

## **ARE YOU SMARTER THAN AN ‘AVERAGE CONSUMER’? THE TEST FOR ASCERTAINING TRADE MARK INFRINGEMENT IN MODERN TIMES**

RADHIKA SIKRI\* AND ANAHIDA BHARDWAJ\*\*

### **ABSTRACT**

*Trade mark laws primarily seek to protect the consumer against confusion arising out of deceptively similar marks in conjunction with enforcing the intellectual property rights of their proprietor. As has been the established precedent in India, the test to ascertain whether a mark is truly being infringed is of an unwary consumer having average intelligence and imperfect recollection. However, such was established by the Supreme Court in the 1960s, when the socio-economic conditions were recovering from the aftermath of the Partition at a snail’s pace. In 2022, in the age of globalisation and the evolution of digital markets, a consideration between consumer protection and trade mark overprotection when the unmalleable ‘average intelligence’ standard continues to be adopted is paramount. Consumer intelligence has only been measured through this relatively dated standard regarded as an exemplar. This means to grant protection to the customer has inadvertently translated into a medium to measure how deserving a mark is of acquiring a monopolistic presence. The question attempted to be answered primarily includes whether the lens through which Indian Courts view trade mark infringement is problematic as it erroneously manifests consumer confusion as economic harm to the mark owner. Furthermore, keeping in mind possible Legal Paternalism and its ricochetting effect on consumer perception, this paper will discuss who ought to be at the centre of this standard- the ‘unwary consumer’, or the entity seeking protection against infringement.*

### **I. INTRODUCTION**

The Utilitarian Theory by John Stuart Mill in reference to conserving Intellectual Property Rights (“**IPR**”) expounds upon economic incentives furthered by protection. This assurance leads to social welfare in the form of the development of ideas and originality at large in comparison to a voluntary contractual arrangement.<sup>1</sup> The same is reflected in Article 7 of the Trade-Related Aspects of Intellectual Property Rights (“**TRIPS**”),<sup>2</sup> which draws out the objective of preserving rights in contributing to promoting technological innovation and dissemination of the same. Therefore, the capitalistic way of self-centered temporary micro-monopolies motivates new methods which

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\* Radhika Sikri is a fourth-year student pursuing her law degree from Jindal Global Law School.

\*\* Anahida Bhardwaj is an Advocate and currently a Fellow at Citizens of Public Leadership.

<sup>1</sup>Andrew Lee, *Intellectual Property, Moral Rights, and Social Utility: A Classically Liberal Exploration of the Normative and Practical Implications of Intellectual Property Rights*, 7 N.Y.U. J.L. & LIBERTY 431, 432 (2013).

<sup>2</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art. 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

would go to inspire supplementary creativity and further micro-monopolies. For such an economic system, barriers against infringement over these private rights are necessary as, without them, there is no stimulus in investing in Intellectual Property ("IP"), morally or economically. Profit at the center of innovation has proved to be the most lucrative driving factor in providing a means of healthy competition, which ineluctably is meant to favor the consumer and society at large. Lastly, mala fide intentions of infringers to pass off under a well-established brand identity cannot be ignored either.

The classic juggling act of ensuring reasonable protection to IP owners and maintaining a horizon to promulgate further innovation within this restriction of protection is a consideration Courts must make subjectively yet within the walls of the statute. For example, in trade mark infringement cases (which center the narrative of this paper), even though the suit presents itself as a comparison between disputed marks, their respective establishment in the market, and technical checks such as registration and term of use, all these ideally weigh in regard to consumer perception.<sup>3</sup> The primary goal is two-pronged – first, that the consumers must be protected in an environment of potentially unfair competition; and second, that the said consumers and their comprehension of the marks will be used to escort the mark into protectable limits in case of infringement. Such an apparatus essentially draws a fabricated contour deciding where the claim for right enforcement stops seeing wherever consumer confusion ends.

This research article deals with firstly, the inherent and technical problems in ascertaining a singular standard for consumer intelligence; secondly, the judiciary's hyper-vigilance when applying the '*average intelligence*' doctrine to instances of trade mark infringement, inadvertently lowering it and thirdly, whether the adoption of this doctrine is another instance of legal paternalism being enforced and where should the line be drawn in the sand.

## II. THE COMPLEXITY IN DEFINING A SINGULAR STANDARD

This idealistic sentiment to balance public and private interests does not always translate accurately within a Courtroom when deciding a case of trade mark infringement, given certain intrinsic and statistical externalities beyond its control. When ascertaining the metrics of an infringement claim a Court is equipped with judicial officers and legal researchers, but naturally no real consumers.

