assured and critical stance is also manifest in complaining behavior over poor service, poor quality products, and market practices").

that can attend in-person interactions,[72] it requires, of course, a reliable and sufficiently fast internet connection as well as access to a credit card or other means of online payment. A 2017 study reported that 40% of internet users with less than a high-school degree buy products online, compared to 91% of college graduates; 60% of internet users living in households earning less than $20,000 per year buy products online compared to 89% of those in households earning $100,000 or more per year.[73] This likely relates, at least in part, to the inequitable availability of broadband internet services across the country. A 2019 report from the Federal Communications Commission indicated that 21.3 million Americans lacked a connection of at least 25 Mbps/3 Mbps (download/upload), the accepted definition of a broadband connection, at the end of 2017.[74] (Three Commissioners took issue with these numbers, asserting that the report's figures were too low.)[75] In addition, many consumers who do have access to reliable internet services access the Internet primarily through mobile devices,[76] which changes the nature of the online

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72. Bone et al., *supra* note 62, at 452 (investigating "systemic restricted choice" based on race and ethnicity, defined as "choice [that] occurs when a consumer is motivated to choose, construes the choice as salient and self-relevant, but cannot finalize the choice because of individual characteristics beyond his or her control that circumscribe his or her ability to make marketplace choices"); Garrett & Toumanoff, *supra* note 28, at 7.

73. MARY MADDEN, DATA & SOC'Y, PRIVACY, SECURITY, AND DIGITAL INEQUALITY: HOW TECHNOLOGY EXPERIENCES AND RESOURCES VARY BY SOCIOECONOMIC STATUS, RACE, AND ETHNICITY 44 (2017), https://datasociety.net/wp-content/uploads/2017/09/DataAndSociety_PrivacySecurityandDigitalInequality.pdf [https://perma.cc/KTZ8-VR5B].

74. FED. COMMC'NS COMM'N, FCC NO. 19-44, 2019 BROADBAND DEPLOYMENT REPORT 2 (2019), https://docs.fcc.gov/public/attachments/FCC-19-44A1.pdf [https://perma.cc/5A9U-J8XY] (noting that while the number of Americans with access to at least 250 Mbps/25Mbps broadband grew in 2017 by more than 36%, 21.3 million Americans lacked a connection of at least 25 Mbps/3Mbps at the end of 2017); *id.* at 42 (noting that "six percent of Americans, over 19 million households, lack access to fixed terrestrial advanced telecommunications capability"; the percentage is 24% in rural areas and 32% in tribal lands).

75. *Id.* at 322 (statement of Comm'r Michael O'Rielly) (criticizing the report's failure to consider fixed and mobile broadband as a single market, noting that "[d]ata show that fixed and mobile service are undoubtedly substitutable for many Americans"); *id.* at 325 (statement of Comm'r Jessica Rosenworcel, dissenting) (stating that the report's conclusion that "broadband deployment is reasonable and timely throughout the United States . . . will come as news to millions and millions of Americans who lack access to high-speed service at home" and "to urban areas where redlining has led to broadband deserts"; stating that because of errors in methodology, "the claim in this report that there are only 21 million people in the United States without broadband is flawed" and pointing to another analysis that "concluded that as many as 162 million people across the country do not use internet service at broadband speeds"); *id.* at 327 (statement of Comm'r Geoffrey Starks, dissenting) (dissenting on similar grounds).

76. MADDEN, *supra* note 73, at 38 (reporting results of a 2015 survey indicating that among Americans living in households earning less than $20,000 per year, 64% use the Internet or email (compared to 96% of those earning $100,000 or more per year)); *id.* (noting relevance of age to these results); *id.* at 8, 41 (noting of the 44% earning less than $20,000 per year who own a smartphone, 63% report accessing the Internet primarily from their phone); *id.* at 42 (reporting that 73% of smartphone owners with less than a high-school

purchasing experience, both in terms of design and in terms of whether access is via an unlimited plan or is metered in some way.[77] For consumers who rely on public benefits, such as the Supplemental Nutrition Assistance Program ("SNAP"), another limitation comes from the fact that only certain retailers are permitted to accept SNAP benefits for online purchase of food items, although this appears to be improving.[78]

Thus, to the extent trademark law uses the nature of the consumer purchasing experience to draw conclusions about confusion, it is worth questioning whether the assumed model of that experience matches reality for all consumers.

C. Gaining Information About Consumer Constraints

Finally, it should not go unnoticed that methods of gaining information about consumer behavior—whether in the scholarship or the courtroom—often yield information primarily regarding literate consumers with financial resources. Many marketing studies are based on experiments or surveys conducted among a respondent group of university students,[79] who are not always representative of the larger population in terms of income, educational level, and other characteristics—a fact that some studies have acknowledged.[80] Using controlled studies to draw

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degree access the Internet primarily from their phones); *see also* MONICA ANDERSON, PEW RSCH. CTR., MOBILE TECHNOLOGY AND HOME BROADBAND 2019, at 2–3 (June 2019), https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/ [https://perma.cc/MLS5-JVN6] (reporting that 37% of U.S. adults use primarily a smartphone to access the Internet and that 27% reported that they did not subscribe to broadband service at home, with 21% of those respondents citing cost as the primary reason); *id.* at 4 (reporting that 92% of adults from households earning $75,000 or more per year have broadband service at home, while only 56% of those in households earning $30,000 or less do). For a narrative report on the effects of lack of internet service during the pandemic, see Cecilia Kang, *Parking Lots Have Become a Digital Lifeline*, N.Y. TIMES (May 6, 2020), https://www.nytimes.com/2020/05/05/technology/parking-lots-wifi-coronavirus.html#:~:text=Revis%20and%20many%20others%20across,have%20kept%20their%20signals%20on [https://perma.cc/QX3E-TAQK] (describing individuals who worked from their cars in order to access hotspots).

77. An online purchase also typically involves delivery, which, in turn, requires an address to which items can be shipped and safely retrieved. Thanks to Ronald Paul Hill for raising this point.

78. The SNAP Online Purchasing Pilot launched in April 2019 and is, as of this writing, operational in all states and the District of Columbia except Alaska, Montana, and Louisiana. Both Amazon and Walmart are approved retailers. *FNS Launches the Online Purchasing Pilot*, U.S. DEP'T OF AGRIC., https://www.fns.usda.gov/snap/online-purchasing-pilot [https://perma.cc/D2ZF-TTDB] (last visited Aug. 4, 2021). SNAP is the program formerly known as "food stamps." Benefits are provided to recipients each month on an electronic benefits transfer ("EBT") card; paper coupons are no longer used.

79. *See* Robert A. Peterson, *On the Use of College Students in Social Science Research: Insights from a Second-Order Meta-Analysis*, 28 J. CONSUMER RSCH. 450, 451 (2001) (noting the increasing percentage of scholarly articles on consumer research that employ college students as subjects).

80. Some of these acknowledgments use the dated language of the time. *See, e.g.*, Ben M. Enis, Keith K. Cox & James E. Stafford, *Students as Subjects in Consumer Behavior Experiments*, 9 J. MKTG. RSCH. 72, 72 (1972) (noting, in 1972, that most undergraduate business students were male and that "[t]he consumer of interest in many marketing studies

conclusions about consumer behavior also risks minimizing the cognitive and other restraints that some consumers face, such as stressors, limited time for decision-making, and consideration of real-life trade-offs in financial resources. Failure to take these same limitations into account must also be considered during litigation. The comparison of two trademarks in the quiet, reflective environment of a courtroom, where the marks are often presented side by side, may not be representative of *any* consumer experience, let alone the experiences of consumers facing constraints.

Social media is increasingly becoming a way of gaining information about consumer attitudes. Litigants now submit evidence derived from Twitter, Yelp, and other sites to support claims of consumer confusion (or lack thereof).[81] But even if the use of social media more generally is distributed across various socioeconomic groups, this may not be true of particular social media sites. For example, according to information provided by Yelp as of September 2021, 88% of U.S. Yelp users have a college degree, and 79% of U.S. Yelp users have an annual income of $60,000 or above.[82] This tracks the results of one study on the usefulness of complaints on Yelp to track food-borne illnesses, which noted a positive correlation between variables associated with affluence (such as income and education) and the number of such reports in a particular geographic area.[83] This suggests that to the extent Yelp reviews are representative of consumer experiences at all, they are likely representative only of the experiences of some demographic groups, and the same is likely true of at least some other social media sites.

Another consideration is the way in which information about consumer attitudes is gained during litigation—i.e., through consumer surveys. Before the internet age, consumer surveys were frequently done either through telephone or through mall-intercept procedures. Both forms engage consumers who have the time and resources to respond to a survey (including jobs that allow one to structure one's own workday); the latter additionally engages a population that (assuming the survey is conducted during daytime hours) has the ability to visit a shopping center during the day and to take the time necessary to participate in the survey.[84] To the

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is the housewife"); *id.* at 73 (reporting inconclusive results of a study comparing responses of the two groups and encouraging further research in the area); *see also* Hamilton et al., *supra* note 31, at 543–44 (advising that researchers use creative strategies to study consumers experiencing severe resource scarcity); Viswanathan et al., *supra* note 41, at 392 (noting that researchers studying low-literacy individuals must take care in administering studies to avoid causing anxiety).

81. *See, e.g.*, Museum of Modern Art v. MOMACHA IP LLC, 339 F. Supp. 3d 361, 378–79 (S.D.N.Y. 2018) (using social media posts, including on Yelp, as evidence of actual confusion). *See generally* Alexandra J. Roberts, *Mark Talk*, 39 CARDOZO ARTS & ENT. L.J. 1001 (2021).

82. *Fast Facts*, YELP, https://www.yelp-press.com/company/fast-facts/default.aspx [https://perma.cc/Q66J-H42T] (last visited Dec. 7, 2021).