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<sup>3</sup> Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 139 (2010).

The standard and likelihood of confusion are derived through legal fiction and the construction of an imagined consumer, much like the reasonable person in tort law.

The most apparent problem here is that unlike the latter, which follows a restricted spectrum based on relatively-stoic anthropological commitments and practice,<sup>4</sup> a concocted consumer demands a varied sample size for each kind of infringement claim depending on which mark represents which good or service. The Court represents this based on generally-accepted objective principles and applies it to subjective questions of fact and law. This limiting factor of perpetually abridged information leaves the possibility of inaccurate consumer awareness open in every instance. In this light, different jurisdictions adopt conspicuous standards based on factors specific to that jurisprudence, such as literacy level, population size, income disparity, and other such elements. The question with respect to how reasonable, how intelligent, or prudent this consumer may be is usually collected and compiled through these contemplations.<sup>5</sup>

To build on this with a provocation, the existence of a ‘*reasonable*’ person in trade mark law has virtually never been acknowledged.<sup>6</sup> Instead, there are bespoke standards ranging from ‘*a person of average intelligence with imperfect recollection*’ as seen in India and a ‘*reasonably prudent person*’ in international jurisprudence.<sup>7</sup> Both of these can be said to have a lower degree of intelligence than the reasonable man. Graeme Austin when differentiating the reasonable person in tort law versus a reasonably prudent person in trade mark law, describes the latter to be a proxy for real people rather than a standard for conduct.<sup>8</sup> Therefore, it is conceivable why Indian Courts, when fitting imagined counterparts for very real consumers, attempt to provide the benefit of confusion to the section of the society with cognitive abilities hindered by various socio-economic disadvantages.<sup>9</sup> However, in this ambitious legal fiction and the artificial construct of the litigation process, Courts are susceptible to be overtly focused on the evidence of infringement provided by the plaintiff.<sup>10</sup>

Therefore, once this penchant to be cautious is arrived at, there is an over-dependence on the source-identification judgement, which is essentially the goodwill and reputation of a mark

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<sup>4</sup> Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 324 (2012).

<sup>5</sup> Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313,1316 (2010).

<sup>6</sup> Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781, 784(2008).

<sup>7</sup> see The Lapp test as expounded in *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460 (3d Cir. 1983) which is used to decipher confusion in the mind of a ‘*reasonably prudent consumer*’.

<sup>8</sup> Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 832 (2004).

<sup>9</sup> William E. Gallagher & Ronald C. Goodstein, *Inference Versus Speculation in Trademark Infringement Litigation: Abandoning the Fiction of the Vulcan Mind Meld*, 94 TRADEMARK REP. 1229, 1230 (2004).

<sup>10</sup> Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 71(2008).

successfully embedded in the market; making it increasingly difficult to ascertain precise economic harm faced by the aggrieved party and inevitably, overprotection. Ironically, what is meant to be judged on the basis of consumer perception becomes the basis for this consumer perception.

Regardless, in the opinion of the authors, in asking for accuracy there is the problem of efficiency in the overburdened legal system. An in-depth analysis of the effect of a mark in relation to the goods and services it represents on every kind of consumer is neither cost-effective nor completed in a timely manner. Furthermore, changing consumer patterns and psychology in the adaptation of newer and more streamlined modes of advertisement endangers the formulation of a constitutional standard.<sup>11</sup> This rationale, however, also works to point out how a subjective analysis of each infringement case cannot be restricted to an '*unwary consumer with average intelligence and imperfect recollection*' - a standard established in the Indian judiciary since the early days of IP law evolution. The Court's tendency to prefer cautionary methods of such examination even within this doctrine provides an unrealistic portrayal of the entire consumer population in question, as there is no space for the prospect of a prudent consumer.