83. Samuel Henly et al., *Disparities in Digital Reporting of Illness: A Demographic and Socioeconomic Assessment*, 101 PREVENTIVE MED. 18, 19 (2017).

84. While survey participants may be compensated for their time in the form of a low-value gift card—which may, for some participants, represent a higher dollar value than their hourly wage—that payment does not compensate for the risk of losing one's job for failure to return to work after a trip to the mall.

extent that more surveys are conducted online, the results may be skewed in favor of individuals who access the Internet through a computer rather than via their phones and who have the literacy and other skills to fully participate.

With this background in mind, I now turn to how trademark law has traditionally described the consumer.

II. TRADEMARK LAW'S CONCEPTION OF THE CONSUMER

Trademark law's conception of the consumer has evolved along with the evolution of marketing practices. Changes in modern consuming and marketing practices have created a world in which consumers who once bought largely unbranded goods from a single trusted merchant (the local general store) now shop in retail environments with multiple brands of the same product, fluctuating prices depending on location or timing, and much more self-reliance in the selection of goods.[85] Accordingly, courts have had to determine whether this modern form of marketing has yielded a savvy consumer or a burdened consumer and, relatedly, what vocabulary courts will use to describe them.[86]

Although conceptions of the consumer pervade trademark law doctrine, they appear most prominently during the likelihood of confusion analysis in a trademark infringement case. The Lanham Act provides, in cases involving infringement of a registered mark or an unregistered mark, that the cause of actionable harm is a use that is likely to cause confusion as to the relationship between the defendant's goods or services and the plaintiff's goods or services.[87] Because the extent of actual confusion in the future is not always known, predictable, or measurable, federal courts use a multifactor test to determine whether confusion is likely. Although the phrasing of the factors differs from circuit to circuit, there is general uniformity among the circuits in the substance of the factors that are considered. I'll discuss one factor—the similarity of the marks—in Section III.A. Here, I want to focus on another factor—what most circuits term "the

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85. Austin, *supra* note 4, at 912–13; Bartholomew, *supra* note 13, at 13–14; Deven R. Desai, *The Chicago School Trap in Trademark: The Co-Evolution of Corporate, Antitrust, and Trademark Law*, 37 CARDOZO L. REV. 551, 591 (2015).

86. *See* Bartholomew, *supra* note 13, at 10–11 (describing a shift in courts' views of the reasonable purchaser in the early 1900s from one who engaged in "careful inspection" to one who was "not expected to exercise a high degree of caution") (internal quotation marks omitted); Austin, *supra* note 4, at 836 (noting that the history of consumer movements in the United States "reveals numerous examples of American consumers exhibiting quite sophisticated attitudes towards branded products"); *cf.* Lidsky, *supra* note 9, at 820 ("[T]he implied audience construct is an excellent vehicle for parsing commercial speech jurisprudence, since the shift from a credulous consumer model to a savvy shopper model largely explains the Court's increasing protection of commercial speech.").

87. 15 U.S.C. § 1114(a) (imposing liability for a use of a registered mark in commerce "in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive"); *id.* § 1125(a) (imposing liability for a use of, inter alia, any "word, term, name, symbol, or device, or any combination thereof" that is "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person").

sophistication of the consumer"—as an overall conception of the consumer. Consumer "sophistication" might be conceived of as a proxy for consumer confusion in the marketplace, in that consumers who are more "sophisticated" are less likely to be confused between two trademarks, and vice versa. But "sophistication" is a rather inapt word to describe the work that this factor should be doing. To help explain this assertion, I'll begin by tracing the development of this factor in the caselaw.

The development of the multifactor test to determine trademark infringement is often traced to the Second Circuit's 1961 opinion in *Polaroid Corp. v. Polarad Electronics Corp.*[88] *Polaroid* involved a dispute between the plaintiff, a manufacturer of goods related to optics and photography (sold under the trademark Polaroid), and the defendant, a manufacturer of microwave devices and television studio equipment (sold under the trademark Polarad).[89] Unlike other trademark disputes, the parties in this case were not direct competitors, and so any sales made by the defendant under the mark Polarad did not divert profits from the plaintiff. If the court had followed cases such as *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*,[90] this would have resulted in a denial of relief to the plaintiff.

Nevertheless, although the case was ultimately resolved on a theory of laches,[91] the *Polaroid* court explained how to determine when actionable harm was likely to occur in cases involving noncompeting goods. Notably, the Second Circuit did not feel the need to discuss the *nature* of the harm. The district court had noted that the plaintiff's own witnesses had conceded that the defendant had not engaged in passing off and that the plaintiff had not suffered from any diversion of sales; it further noted that the plaintiff had not shown that it had suffered any reputational harms.[92] It nevertheless went on to consider the evidence as to confusion, ultimately concluding that differences in the types of products, the methods of advertising, and the nature of their markets meant that confusion was not likely.[93] The Second Circuit likewise did not identify the relationship between consumer confusion and any harm suffered by the plaintiff, although it did cite cases suggesting that the harm in cases of unrelated goods lies largely in the effects on the plaintiff's reputation caused by consumer confusion as to the relationship between the defendant's goods and the plaintiff, as well as preventing the plaintiff from expanding to provide the types of

88. Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492 (2d Cir. 1961). For a discussion of the *Polaroid* test, and its place in the development of trademark infringement doctrine, see Robert G. Bone, *Taking the Confusion Out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 NW. U. L. REV. 1307, 1331–32 (2012).

89. *Polaroid*, 287 F.2d at 494.

90. Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 F. 510 (7th Cir. 1912).

91. *Polaroid*, 287 F.2d at 493 ("We find it unnecessary to pass upon [the district court's] conclusion that defendant's use of Polarad does not violate any of plaintiff's rights. For we agree that plaintiff's delay in proceeding against defendant bars plaintiff from relief so long as defendant's use of Polarad remains as far removed from plaintiff's primary fields of activity as it has been and still is.").

92. Polaroid Corp. v. Polarad Elecs. Corp., 182 F. Supp. 350, 354 (E.D.N.Y. 1960), *aff'd*, 287 F.2d 492 (2d Cir. 1961).

93. *Id.* at 354–55.

goods sold by the defendant.[94] Thus, although the case has come to be known as one of the key cases setting forth the factors indicating when consumer confusion is likely, the case did not itself explain why consumer confusion, as such, was a relevant consideration.

The court did provide guidance on what it characterized as the "vexing" problem of "determining how far a valid trademark shall be protected with respect to goods other than those to which its owner has applied it."[95] In such cases, the court suggested, the answer should depend on several factors:

> the strength of his 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, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.[96]

The court did not define what it meant by "sophistication of the buyers," but from the court's citation to §§ 729, 730, and 731 of the First Restatement of Torts,[97] it seems evident that the court meant not whether the consumer was intelligent or educated—in other words, not whether the typical consumer could be characterized as "sophisticated" in the abstract—but rather the nature and frequency of the consumer's experience with the good in question, the familiarity that the consumer would develop with the good as a consequence, and thus the likelihood that the

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94. *Polaroid*, 287 F.2d at 496 (first citing Yale Elec. Corp. v. Robertson, 26 F.2d 972 (2d Cir. 1928); then citing L.E. Waterman Co. v. Gordon, 72 F.2d 272 (2d. Cir. 1934); then citing Triangle Pub., Inc. v. Rohrlich, 167 F.2d 969 (2d. Cir. 1948); and then citing Admiral Corp. v. Penco, Inc., 203 F.2d 517 (2d Cir. 1953)). Of the cases cited, *Yale Electric* is perhaps the best known on the question of the reputational harm in the case of noncompeting goods:

> [I]t was at first a debatable point whether a merchant's good will, indicated by his mark, could extend beyond such goods as he sold. How could he lose bargains which he had no means to fill? What harm did it do a chewing gum maker to have an ironmonger use his trade-mark? The law often ignores the nicer sensibilities.
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> However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful.

Yale Elec., 26 F.2d at 973–74. On the question of whether preservation of future markets is a legitimate goal for trademark law, see Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137 (2010).

95. *Polaroid*, 287 F.2d at 495.

96. *Id.*

97. *Id.*

consumer would be deceived by similar marks or trade dress from another producer.[98] To this end, § 731 of the Restatement gives the example of "expert buyers employed by department stores" as contrasted with "the persons who buy at department stores,"[99] the assumption being that the expertise and motivation of the former to select products carefully militates against the possibility of mistake.[100] As the Fourth Circuit later confirmed:

> Barring an unusual case, buyer sophistication will only be a key factor when the relevant market is not the public at-large. If the typical consumer in the relevant market is sophisticated in the use of—or possesses an expertise regarding—a particular product, such sophistication or expertise may be pertinent in determining the likelihood of confusion.[101]

As suggested by the Restatement's summary, this distinction was evident in older cases. In *Liggett & Myer Tobacco Co. v. Hynes*,[102] an 1884 federal district court case in which the plaintiff sought to enjoin the defendant from using a star as a mark for its plug tobacco, the court began by noting that the plaintiff's mark and the defendant's mark need not have been identical for infringement to be found; it was enough if the two marks were similar enough to deceive an "ordinary purchaser," giving "such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other."[103] In particular, the court went on to note, the resemblance need not be such "as would deceive experts, persons, because of their peculiar knowledge from their being wholesale or retail dealers, or in any other way specially conversant with the trade-mark simulated"; it was enough if the "public generally" was misled.[104] Thus, in the case at hand, the court noted that a tobacco devotee, "looking for his favorite brand," might notice a difference between the two marks, "just as the man of luxurious tastes would discern

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98. RESTATEMENT (FIRST) OF TORTS § 729 cmt. g (AM. L. INST. 1938) ("The buying habits of the purchasers of the particular goods in question are also significant. If the goods are bought by purchasers who exercise considerable attention and inspect fairly closely, the likelihood of confusion is smaller than when the goods are bought by purchasers who make little or no inspection. These factors are related aspects of the particular circumstances under which the goods in question are marketed.").