### III. AD HOC DEVIATIONS WITHIN THE STANDARD

Indian Courts, like most common law countries, have had strong precedents touching upon the aspect of consumer perception which (although not always categorically) cover classifications such as the age, literacy level, and economic standing of the consumer. This is equated with the ability of the good or service under a mark to perform in the market, its target audience, and its purpose. A plethora of landmark cases such as *Corn Foods* and *Amritadhabra*, as discussed in the latter portion of the paper have lengthened Section 10 of the Trade Marks Act, 1999 ("the Act"),<sup>12</sup> which speaks to the level of intelligence and mental investigations made by consumers when discerning the element of two disputing marks being 'deceptively similar'. It implies that the focus will be on the degree to which a consumer would be confused/deceived to sway away from purchasing the original mark to the infringing mark which would then deviate the potential economic gain into a different channel. When comparing the two marks in dispute, factors such as deceptiveness are calculated keeping the above-mentioned factors in mind along with intrinsic components such as the visual and phonetic similarities.<sup>13</sup>

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<sup>11</sup> Nicki Woods, *Initial Interest Confusion in Metatag Cases: The Move From Confusion to Diversion*, 22 U.C.B. L. REV. 393, 395 (2007).

<sup>12</sup> The Trade Marks Act, 1999, § 10, No. 47, Acts of Parliament, 1999 (India).

<sup>13</sup> See S.M. Dyechem Ltd. v. Cadbury (India) Ltd., (2000) 5 SCC 573 (India).

### A. Non-native Language and Phonetic Similarity

The ‘*Average Intelligence*’ test presumes the consumer to be reasonably informed with respect to their market preferences, and operates on a preconceived mental picture of products, goods and services rather than practicing a direct comparison each time before the final purchase (given habitual purchase).<sup>14</sup> However, the said lengthening of the legislative intent implies de facto discretion and subjectivity even within the ambit of phonetic and visual similarity. This attracts scope for Courts to gravitate between two extremes which might head before and beyond it often within the same category of goods. The more common dangerous extreme can be construed as the bottom barrel expectation which can dip into below-average intelligence due to the absence of perfect information, the existence of which creates inconsistencies even if the Court adopts a case-by-case analysis.

The case of *Corn Products v. Shangrila Food*,<sup>15</sup> wherein the Supreme Court was dealing with biscuits bearing the marks ‘Glucovita’ and ‘Gluvita’ comes at the forefront of being the most popularly cited case in trade mark infringement suits. It sets out tangential observations which are then latched onto, specifically applied, and elaborated. Although ranked as a strong rationale for its time, it can be argued that its establishment of the ‘*unwary consumer with average intelligence and imperfect recollection*’ test as a benchmark does not necessarily hold true in the current context. Going past the purview of the ‘*first impression*’, it focused on the phonetic similarities between the disputed marks when considered as a whole and adjusted its finding to how non-anglicised and native non-English speakers would decipher foreign words. Halting at this explanation, the standard seems nothing less than reasonable.

However, if this justification was to be applied in the present scenario with respect to the marks ‘Glucovita’ and ‘Gluvita’ as in the case, it would stipulate that consumers would be confused by the trade connection through the prefix ‘glu’ (indicative of the sugar Glucose present in both products of dissimilar descriptions). Therefore, a contrast must be made regarding confusion from the phonetic similarity between English words the consumers may be unaccustomed to, and the prefix of the scientific name for a commonly known nutrient.

By implication, the plaintiff would get a monopoly over said prefix and there would be a deterrent for manufacturers to identify with a popularly known supplement to advertise their products. The

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<sup>14</sup> *Corn Products Refining v. Shangrila Food Products Ltd.*, (1960) 1 SCR 968 (India).

<sup>15</sup> *Id.*

observation that consumers cannot differentiate between a nutrient available in perishable goods meant for consumption and hence cannot see them as competitive goods on the basis of how they might want to prescribe its consumption ages uncomfortably.<sup>16</sup> Paradoxically, an acknowledgement to this hypothesis was that there is a lack of evidence to show that a consumer would be able to distinguish between two marks demonstrating a common source, therefore a presumptuous vigilance was adopted even though neither product was pedestaled over the other.<sup>17</sup>

Corn Product's reliance on the unwary consumer's inability to familiarise themselves with foreign words and close phonetic similarity takes a rebellious turn in the case of *Amritdhara v. Satya Deo Gupta* where the disputing marks orientated and were destined for one of the most popularly recognised languages in the sub-continent.<sup>18</sup> The Supreme Court did adjust its finding to incorporate the larger portion of the target audience belonging to economically backward classes but did so within the scope of an unwary consumer with average intelligence. The application of this standard, when decorated with leading adjectives implying the consumers to be relatively more imprudent than the 'unwary consumer', pulls down the standard while the Court expressly exerts to stay in its bounds. Even with the acknowledgement that this audience would be familiarised with lore (in connection with the meaning of the marks), the Apex Court held that they would not be able to distinguish between the marks 'Amritdhara' and 'Lakshmandhara' as goods falling within the same description given phonetic similarities and held them to be deceptively confusing.