99. *Id.* § 731 cmt. e ("[T]he greater the attention exercised by purchasers and the more they subject the goods and their trade symbols, labels and dress to inspection, the smaller the likelihood of such association. Thus, there is less likelihood of such confusion among the expert buyers employed by department stores than among the persons who buy at department stores.").

100. One might conclude, alternatively, that familiarity breeds inattention, of course, and that expert buyers who are under pressure to work quickly or who have been engaged in the selection process for long enough that they are inclined to take shortcuts might be more likely to make a mistake when presented with two similar trademarks.

101. Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 467 (4th Cir. 1996).

102. 20 F. 883 (W.D. Ark. 1884).

103. *Id.* at 884.

104. *Id.* at 884–85.

his favorite brand of champagne."[105] But that type of buying experience was not the touchstone; rather, it is "the ordinary purchaser, purchasing as such persons ordinarily do," which involves "the character of the article, the use to which it is put, the kind of people who ask for it, and the manner in which they usually order it."[106]

Looking at the "sophistication of the consumer" factor through the lens of the buying experience as opposed to any inherent qualities of the individual[107] also tells us something both about the nature of the harm at issue and about the interplay of the other likelihood of confusion factors. If the harm at issue were simply diversion of profits, a multifactor test would likely not be necessary. Instead, courts could resort to a simpler "double identity" test, meaning that if defendant's trademark and good were identical to the plaintiff's, one could reasonably assume that consumers purchasing the good from the defendant had intended to buy from the plaintiff, thus causing a loss of sales to the plaintiff. It is only when the goods are unrelated that a different test is needed because the question has now become whether the defendant's typical consumer will change her evaluation of the plaintiff's reputation as a result of mistaken beliefs about the plaintiff's association with the defendant's goods.[108] To the extent that the harm is preventing the plaintiff from expanding to provide the types of goods sold by the defendant, no assessment of consumer confusion is necessary—all that is needed is an inquiry into how likely that expansion is and whether equity requires that the plaintiff be permitted to expand. (I should emphasize here that I am describing the harm as it has come to be accepted by the courts and am making no normative claim as to what the harm of trademark law should be.)[109]

Thus, in order to determine the likelihood of reputational association, and thus reputational harm (again, taking as a given that this is the harm that courts believe trademark law should address), the multifactor test must converge on the singular question of the consumer experience in the marketplace. A court should not consider, for example, the similarity of the marks as compared by the judge in the courtroom; it should consider how the relevant consumer sees the marks in the marketplace. Similarly, the quality of the defendant's product should not be considered in a vacuum—the question is whether the typical consumer encountering the defendant's product would view the product as of lower quality and therefore reach a judgment about the reputation of the plaintiff. It is only in the context of the

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105. *Id.* at 885. The court used the phrase "intelligent user of tobacco," but the context suggests that it was not talking about the user's educational capacity or cognitive abilities apart from his experience with the product.

106. *Id.*

107. Lee et al., *supra* note 6, at 588 ("Consumers can be said to be 'sophisticated' when they have both the motivation and ability to exercise a high degree of consumer care when performing the source-identification judgment.").

108. Note that because the Lanham Act does not provide for consumer standing, the harm experienced by the consumer as a result of having been deceived into buying goods that she assumed were associated with the plaintiff will go unaddressed, at least by trademark law.

109. For a discussion of the various theories of harm in trademark law, see generally Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63 (2009).

purchasing experience that "the sophistication of the consumer" has any meaning. The conclusion to be drawn is not that educated consumers are careful and consumers without formal education are careless; rather, the question is about how the characteristics and experiences the consumer brings to the table affect her ability to assess products in the marketplace and draw conclusions about their source.

Nevertheless, continuing with Second Circuit jurisprudence as an example, courts seem to reflect considerable variance in how they discuss this factor. Some cases, for example, equate the sophistication of the consumer with the price of the product and assume that all consumers of low-cost products purchase those products without much care. *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*[110] was an appeal from a district court opinion issuing a preliminary injunction barring the defendant's use of a particular trade dress for its nighttime pain reliever. Although the Second Circuit reversed the preliminary injunction, it wrote approvingly of the district court's treatment of the "sophistication of the consumer" factor. The lower court began by noting that this factor is generally related to consumer engagement with the purchasing experience—that is, "whether consumers spend much time evaluating the product before making a purchase or whether it is considered a 'grab off the shelf' product."[111] The district court went on to note, however, that "'[c]ommon sense dictates that price is the crucial factor in ascertaining the depth of attention the ordinary purchaser is likely to apply to a given purchase.'"[112] Because the court determined that over-the-counter analgesics with a sleep aid were "not major expenditures for most purchasers when buying the 24-caplet or tablet size,"[113] it concluded that this factor favored a likelihood of confusion.

The Second Circuit also equated the price of the item with consumer sophistication. Even though it concluded that the prominent brand names featured on each party's trade dress would have been clear to "even 'low involvement' consumers," it concluded that the lower court was not clearly erroneous in holding that this factor favored a likelihood of confusion, given its finding that the products were "relatively inexpensive" and that "consumers of non-prescription analgesic/sleep aids [are] not typically careful or sophisticated in making their purchases."[114]

Another example is the district court's discussion in *Classic Liquor Importers, Limited v. Spirits International B.V.*,[115] a dispute between two producers of vodka, one using "elit by Stolichnaya" and the other, allegedly infringing, using the mark "Royal Elite." The court, quoting *Bristol-Myers Squibb*, noted that,

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110. 973 F.2d 1033, 1036 (2d Cir. 1992).

111. Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 786 F. Supp. 182, 211 (E.D.N.Y.), *aff'd in part, vacated in part*, 973 F.2d 1033 (2d Cir. 1992); *see also* Goya Foods, Inc. v. Condal Distribs., Inc., 732 F. Supp. 453, 457 (S.D.N.Y. 1990) ("[W]hen purchasing a low-cost staple food item consumers often rely on color as they quickly grab the product off the supermarket shelf."); *id.* (distinguishing this conclusion from "direct evidence of the sophistication of the relevant consumer group").

112. *Bristol-Myers Squibb*, 786 F. Supp. at 213 (citing Brown v. Quiniou, 744 F. Supp. 463, 473 (S.D.N.Y. 1990)).

113. *Id.*

114. *Bristol-Myers Squibb*, 973 F.2d at 1046–47.

115. 201 F. Supp. 3d 428, 450 (S.D.N.Y. 2016).

generally, the "'more sophisticated and careful the average consumer of a product is,'" the less likely it is that confusion would result.[116] The producer of "Royal Elite" vodka thus argued that because "elit by Stolichnaya" was a "high-end, expensive product," its consumers would be "more affluent and sophisticated" and, presumably, less likely to be confused as between the two products. The court, crediting the positioning of "elit by Stolichnaya" in the vodka market, found that this factor favored the producer of "Royal Elite."[117]

Other courts have linked sophistication directly to the income level of the consumer, regardless of the cost of the good in question.[118] One particularly egregious example is from the district court's 2017 decision in *Coty, Inc. v. Excell Brands, LLC*,[119] involving a dispute over "knockoff" versions of well-known fragrances. The court, quoting from the parties' jointly stipulated characterization of the defendant's consumers, mused that "it could be argued that [defendant's] target demographic, 'lower income, sometimes ethnic customers' (Stipulated Facts ¶38), is likely to be less sophisticated about the differences between and among fragrances and more easily confused upon seeing Excell's cheaper knockoffs."[120] Another

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116. *Id.* at 450 (quoting *Bristol-Myers Squibb*, 973 F.2d at 1046).

117. *Id.*; *see also, e.g.*, Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc., 735 F.3d 735, 739 (7th Cir. 2013) ("Still another reason to expect confusion is that both Cracker Barrel cheeses and most meat products that CBOCS has licensed for sale to grocery stores are inexpensive — under $5. Generally only very cost-conscious consumers are apt to scrutinize carefully the labels of the less expensive items sold in a grocery store."); Star Indus., Inc. v. Bacardi & Co., 412 F.3d 373, 390 (2d Cir. 2005) ("[I]n some cases, a court is entitled to reach a conclusion about consumer sophistication based solely on the nature of the product or its price."); Paco Sport, Ltd. v. Paco Rabanne Parfums, 86 F. Supp. 2d 305, 326–27 (S.D.N.Y. 2000) ("Because people generally exercise greater care in purchasing expensive products than in purchasing cheap products, purchasers of expensive products are usually less likely to be confused."); Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc., 281 F.2d 755, 762 n.19 (2d Cir. 1960) ("[T]he normal buyer does not exercise as much caution in buying an inexpensive article as he would for a more expensive one, making confusion more likely.").

118. Lee et al., *supra* note 6, at 630 (citing cases in which courts left unquestioned "the general premise that consumer care rises and falls with wealth or income").

119. 277 F. Supp. 3d 425 (S.D.N.Y. 2017).