Another landmark case *Cadila Healthcare v. Cadila Pharmaceutical Ltd*,<sup>19</sup> represents the adamant cautionary approach the Indian Courts take based on insufficient information, especially in the event of pharmaceutical products. The Supreme Court laid down the elements Courts need to consider when ascertaining '*deceptive similarity*' in cases of passing off,<sup>20</sup> which in this instance were pharmaceutical products with marks containing the prefix 'Falci' (for treating Falcipharam Malaria). Although the Supreme Court directed a sensible consideration in including the level of care and intelligence used by the consumer when purchasing the goods and services in question, the final decision echoed the overarching intent of hyper-consumer protection by presuming that

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<sup>16</sup> *Supra* note 14..

<sup>17</sup> *But cf.* Recently, in the case of *Sun Pharma v. Hetero Healthcare*, 2022 LiveLaw (Del) 823, the Delhi High Court held that common salt names cannot be granted protection. However, it is essential for courts to distinguish that rationale from corn products to limit its effect in confusing phonetic similarities between English words, and not nutrients.

<sup>18</sup> *Amritdhara Pharmacy v. Satyadeo Gupta*, AIR 1963 SC 449 (India).

<sup>19</sup> *Cadilla Health Care v Cadilla Pharmaceutical Ltd.*, (2001) 5 SCC 73 (India).

<sup>20</sup> *Id.*, at 35.

there will in all likeliness be discrepancies in the production to consumer channels.<sup>21</sup> On this basis, it was held that such a degree of phonetic similarity between the products would be detrimental and would cause confusion within the field. Cadila's precedent, although on paper focused on consumer protection, limits the buyer-to-consumer passage between the production company and the consumers on the assumption that every variable in the median would be negligent. This leaves the question of consumer-based consideration moot. The inference drawn from this analysis speaks for the consumer without consulting them, resulting in innate confusion beyond their control or judgement.

### B. The Inherent Fallacy Within the Initial Interest Doctrine

These cases form the basis of almost all trade mark infringement cases being the Supreme Court's initial encounters with the subject matter, however, what is inherited as the primary decision and obiter is a lethargic interpretation of the '*average intelligence*' standard. Although always a bane arising with the legislative promise to the individualised practice approach, targeted phraseology and insinuations can allow the standard to fall below that of an unwary consumer, which is then perpetuated into present-day suits. In order to gain more clarity on the inconsistent methodology taken up by Courts in the aforementioned ascertainment/conclusions, the analysis has to be dissected on the basis of the Court's inherent over-dependence on the Initial Interest Doctrine ("IID") and trade mark dilution dichotomy arising between trade mark infringement via unrelated goods.<sup>22</sup>

Ironically, many of the tools a Court uses to render a subjective analysis of an average consumer are highly impartial towards the altering consumer cognizance. One such tool is the IID, which operates within the initial and momentary interest the consumer portrays toward a product falsely presented to be represented with the mark they set out to purchase.<sup>23</sup> An essential factor attributing to the miscalculation within the IID is present in the plaint and primary arguments, where (due to precedent or otherwise), the consumer of the goods and/or services are presented as an extension of the aggrieved party, just as inconvenienced with the deception at hand. This is enhanced when the allegedly infringing competitive product is priced relatively lower than the counterpart holding the trade mark registration, playing directly into the economic losses accounted for.

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<sup>21</sup> *Id.*, at 32.

<sup>22</sup> Andrew Martineau, *Imagined Consumers: How Judicial Assumptions about the American Consumer Impact Trademark Rights, for Better and for Worse*, 22 DEPAUL J. ART TECH. & INTELL. PROP. L. 337, 342 (2012).

<sup>23</sup> Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 768 (2004).

The recent case of *Mondelez Foods v. Neeraj Foods* is an appropriate example of the same where the disputed marks pertained to competing confectionery products under the marks ‘Gems’ and ‘James Bond’.<sup>24</sup> The Court followed the intelligence test established in *Corn Products*<sup>25</sup> and followed the IID elaborated in *Parle Products v. J.P.* as illustrated below.<sup>26</sup>

“...The aspect of ‘initial interest’ was explained by this Court in *Baker Hughes Limited v. Hiroo Khushalani* as under:

*“In some cases, however, it is also possible that such a purchaser after having been misled into an initial interest in a product manufactured by an imitator discovers his folly, but this initial interest being based on confusion and deception can give rise to a cause of action for the tort of passing off as the purchaser has been made to think that there is some connection or nexus between the products and business of two disparate companies.”*<sup>27</sup>