120. *Id.* at 456 (finding infringement and rejecting nominative fair use defense). Earlier courts were more direct about which consumers they believed had sufficient cognitive capacity to avoid confusion. *See, e.g.*, Helen Schy-Man-Ski & Sons v. S.S.S. Co., 73 F.2d 624, 625–26 (C.C.P.A. 1934) ("It seems quite evident that the tribunals in the Patent Office came to the proper conclusion about this matter. It is apparent that if, in the same establishment, bottles of the S.S.S. preparation were placed side by side with goods of the same descriptive properties, as there are, in similarly shaped bottles marked 'S.M.S,' the opportunities for confusion are very great. Especially is this true among the illiterate and ignorant, and those who cannot be expected to exercise the same care and caution which might be exercised by those of another degree of information or intelligence."); Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 206 F. 611, 615 (8th Cir. 1913), *aff'd*, 240 U.S. 251 (1916) ("This court at that time had before it evidence showing that the name 'American Lady' was adopted by the appellee at an assembly of its traveling salesmen and resulted from suggestions made by them. These salesmen came from the same territory in which appellant's shoes were most largely sold. The original suggestion came from a salesman who traveled in Texas;

example comes from the district court's decision in *Klein-Becker USA LLC v. Product Quest Manufacturing Inc.*,[121] in which the court noted that the typical purchaser of plaintiff's skincare product was "45 years old or older, affluent and educated" and thus less likely to be confused, particularly in light of the fact that plaintiff's product sold for more than five times the price of defendant's product.[122] A third, more recent example is *Reflex Media, Inc. v. Luxy Limited*, a case involving competing dating websites and mobile apps. The court noted that such services "attract two kinds of people":

> The first group is, theoretically, more sophisticated and less likely to be confused since they are successful individuals looking for relationships. But [the] second group, in theory, is less sophisticated and just looking to find a way to "hook" up with members of the first group. This latter group is less likely to exercise care in which app they select to find potential mates.[123]

Other courts have taken a more nuanced view, focusing on the purchasing experience more broadly rather than simply the cost of the goods in question or the income level or other inherent characteristics of the consumer. For example, in *New York City Triathlon, LLC v. NYC Triathlon Club, Inc.*,[124] a dispute between two organizations organizing competitive triathlons, the district court found that the "sophistication of the consumer" factor favored the plaintiff not because of the cost involved in participating in a triathlon but because a majority of the registrants for the race were first-time participants and so were not deeply familiar with the mark; in addition, the court noted, "even sophisticated triathletes [were] likely to be confused" given the similarity between the names of the two organizations.[125] Similarly, in a dispute between Reebok, the athletic shoe manufacturer, and the retailer Kmart, the court rejected Reebok's assertion that the low price of the defendant's shoes "attract[ed] an unsophisticated consumer" who would be likely to engage in an impulse purchase:

> The parties have not cited any case holding that the price of an item along establishes a lack of care by consumers . . . . In addition, the court cannot find that K-Mart [sic] customers, by definition, are necessarily unsophisticated. It strikes the court as more than a little elitist to believe that K-Mart shoppers fail to exercise care merely because they shop at a discount store. The fact that a consumer may prefer to purchase low-priced footwear (or have no other option) does not transform that consumer into an unsophisticated, careless shopper. In fact, an argument can be made that shoppers with limited

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another Texas salesman and one from Arkansas were also present. It was disclosed in the testimony that the largest sale of The American Girl shoes was among the negroes and illiterate whites in the South; also that in this very territory actual confusion, which worked greatly to the disadvantage of appellant, existed among purchasers.").

121. 429 F. Supp. 2d 1248 (D. Utah 2005).

122. *Id.* at 1254.

123. Reflex Media, Inc. v. Luxy Ltd., No. 2:20-CV-00423-RGK-KS, 2021 WL 4134839, at *5 (C.D. Cal. July 13, 2021).

124. 704 F. Supp. 2d 305 (S.D.N.Y. 2010).

125. *Id.* at 320.

> budgets use more care in spending their more limited resources than shoppers at non-discount stores.[126]

A similar view was reflected in the Eleventh Circuit's opinion in *Frehling Enterprises, Inc. v. International Select Group, Inc.*,[127] in which the circuit court criticized the district court for dividing the consumer world into those who shopped at Macy's and those who shopped at Sears:

> We are troubled by the district court's methodology of dividing up the world into distinct segments of "affluent" and "less affluent" for the purpose of determining the balance of the [sophistication] factor . . . . [A]ffluent people shop at Sears and less affluent people shop at Macy's. Hence, there would seem to be overlap in customer base even though the retail outlets where the parties' products are sold are not exactly the same.[128]

The district court in *Best Flavors, Inc. v. Mystic River Brewing Co.*[129] similarly rejected the defendant's argument that confusion was unlikely because its customers were more "sophisticated" as measured by household income, age, and cultural interests, noting, "That is not the kind of 'sophisticated purchaser' that courts have in mind, however, when analyzing likelihood of confusion. That description applies to people who have experience in purchasing a product and who care about their purchase decisions; typically 'high ticket' items are involved."[130] More recently, the district court in *Easy Spirit, LLC v. Skechers U.S.A., Inc.*, rejected the plaintiff's argument that older women would not be sophisticated consumers of comfort shoes,

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126. Reebok Int'l Ltd. v. K-Mart Corp., 849 F. Supp. 252, 267–68 (S.D.N.Y. 1994), *vacated by consent order sub nom.* Reebok Int'l Ltd. v. Kmart Corp., No. 92 CIV. 8871 (CHT), 1994 WL 733616 (S.D.N.Y. Dec. 28, 1994); *see also* Kohler Co. v. Bold Int'l FZCO, 422 F. Supp. 3d 681, 731 (E.D.N.Y. 2018) ("[P]laintiff implicitly relies upon a theory of consumer sophistication — i.e., that the less-than-affluent are unsophisticated — for which this Court is, to say the least, highly skeptical."); Bartow, *supra* note 5, at 772 ("It is certainly possible that poor people are easily confused and unsophisticated in their purchasing habits. It is at least equally plausible, however, that the exact opposite is true — 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 careless or recklessly."); 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, 1263 (2004) (cautioning against assumptions regarding price of products and relative care in purchase based on one's own experience).

127. 192 F.3d 1330 (11th Cir. 1999).

128. *Id.* at 1339 (citation omitted); *see also* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:51 (5th ed. 2017) ("[I]t may be difficult to draw a line between those consumers who shop at 'class' retailers and those who shop at 'mass' retailers because of those consumers who 'cross-shop' and frequent both types of retailers.").

129. 886 F. Supp. 908 (D. Me. 1995).

130. *Id.* at 916.

noting it "borders on the offensive and, in any case, is at war with common experience and common sense."[131]

An interesting analysis was provided by another district court in the Second Circuit in *Illinois Tool Works, Inc. v. J-B Weld Company, LLC*, a dispute between two companies selling muffler crack sealant, one under the trademark "Muffler Weld" and the other under the mark "MufflerWeld."[132] In analyzing the sophistication of the consumers, the court first rehearsed the principle that the low price of the product ($5.00 to $10.00) suggested a finding of "limited sophistication."[133] But the court went on to consider the nature of the product, which it said was "more equivocal":

> On the one hand, all muffler sealant does is seal cracks on mufflers. This is not the kind of complex tool or object (such as a muffler itself) that one would need to have high skill to apply: one sees cracks on the muffler, one seals them. The instructions on the products themselves appear to presuppose a limited degree of sophistication. Both ITW and J-B Weld's products claim on their packaging that they can be applied in just three steps.
>
> On the other hand, even setting aside potential professional customers, it is a select audience bold enough to seek to seal cracks in their own car muffler rather than entrusting their unhappy automobile to the tender yet expensive care of the auto repair professional. A degree of intrepidation, of particular passion for the repair of complex machines, and an accompanying obsessive attention to detail might be expected. I conclude that this factor is neutral.[134]

This approach gets partly there. The court, to its credit, ultimately does not tie the "sophistication of the consumer" factor to the cost of the product or the income level of the consumer. But the court does still seek to characterize the consumer as either a careless novice or a careful amateur repair technician without tying this characterization to how it would relate to the experience in the marketplace. The novice, aware of her own lack of experience in making repairs, might be more attentive to researching and obtaining the right product than the confident amateur.

The characterization of the consumer takes on an additional valence when it comes to purchasing products over the Internet. Courts' assessment of consumer engagement with trademarks on the Internet was initially more skeptical, with courts tending to believe that a user momentarily taken astray by the use of another's trademark when conducting a search would either experience extraordinary difficulty in getting back on course or would resign themselves to staying put and

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131. Easy Spirit, LLC v. Skechers U.S.A., Inc., No. 19-CV-3299 (JSR), 2021 WL 5312647, at *20 (S.D.N.Y. Nov. 16, 2021).

132. Ill. Tool Works Inc. v. J-B Weld Co., LLC, 419 F. Supp. 3d 382 (D. Conn. 2019), *modified*, No. 3:19-CV-01434 (JAM), 2019 WL 7816510 (D. Conn. Dec. 20, 2019).

133. *Id.* at 400.

134. *Id.*

satisficing.[135] Courts have since evolved to conducting a more nuanced assessment, recognizing consumers' general familiarity with internet commerce and use of search engines, including the possibilities of alternative suggestions provided by search results.[136] Nevertheless, courts do not typically take into account the way in which some consumers access the Internet. As noted in Section I.B, a significant percentage of consumers access the Internet primarily through mobile devices, and many users do not have broadband access at home. Thus, if the determination of consumer confusion on the Internet assumes a consumer sitting at home in front of a laptop screen, and not a consumer using a public WiFi network on a mobile phone, conclusions as to consumer perceptions may be distorted.

One last note relates to courts' conceptions of what a reasonable consumer does when faced with a mistaken purchase. Often arising during a consideration of the "actual confusion" factor of the multifactor infringement test, such discussions detail calls to customer service, counterfeit products brought to authorized retailers for repair, or complaints on social media.[137] Likewise, the absence of such evidence can be seen as tipping this factor toward the defendant. This might be the right result in most cases. But given that some consumers may not feel empowered to complain—or have the resources to return to a store or send a frustrated email—it might be worth it in relevant cases to consider other methods to determine whether actual confusion has occurred.[138]

Overall, what one takes away from many courts' discussions about the "sophistication of the consumer" factor is a desire to essentialize consumers rather than draw conclusions about the particular consumer experience at hand. The phrasing thus can take on a paternalistic tone—if only consumers had been more careful, or more sophisticated, or more educated, they wouldn't have been taken in by the defendant. But as the information detailed in Part I indicates, consumer characteristics should be relevant not in determining whether they deserve protection but in informing a view of the consumer experience. A consumer may well lack formal education, but that fact does not necessarily mean that their activities in the marketplace lie outside the bounds of what is reasonable. The essentializing of the consumer in trademark law in service of understandable administrative goals comes at a cost, a cost we should at least recognize even if we can't always take it into account.

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135. *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1057 (9th Cir. 1999), is the case typically cited as an example for this point.

136. *See, e.g.*, Multi Time Machine, Inc. v. Amazon.com, Inc., 804 F.3d 930, 938–40 (9th Cir. 2015).

137. *See, e.g.*, Uber Promotions, Inc. v. Uber Techs., Inc., 162 F. Supp. 3d 1253, 1271–73 (N.D. Fla. 2016) (discussing evidentiary value of calls and emails from customers in determining existence of actual confusion).

138. *Cf.* Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 383 (7th Cir. 1976) ("The value of evidence of actual confusion is greater when the products involved are low value items because purchasers are unlikely to complain when dissatisfied, which would bring to light confusion; but rather they are likely simply to avoid all products produced by the company which they believe produced the product which caused them trouble.").

III. HOW TRADEMARK LAW ENGAGES WITH CONSUMER CONSTRAINTS

Having considered both the experiences of some consumers and how courts in trademark cases characterize the consumer more generally, I turn in this Part to some of the implications of trademark doctrine in light of consumer constraints.

A. Analyzing the Similarity of Trademarks

In determining whether trademark infringement has occurred, one factor courts consider is the similarity of the marks, the idea being that the more similar the marks are, the more likely it is that a consumer will believe that the two goods or services are related to the same source. Courts typically consider similarity along the dimensions of sight, sound, and meaning—that is, not only how the marks appear but also how they sound when spoken aloud or the meaning of the lexical equivalents of the marks. For example, one court found that the marks CYCLONE and TORNADO for wire fencing were similar despite their lexical differences because both marks referred to strong wind conditions.[139] A consumer in a store intending to purchase CYCLONE fencing but seeing only TORNADO fencing might have remembered only that the desired fencing had an association with wind and thus believed that the TORNADO fencing was the one she wanted. Judges can bring their own backgrounds and biases to the table regarding these dimensions, such as finding no similarity between two marks if the pronunciation of the marks is the result of "correct" or "careful speech."[140] Here, I want to highlight an additional consideration: the way in which consumers without literacy in the English language might interpret composite (or word-plus-design) marks.

Trademark doctrine typically directs that, when comparing the plaintiff's and the defendant's marks, composite marks should be considered in their entirety with respect to the impression they leave on the consumer. Nevertheless, if one feature of a mark—the words or the design—dominates, courts can accord more weight to that aspect of the mark in making their comparison.[141] Thus, many courts have given more weight to the word portion of the marks in question because of their conclusion that the word is how consumers will order or talk about the product

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139. Hancock v. Am. Steel & Wire Co. of N.J., 203 F.2d 737, 740–41 (C.C.P.A. 1953) ("[W]e think that contemporaneous use of appellant's and appellee's marks on wire fencing is likely to result in confusion or mistake in trade, notwithstanding there is a distinction between the technical meteorological meanings of the two terms. We are primarily concerned with the meaning of the marks to members of the public at large who are prospective purchasers of such wire, and not to meteorological experts.").

140. *See generally* Heymann, *supra* note 20.

141. *See, e.g.*, Boise Cascade Corp. v. Miss. Pine Mfrs. Ass'n, 164 U.S.P.Q. (BNA) 364, at *4 (T.T.A.B. 1969) ("It is, moreover, a well settled principle of trademark law that, in determining the question of confusing similarity, applicant's mark must be considered in its entirety. But, it is an equally well-established rule that one feature of a mark, whether a design or a word, may by reason of its nature or manner of display, be the dominant or most prominent feature thereof and may without doing violence to the aforementioned principle, be given greater force and effect than other parts of the mark in resolving the question of confusing similarity between it and another mark."); *id.* (holding that tree design predominated in both marks and so would likely be confusing).

associated with the mark.[142] This is, as J. Thomas McCarthy has termed it, a "literacy presumption" in that it assumes that consumers will use the word portions of marks to identify the products in question.[143]

But this is not necessarily how consumers lacking basic literacy skills in English would interpret a mark. Such consumers might develop strategies of pictographic thinking for identifying marks with letters. In other words, they might treat a word mark as a design—not reading the word mark PEPSI but rather seeing it as a design in which the first and third elements have a line on the left attached to a round area on the right, and so forth—and then matching the shape of that design from memory with what they see in the store.[144] As one researcher described it, such consumers recognize logos in the same way individuals might recognize people they know in a photograph.[145] One possible result, then, is that consumers with low levels of literacy will see brand extensions ("Tide with Bleach Alternative" or "Coke Zero") as new and separate product categories altogether rather than as product variations coming from the same source, depending on how the logo of the extension is rendered.[146]

Additionally, consumers with low levels of literacy in English who focus on designs or pictures on product packaging might sometimes interpret pictures as having strong descriptive meaning, whereas a literate consumer might recognize the same picture as a design element or as descriptive only in connection with related text that provides the necessary information. Take, for example, a bottle of household cleaner with a picture of a flower on it and the text "Acme Disinfectant Spray Cleaner. Eliminates 95 Percent of Household Germs Without a Chemical Scent!" A consumer literate in English would likely focus on the text on the bottle

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142. *See, e.g.*, Arnold, Schwinn & Co. v. Evans Prods. Co., 302 F.2d 765, 767–68 (C.C.P.A. 1962) (holding that because the goods at issue (bicycles) were typically bought by name, "the [similar] designs serve primarily as the background for display of the words" and rejecting the argument that designs should be given more weight because "the users of goods of the type involved are children, many of whom cannot read," in light of the fact that a parent or another adult would be the purchaser). *But see, e.g.*, King of the Mountain Sports, Inc. v. Chrysler Corp., 185 F.3d 1084, 1090 (10th Cir. 1999) (concluding that even if the word portion of the defendant's mark dominated, the plaintiff's mark and the defendant's mark as whole were not confusingly similar given their two logos' visual appearances).

143. Professor McCarthy concludes, however, that the "literacy" presumption is "a dubious generalization." MCCARTHY, *supra* note 128, § 23:47.

144. Viswanathan et al., *supra* note 70, at 21. To better understand this process, the reader of this Article might consider a written language that they don't read—for example, Mandarin Chinese, Hebrew, or Arabic—and then consider how they might determine that two written expressions in that language are in fact the same word.

145. *Id. See generally* J. Colleen McCracken & M. Carole Macklin, *The Role of Brand Names and Visual Cues in Enhancing Memory for Consumer Packaged Goods*, 9 MKTG. LETTERS 209 (1998) (studying the role of imagery on product packaging in enhancing brand recall); Wee Loon Ng-Loy, *An Interdisciplinary Perspective on the Likelihood of Confusion: Consumer Psychology and Trademarks in an Asian Society*, 98 TRADEMARK REP. 950, 960–63 (2008) (describing cases in Singaporean courts involving goods purchased by consumers not literate in the language the word marks at issue were written in); *id.* at 967 (describing evolution of opinions as English literacy became more prevalent in Singapore).

146. Viswanathan et al., *supra* note 70, at 27.

to understand the nature of the product and interpret the flower image as either functioning as a trademark or indicating that the product has a pleasant smell. A consumer who is not literate in English, by contrast, might understand the graphic to indicate a category of product rather than a characteristic—for example, that the product is a type of air freshener or other product where the scent is the purpose of the product.[147] Thus, if a product or service might be purchased by a significant number of consumers who are not literate in the English language, courts should consider that consumers might engage with designs and information on product labels and advertising in different ways from what courts might expect, based on the judges' own experiences. As one example, a district court considering an infringement case in which customers tended to learn about the defendant's services "by word of mouth," including nonliterate individuals who tended to "obtain information orally," emphasized the similarity in the sound of the marks as supporting a finding of likelihood of confusion.[148]

Another doctrine that depends on consumer interpretation of trademarks is tacking. Tacking allows trademark holders to vary a mark slightly over time without losing protection so long as the mark creates the same continuing commercial impression. The idea behind the tacking doctrine, presumably, is to allow modernization and other small adjustments of a mark over time but without letting trademark holders gain rights over an entirely new mark in the process. Accordingly, courts have taken a narrow view of what constitutes the same continuing commercial impression, denying the benefits of the tacking doctrine to mark holders who made relatively small changes to the mark.[149] As with composite marks, the comparison of word marks that differ only slightly but convey the same meaning will likely not pose an interpretive problem for consumers literate in the English language. But for consumers who are not literate in the English language, and who use pictorial methods of comparing word marks, even small changes might be interpreted as completely different marks.[150] And of course, for such consumers, thinking about

147. *Id.* at 29. The authors note the implications for dangerous product misuse as a result of this interpretation and encourage producers to rethink instructions and warnings on packaging. *Id.* On the assumptions that tort law makes about whether consumers read, understand, and comply with product warnings, see Latin, *supra* note 44, at 1196.

148. *See, e.g.*, Mgmt. Grp., LLC v. T&G Consultant Agency, LLC, No. 16-cv-470wmc, 2016 WL 3830585, at *6 (W.D. Wis. July 12, 2016).

149. *See* Brookfield Commc'ns, Inc. v. W. Coast Ent., 174 F.3d 1036, 1048 (9th Cir. 1999) (noting that the standard is "exceedingly strict"); Quiksilver, Inc. v. Kymsta Corp., 466 F.3d 749, 760 (9th Cir. 2006) (denying tacking of "QUIKSILVER ROXY" onto later use of "ROXY"); Van Dyne-Crotty, Inc. v. Wear-Guard Corp., 926 F.2d 1156, 1160 (Fed. Cir. 1991) (affirming TTAB's rejection of attempt to tack "CLOTHES THAT WORK" to "CLOTHES THAT WORK. FOR THE WORK YOU DO"). The Supreme Court has held that whether an earlier trademark can be tacked to a later one is an issue of fact. Hana Fin., Inc. v. Hana Bank, 574 U.S. 418, 426 (2015).

150. Viswanathan et al., *supra* note 41, at 390 ("Functionally low-literate consumers may treat store signs, brand names, and even frequently encountered numbers, as if they are objects in a scene, ignoring much of the symbolic meaning behind these bits of information. This may lead to confusion when physical features, such as the font style or color, of familiar words and brands are changed.").

word marks along the *Abercrombie* spectrum,[151] which determines distinctiveness by asking about the semantic relationship between the word and the product or its characteristics, may be entirely irrelevant to a consumer whose facility in reading English presents a hurdle to the first step in understanding that relationship.[152]

B. Private Label Goods and Trade Dress Confusion

Consideration of the consumer experience is also relevant to how trademark law thinks about private label goods. Also referred to as house brands or store brands, private label goods are a mainstay for many large retailers, whether the product is sold under the trademark of the retailer or whether the retailer establishes its own mark for its private label goods. (In other words, MegaShop Supermarket could sell paper towels under the MegaShop mark, or it could establish a private label mark—MegaValue—that it would then presumably use across its entire line of private label goods.) Philip Fitzell identifies Brooks Brothers as one of the oldest private labels for men's clothing, sold in the shop that has been called by the same name since the early 1800s.[153]

In the mid- to late-eighteenth century, more manufacturers began to realize the benefit of marketing their products under a separate mark and positioning those goods as less expensive than the comparable national brands.[154] Even though the purchase of a store brand product presumably results in a lost sale of the national brand product for the retailer (what one marketing article calls "cross-brand cannibalism"), the result is that "the loyalty of the consumer is aligned with the retailer rather than nationally branded products which can be purchased from a number of differen[t] retailers."[155] Stores are able to sell private label goods at a cheaper price because they are both manufacturer and retailer, but because they don't have the benefit of the national advertising conducted by the national brands, they need to compete at the point of sale. This requires packaging that both attracts

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151. Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9–11 (2d Cir. 1976).

152. Indeed, the *Abercrombie* spectrum itself, by focusing on the relationship between the word and the characteristics of the good or service, including whether the relationship is metaphorical, depends not only on literacy but on a certain degree of interpretive skills. *See* Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1333 n.67 (2010) ("[A] court's determination of whether a claimed mark is, for example, suggestive may well depend on the vocabulary the court brings to the exercise, knowledge that may or may not match that of the relevant consumer.").

153. PHILIP B. FITZELL, PRIVATE LABELS: STORE BRAND & GENERIC PRODUCTS 28 (1982).

154. *Id.* at 32.

155. Michael Harvey, James T. Rothe & Laurie A. Lucas, *The "Trade Dress" Controversy: A Case of Strategic Cross-Brand Cannibalization*, 6 J. MKTG. THEORY & PRAC. 1, 12 (1998).

and informs the consumer, in addition to adjacent shelf placement[156] and circulars and signage that makes the comparison between the products directly.[157]

Consequently, some private label brands have adopted packaging trade dress that closely resembles that of the comparable national brand to easily indicate similarity to the consumer and "reassure the customer by a consistent look that the quality of the private label product is similar [to] or as good as the national brand," even if this might result in mistaken purchases or the absence of a unifying brand identity for the private label.[158] Some trademark owners, not surprisingly, have opposed this practice, arguing that the similar trade dress confuses consumers into thinking they were purchasing the name brand product; trademark owners also have voiced concern that the proliferation of similar trade dress would result in dilution, such that the trade dress would come to represent the category of product rather than a single source.[159]

But for some consumers, the similar trade dress performs an informational function—by adopting a similar trade dress, a private label manufacturer is able to quickly and easily communicate to a consumer that the product is substantially the same as (or, at least, comparable to) the name brand product. As one marketing study put it:

> A new brand of "baby shampoo" is more easily and quickly categorized as a baby shampoo if it shares similarities to baby shampoos already on the market. Therefore, if it is advertised as "gentle" and is packaged in a clear yellow tear-shaped bottle, consumers will quickly learn that it is a baby shampoo and will presumably benefit from the similarities between it and previously learned shampoos.[160]

Much like a parody that imitates a trademark in order to poke fun at it, the private label product both is and is not the name brand product.[161] Therefore, whether such practices should be legally permissible depends on a determination both that consumers will generally not be confused by the similarity in trade dress and, perhaps, that such similarity results in more effective transmission of information

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156. *See generally* Eric Goldman, *Brand Spillovers*, 22 HARV. J.L. & TECH. 381 (2009) (discussing the ways in which shelf placement and other retailer decisions facilitate product comparisons by consumers).

157. FITZELL, *supra* note 153, at 46 (noting that the A&P stores in New Orleans deployed one of the earliest price comparison ads between private label products and national brands in 1936).

158. Andrew W. Coleman, *National Brands, Private Labels and Unfair Competition — When Imitation Goes Beyond the Sincerest Form of Flattery*, 87 TRADEMARK REP. 79, 85–86 (1997).

159. *Id.* at 110.

160. Barbara Loken, Ivan Ross & Ronald L. Hinkle, *Consumer "Confusion" of Origin and Brand Similarity Perceptions*, 5 J. PUB. POL'Y & MKTG. 195, 207 (1986).

161. Bartow, *supra* note 5, at 766 (stating that "label and price disparities will clearly signal the differences between the goods and sources to the vast majority of consumers").

than, say, a simple textual legend on the competing product ("Compare to Brand X").

As marketing studies note, however, such determinations may be more complicated with respect to consumers facing constraints. One study found that consumers who have independent information about the similarity of the products—for example, from professional education or experience—buy more store brands over national brands, although this effect was seen more strongly in the study with respect to health-related products, such as pharmaceuticals, than in food and drink products.[162] The authors drew from this study a suggestion to ameliorate this deficit of information for other customers by using "copycat packaging" to signal similar quality.[163] But another study noted that consumers who are not otherwise educated about the nature of private label brands may in fact conclude from the similarity in trade dress that there is a relationship between the source of the two products—in other words, that the similar trade dress conveyed contrary information to what was intended.[164] The needle to thread, then, is how to balance the informational value of the similar trade dress.

Decisions in the federal courts involving private labels have reflected this uncertainty. *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, a 2007 Third Circuit decision,[165] involved a dispute between the producer of the artificial sweetener Splenda and a manufacturer and distributor of private label brands for grocery stores that used similar yellow packaging. In holding that, for many of the house brands at issue, there was not sufficient similarity to find a likelihood of confusion, the court noted that the prominence of the store's house marks, which consumers would presumably be familiar with and see on many other products, militated against a finding of confusion (and, conversely, where the house mark was not sufficiently prominent, the similarity supported a finding of confusion).[166] For

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162. Bart J. Bronnenberg et al., *Do Pharmacists Buy Bayer? Informed Shoppers and the Brand Premium*, Q.J. ECON. 1669, 1717 (2015). For an alternative theory about low-income consumers and private labels, see Simba Pasirayi & Carola Grebitus, *The Consumer Paradox: Why Bottom-Tier Consumers Are Loyal to Brand Names*, AAEA Annual Meeting (2016) (manuscript at 5) ("[L]ow income consumers prefer national brands so as to associate themselves with high-income households and to gain social status. In fact, their purchase intentions and willingness to pay for private labels increase when they assume that high income consumers consume private labels.").

Of course, it is not always the case that generic pharmaceuticals are trustworthy substitutes. *See* Farah Stockman, *Our Drug Supply Is Sick. How Can We Fix It?*, N.Y. TIMES, Sept. 19, 2021, at SR4 ("Competition for market share [of generic drugs] at rock-bottom price points has led to chronic shortages, unpredictable price-spikes, allegations of illegal price-fixing, and substandard and even dangerous practices.").

163. Bronnenberg et al., *supra* note 162, at 1718.

164. Loken et al., *supra* note 160, at 206. The study's authors note possible limitations with the study, including the fact that the respondents were all marketing students. *Id.* at 207–08.

165. 511 F.3d 350 (3d Cir. 2007).

166. *Id.* at 361 (noting that "Food Lion" and "Safeway" house marks "are well-known because they are well-known to the consumers who shop in the stores with those same names" and that the marks featured prominently on the packages); *id.* at 367–68 (holding that

the products at issue, the court also held that the district court did not err in characterizing the relevant consumer as devoting "some heightened care and attention" to the purchase "because her health considerations typically override the products' low cost."[167] The Federal Circuit reached much the same conclusion in *Conopco, Inc. v. May Department Stores Co.* in 1994, in which it held that the phenomenon of retailers marketing both national brands and their own private label brands "has become commonplace and well-known in the marketplace," such that "[w]hen such packaging is clearly labelled and differentiated," it should not be presumptively unlawful.[168] As in *McNeil*, the court held that consumers would have come to be very familiar with the store's own marks from its appearances "in the store parking lot, on store signs, on employees' badges," in advertising, and on other private label products.[169]

Not every court has been so persuaded, however. In *McNeil-PPC, Inc. v. Guardian Drug Company, Inc.*,[170] a dispute over the similar trade dress for a national brand and a private label product for a digestive aid, the district court rejected the defendant's argument that the use of house marks and signage encouraging customers to compare the products was sufficient to overcome any confusion arising from the similarity in the trade dress; indeed, the court noted that if the defendant's goal had been merely to encourage comparison between the products, it would have used a dissimilar trade dress.[171] And in some instances, there is no nearby national brand on the shelf to which the house brand is directly being compared, such as the versions of name brand products that are sold at dollar stores using similar trade

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the district court erred in finding no confusion where there was insufficient dissimilarity); *id.* ("The danger in the District Court's result is that producers of store-brand products will be held to a lower standard of infringing behavior, that is, they effectively would acquire *per se* immunity as long as the store brand's name or logo appears somewhere on the allegedly infringing package, even when the name or logo is tiny. The Lanham Act does not support such a *per se* rule.").

167. *Id.* at 365.

168. Conopco, Inc. v. May Dep't Stores Co., 46 F.3d 1556, 1565 (Fed. Cir. 1994); *see also* Warner Lambert Co. v. McCrory's Corp., 718 F. Supp. 389, 398–99 (D.N.J. 1989) ("Furthermore, the price difference between the two products is not only a product difference in itself, but also prompts McCrory to bring this price difference to the [consumers'] attention through the prominent use of 'compare and save' signs on shelves in which the products appear, further distinguishing the two products from each other in the minds of prospective consumers. The Court also takes cognizance of the fact that a McCrory's shopper, as with any shopper in such a retail store chain, has likely been exposed to generic or discount house brands before, and when walking through a McCrory's store and observing the many 'compare and save' signs, is not likely to be misled by the McCrory's mouthwash brand."); Klein-Becker USA, LLC v. Prod. Quest Mfg., Inc., 429 F. Supp. 2d 1248, 1258 (D. Utah 2005).

169. *Conopco*, 46 F.3d at 1568; *see also* Johnson & Johnson v. Actavis Grp. hf, No. 06 CIV. 8209 (DLC), 2008 WL 228061, at *8 (S.D.N.Y. Jan. 25, 2008), *as corrected* Feb. 21, 2008 (denying summary judgment motion of national brand).

170. 984 F. Supp. 1066 (E.D. Mich. 1997).

171. *Id.* at 1073.

dress.[172] The trade dress of such products is presumably intended to have the same communicative effect as a private label product—to indicate similarity with the known national brand—but they are typically missing the additional cues that courts have found to dispel confusion (the house mark or "compare to" language), relying solely on consumers' memory of the name brand trade dress. In one such case, the U.S. District Court for the Southern District of New York found a likelihood of confusion and issued a permanent injunction prohibiting the defendant from using the mark WIPE-OUT on its correction products sold in Dollar Tree Stores in light of the plaintiff's familiar WITE-OUT product.[173]

The takeaway from these cases seems to be a recognition of the ways in which similar trade dress can serve an informational function for consumers but typically only when there are sufficient other cues to ensure that consumers interpret that information narrowly—that the products are purportedly similar in composition or quality but not from the same manufacturer.[174] (This result has some interesting intersections with theories of initial interest confusion, in which the claim is that using a similar mark or trade dress to draw consumers in, even if they understand the relationship between the defendant and the plaintiff at the time of purchase,

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172. As of 2018, there were 30,000 Dollar Tree and Dollar General stores in the United States, combined, more stores than the six largest U.S. retailers combined (Costco, CVS, Home Depot, Kroger, Walgreens, and Walmart). Warren Shoulberg, *Are Dollar Stores the True Retail Disrupters?*, FORBES (July 22, 2018, 2:44 PM), https://www.forbes.com/sites/warrenshoulberg/2018/07/22/are-dollar-stores-the-true-retail-disrupters/#7471f0cd7a6e [https://perma.cc/H5NH-NKB3]. Commentators have highlighted that dollar stores provide inexpensive items to low-income individuals in food deserts but often do not provide a variety of healthy food options and, according to one writer, are frequent targets of crime. *See, e.g.*, Alec MacGillis, *The Dollar-Store Deaths*, NEW YORKER, July 6 & 13, 2020, at 20–26; Stacy Mitchell & Marie Donahue, *Dollar Stores Are Targeting Struggling Urban Neighborhoods and Small Towns. One Community Is Showing How to Fight Back*, INST. FOR LOCAL SELF-RELIANCE (Dec. 6, 2018), https://ilsr.org/dollar-stores-target-cities-towns-one-fights-back/ [https://perma.cc/QJ6K-BXK4]; *see also* Ronald Paul Hill, *Stalking the Poverty Consumer: A Retrospective Examination of Modern Ethical Dilemmas*, 37 J. BUS. ETHICS 209, 218 (2002) ("The experiences of discount retail chains such as Dollar General provide an appropriate role model of corporate as well as moral success.").

173. BIC Corp. v. Far E. Source Corp., No. 99 CIV. 11385 HB, 2000 WL 1855116, at *7 (S.D.N.Y. Dec. 19, 2000), *aff'd*, 23 F. App'x 36 (2d Cir. 2001).

174. Haeran Jae & Devon Delvecchio, *Decision Making by Low-Literacy Consumers in the Presence of Point-of-Purchase Information*, 38 J. CONSUMER AFFS. 342, 351 (2004) ("[G]iven adequate involvement, high-literacy consumers tend to choose products based on central cues [such as printed information] while low-literacy consumers tend to choose products based on peripheral cues [such as attractive packaging appearance]. This results in substandard product choice by low-literacy consumers to the extent that peripheral cues and product quality are inconsistent. The findings also indicate that presenting a visual decision aid that summarizes written product information improves [but does not completely eliminate] the ability of low-literacy consumers to make normative decisions.").

This also gives rise to a question of whether courts should determine whether the private label good is in fact similar to the brand name good and, if demonstrably not, whether a remedy lies in trademark law or in false advertising law. *See, e.g.*, Rexall Sundown, Inc. v. Perrigo Co., 651 F. Supp. 2d 9, 29 (E.D.N.Y. 2009).

should be actionable.)[175] Overall, this seems like a welfare-enhancing result. But we should recognize, as with the other doctrines discussed in this Subpart, that for consumers who don't have sufficient familiarity with private label brands or who don't have fluency in written English, there may be more rather than less confusion at the time of purchase without additional attention to informational cues.

C. Post-Sale Confusion and Luxury Goods

The previous discussion regarding private label goods takes us inevitably into a discussion of luxury goods and the doctrine of post-sale confusion. As with private label goods, the defendant in these cases is selling goods that resemble or imitate the trade dress of a national brand. Here, however, the imitation is not of the packaging, with the goal of communicating information to the consumer about the quality of the good therein, but rather is of the configuration of the good itself, typically a luxury good. For purposes of this discussion, we are assuming that consumers who purchase the imitation luxury good are aware that they are not purchasing the national brand; if that is not the case, liability for trademark infringement should ordinarily result. Nevertheless, the theory of post-sale confusion holds that liability should pertain regardless of confusion at the point of sale when there is a likelihood of confusion on the part of those who may encounter the imitation good at a later point in time by seeing the good being used by a purchaser or encountering the good in a resale market.[176]

Notably, *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-LeCoultre Watches, Inc.*,[177] the case that serves as the genesis of the theory, was not concerned with the resale of such items to unsuspecting buyers. Rather, as several scholars have pointed out, the Second Circuit was concerned that the purchaser of an imitation luxury item was deceiving social associates into thinking that the purchaser had the resources to purchase an authentic good.[178] Thus, these scholars have concluded, the doctrine is often about preserving a status system, and allowing

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175. Playboy Enters. v. Netscape Commc'ns Corp., 354 F.3d 1020, 1025 (9th Cir. 2004) ("Initial interest confusion is customer confusion that creates initial interest in a competitor's product. Although dispelled before an actual sale occurs, initial interest confusion impermissibly capitalizes on the goodwill associated with a mark and is therefore actionable trademark infringement."); *see also* Grynberg, *supra* note 24, at 104 ("[I]nitial interest confusion's potential costs should . . . be weighed against possible information benefits to consumers of the challenged practice.").

176. MCCARTHY, *supra* note 128, § 23:7.

177. 221 F.2d 464 (2d Cir. 1955).

178. *Id.* at 466 ("[S]ome customers would buy plaintiff's cheaper clock for the purpose of acquiring the prestige gained by displaying what many visitors at the customers' homes would regard as a prestigious article. Plaintiff's wrong thus consisted of the fact that such a visitor would be likely to assume that the clock was an Atmos clock."); Rebecca Tushnet, *Stolen Valor and Stolen Luxury: Free Speech and Exclusivity*, *in* THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY: CRITICAL REFLECTIONS 121, 123 (Haochen Sun et al. eds., 2015) ("The condemnation of the copyist's consumer is an important part of a finding of infringement by the copyist because the consumer is not confused, but rather deviously plotting to pose as wealthier or more tasteful than she actually is."); Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 792 (2012) (noting that the relevant observers in "status-confusion" cases "are confused about the *consumers* of the products, and specifically about who is entitled to the high social status that the brand is supposed to impart").

makers of luxury goods to benefit from that system, rather than about preventing deception in the marketplace.[179] As the Second Circuit later wrote, "[T]he 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."[180]

The benefits of allowing such imitations to exist, however, have been variously characterized. Some scholars have contended that allowing imitation luxury goods redounds to the benefit of the producer because once the look has become accessible to the masses, the purchasers of the original, seeking uniqueness, will need to acquire newer goods to remain distinctive.[181] These scholars also note that the purchasers of knockoff goods are not likely to be in the market for the original in any event, so the producer is not likely to have lost any sales to the knockoff producer.[182] At least one court, by contrast, has contended that the producer indeed suffers harm if the observer changes his or her view of the quality of the goods (and is in the class of potential future purchasers).[183] Both sides of the debate, however, seem to assume that the focus should be whether there is any harm to the producer—a view that is completely understandable given that the producer is the one ostensibly complaining of harm. More attention to the value of the purchase to the consumer, and some consumers in particular, however, might tip the balance the other way.

When commentators write about the purchase of such items, it is often assuming a Veblen-like characterization of the process—that such items are designed to satisfy a psychological desire to belong to certain social groups or to demonstrate an aspiration to join such groups. In other words, the assumption seems to be that the benefit to the purchaser of these items is the acquisition of status in

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179. *See, e.g.*, Beebe, *supra* note 51, at 852, 867; Kal Raustiala & Christopher Jon Sprigman, *Rethinking Post-Sale Confusion*, 108 TRADEMARK REP. 881, 898–900 (2018) (discussing use of post-sale confusion theory to control scarcity of a branded good). For a critique of legal protections of status through trademark law, see generally Jeffrey L. Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195 (2007).

180. Hermès Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 108 (2d Cir. 2000).

181. *See generally, e.g.*, Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

182. *See, e.g.*, *id. But see* Aaron Ahuvia, Giacomo Gistri, Simona Romani & Stefano Pace, *What Is the Harm in Fake Luxury Brands?: Moving Beyond the Conventional Wisdom*, *in* LUXURY MARKETING: A CHALLENGE FOR THEORY AND PRACTICE 279, 281 (Klaus-Peter Widemann & Nadine Hennigs eds., 2013) (noting conflicting research on whether buyers of authentic luxury goods and buyers of counterfeit luxury goods are separate groups of people as well as conflicting research on the effect of counterfeit luxury goods on the brand equity of authentic luxury goods).

183. *Hermès*, 219 F.3d at 108.

and of itself[184] or engaging in identity formation and communication.[185] But as Tressie McMillan Cottom has described (and as noted above in Section I.A), such purchases can also be much more utilitarian, designed to signal to gatekeepers that one is entitled to a certain job or that one's concerns should be given as much attention as another individual's; these purchases are designed to reassure such decision-makers that the individual is trustworthy and familiar.[186] Such consumers can thus be in the position of being shamed by other consumers for purchasing luxury items (wasting limited resources) and by courts for purchasing imitation items (attempting to portray themselves as something they're not). Courts, for their part, might find it easier to characterize either purchasers or their community as easily fooled rather than as strategic; the latter would suggest that such consumers are consciously attempting to attain "unearned" status and thus are agents in the deprivation of that status for those who "rightfully" purchased it.[187] But as Jessica

184. VEBLEN, *supra* note 14, at 103 ("No class of society, not even the most abjectly poor, forgoes all customary conspicuous consumption. The last items of this category of consumption are not given up except under stress of the direct necessity. Very much of squalor and discomfort will be endured before the last trinket or the last pretence of pecuniary decency is put away. There is no class and no country that has yielded so abjectly before the pressure of physical want as to deny themselves all gratification of this higher or spiritual need."); Kal Raustiala & Christopher Jon Sprigman, *Let Them Eat Fake Cake: The Rational Weakness of China's Anti-Counterfeiting Policy*, *in* THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY: CRITICAL REFLECTIONS 263, 281 (Haochen Sun et al. eds., 2015) ("To be a true social welfare analysis, and not simply a measure of the preferences of rich people, [the analysis] must also consider the welfare gains of less affluent consumers who are priced into some simulacrum of status consumption by the presence of fakes. The balance between status losses at the top and status gains for everyone else is not susceptible to theoretical analysis — it must be measured empirically."); Sheff, *supra* note 178, at 813 ("The deception worked by status-confusion allows for the possibility that hierarchical social status—and all that flows from it—might be allocated based on something other than wealth."); *id.* at 817 ("By regulating who may stake a claim to social status and who may not—or, more specifically, by deputizing private parties to invoke the coercive power of the law to do so—status confusion entangles the government in the zero-sum, perpetual competition for social status."); *see also* Francesca Gino et al., *The Counterfeit Self: The Deceptive Costs of Faking It*, 21 PSYCH. SCI. 712, 712 (2010) ("We suggest that a product's lack of authenticity may cause its owners to feel less authentic themselves — despite their belief that the product will actually have positive benefits — and that these feelings then cause them to behave dishonestly and to view other people's behavior as more dishonest as well. In short, we suspect that feeling like a fraud makes people more likely to commit fraud.").

185. Gerhardt, *supra* note 7, at 458–62.

186. COTTOM, *supra* note 62, at 152–69. Researchers have also noted that adolescents in households facing economic hardship may respond to resulting feelings of marginalization by seeking material displays of higher income. Hamilton et al., *supra* note 31, at 538.

187. *Cf.* Grynberg, *supra* note 24, at 89 ("[A] maker of an imitation perfume who uses the Chanel name in advertising looks more like a free rider than does the consumer who wants an affordable scent that smells like Chanel. A court is therefore more likely to look past the pejorative label to weigh the social value of the practice under a consumer-conflict framework than the seller-conflict alternative.").

Litman has suggested, if the status-conferring benefit is "in some sense itself a product," then, absent any consumer confusion, "we want other purveyors to compete in offering it to consumers in their own forms and on their own terms. Competition is, after all, the premise of the system."[188]

Finally, we should note that trademark law fully embraces the idea that the sale of secondhand goods does not constitute trademark infringement (unless the good is so fundamentally altered as to constitute a different product altogether).[189] Third-party observers who see a used or shabby trademarked good might well draw conclusions about the producer as a result. But this reputational harm is not sufficient to justify a ban on the sale of secondhand goods; indeed, the doctrine is justified on the grounds that the purchaser of a secondhand good knows exactly what they are getting.[190] The same can be said of an imitation leather jacket or cubic zirconia earrings, despite the possibility that some observers might mistake them for more expensive products.[191] For some consumers, the same can be said of imitation trademarked goods.

CONCLUSION

The goal of this Article is modest. It does not call for a wholesale reevaluation of trademark doctrine, and it might not be the case that a broader, more inclusive consideration of consumer experiences will shift the result in any significant way in any particular matter. If the target market largely comprises consumers facing constraints, courts will have reason to be sensitive to those constraints and how they affect the purchasing experience (and thus the likelihood of confusion or dilution). But as a general matter, courts cannot easily calibrate the nature of the remedy to different classes of consumers in a single case, and so there will always be consumers in any litigation who are left behind.

But, at the very least, courts should consider who is being left behind in these cases and whether judges' and scholars' conception of the reasonable consumer is a consumer who more likely resembles themselves. This is a natural impulse, particularly for those whose conception of the consumer as a rational

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It should not be surprising that luxury brands, in response to this, devise ever more ways to preserve signaling for those in the know (and with resources). *See, e.g.*, Lisa Lockwood, *Balenciaga's Hacker Project Launches Monday in Pop-ups Globally*, WWD (Nov. 12, 2021, 5:45 PM), https://wwd.com/fashion-news/designer-luxury/balenciagas-hacker-project-launches-monday-in-pop-ups-globally-1234996013/ [https://perma.cc/W3Y5-2T2P] (describing Balenciaga's "Hacker Project," involving Balenciaga products "that reinterpret Gucci codes and in so doing, question the idea of branding, appropriating and counterfeiting").

188. Litman, *supra* note 55, at 1731.

189. *See* Champion Spark Plug Co. v. Sanders, 331 U.S. 125 (1947); Nitro Leisure Prods., L.L.C. v. Acushnet Co., 341 F.3d 1356 (Fed. Cir. 2003).

190. *Champion Spark Plug Co.*, 331 U.S. at 129–30 ("[I]nferiority is expected in most second-hand articles. Indeed, they generally cost the customer less.").

191. *Cf.* Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1367–68 (Fed. Cir. 1999) (noting that "[i]t is not at all unusual for a product to be designed to appear to viewers to be something it is not," such as imitation leather, and that the goal of imitation does not deprive an invention of utility for purposes of patent validity).

"sovereign," to use Barton Beebe's language,[192] aligns with preferences regarding the scope of trademark law itself. My goal here is not to challenge this conception—indeed, in many instances, it is a commendable one. But we cannot ignore the way in which public policy—how we address income equality, the availability of broadband access, the layout of cities and bus lines—affects consumption. And so, where possible, we should consider how trademark law, which is part of the way that we legally govern the act of consumption, might take account of more consumers in trademark cases. Perhaps we can do this through more nuanced remedies to accommodate a wider variety of consumer experiences; perhaps the best we can do is an acknowledgment that the consumers who will be on the losing end of the decision are there not because they are foolish but because they are disadvantaged. (As one example of a nuanced remedy, a court in a private label goods case where significant numbers of disadvantaged consumers are among the defendant's consumer base could permit the defendant to continue using aspects of the similar trade dress as an informational device but require clearer house marks or other indicators that the good is not the plaintiff's.) At the very least, those who study consumer behavior with respect to trademarked goods in the United States should be aware of the ways in which their subjects do and do not reflect the broad range of consumer experiences across the country.

Ultimately, if courts had greater recognition of the wide variety of ways in which consumers engage in the purchasing experience, they might rethink the likelihood of confusion analysis writ large, moving away from an atomistic consideration of factors and toward a more holistic approach. The "sophistication of the consumer" factor is not about whether the consumer is clever or foolish, rich or poor, careful or neglectful. It is about the extent to which the consumer is empowered to adapt to the challenges of the modern marketing system. Courts therefore shouldn't reserve consideration of who the customers are for the "sophistication of consumers" factor—it needs to be right up front, so that every aspect of the purchasing experience is considered in that context.

192. Beebe, *supra* note 2, at 2024.