The consequence of being contingent on this doctrine is that if the product was not ultimately purchased it has been entirely disregarded by Courts in this dialogue. The first instance of deviation is that the IID is prejudiced to believe that any initial interest is likely to cause confusion. Nevertheless, if it is assumed that there was a purchase, the biggest drawback in its application to lost sales is that it does not concern itself with whether the consumer (upon the realisation of the difference) made the executive decision to obtain the product in lieu of the original one. The possibility that the initial confusion is dispelled before the purchase is actually made is impossible to account for empirically, and hence, is disconnected from the consumer purchasing experience.<sup>28</sup> Instead, there is a robotic assumption that there was in fact, confusion in the mind of the consumer as they carry the product home leading to expectations traced back only to the brand claiming protection, instead of an expectation of competition.<sup>29</sup> Therefore, the blanket protection on a rendition of accounts under which all economic loss is calculated is never fully accurate, yet, heavily relied on.

Furthermore, the Courts in taking the liberty to decide on behalf of a consumer what can constitute ‘likelihood’ inadvertently advance the discourse that IP rights exist and dissolve within said

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<sup>24</sup> Mondelez India Foods Pvt. Ltd. v. Neeraj Food Products, 2022 SCC OnLine Del 2199 (Del.).

<sup>25</sup> *Supra* note 14.

<sup>26</sup> Parle Products (P) Ltd. v. J.P. & Co., Mysore, (1972) 1 SCC 618(India).

<sup>27</sup> *Supra* note 24.

<sup>28</sup> See generally LEMLEY & MCKENNA, *supra* note 3, at 151.

<sup>29</sup> MARTINEAU, *supra* note 22.

consumer's mind.<sup>30</sup> This dangerous designation can be explained with the help of a 'trademark feedback loop', where these rights can extend beyond the breadth of the statute.<sup>31</sup> Here, a consumer's confusion about what might be a case of infringement or passing off is not controlled by the limits and considerations that the Court is wary of in its investigation.<sup>32</sup> In fact, the cycle of highly publicized media trials based on the aforementioned ingredients of confusion continuously expand these rights in communal discernment. At the same time, this perspicacity of what the consumer conceives to be rights is created within the Courtroom creating an uncomfortable cycle. Accompanied by the IID, such a permeable principle used for the likelihood of confusion would surpass the economic element fundamental to IP right perception and disregard whether or not an actual purchase was made, as can be seen in all cases following Parle.<sup>33</sup>

As there is no mechanism to grasp the volume of the same, the insignificant and momentary loss felt by a consumer perpetrated by the IID cannot correspond with harm which has to be remedied by a cause of action for passing off. This is because the concessions made by Courts to accommodate the same, shift the narrative outside of consumer protection and that of brand goodwill based on the imprecise computation of a potentiality of a diverted consumer.<sup>34</sup>

Whenever there have been efforts to neutralise the standard of a consumer's intelligence and perceptive abilities to be directly equated to the nature of the goods sold, there is an inevitable presumed inconsistency in said perceptive abilities that pushes Courts to take the safety umbrella of 'likelihood of deception'.<sup>35</sup> Under this, an imagined consumer is given the benefit of the doubt as soon as there is scope for such deception instead of using a reductionist mechanism.<sup>36</sup> This scope takes for granted the margin between a 'possibility' and 'likelihood' leaving any additional calculation of the same disposable. The continuance of an 'unwary consumer' existing in Courtrooms since the 1960s subsides the incentive to circumvent maneuvering outside the bounds of this waning archetype. Furthermore, it promotes nestling into the comfortable sequence of an established understanding of 'once upon a time' consumer behavior calling for the standard to be lower and lower.

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<sup>30</sup> Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L.REV. 2020, 2021 (2005).

<sup>31</sup> James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 907 (2007).

<sup>32</sup> MARTINEAU, *supra* note 22, at 339

<sup>33</sup> *Supra* note 24.

<sup>34</sup> GRYNBERG, *supra* note 10, at 84.

<sup>35</sup> See Generally, ITC Limited v. CG Foods (India) Private Limited, 2021 SCC OnLine MP 1906..

<sup>36</sup> Barton Beebe, *An Empirical Study of The Multifactor Tests For Trademark Infringement*, 94 Cal L Rev 1581,1601(2006).

Under this ad-hoc gamut of consumer protection, which is assembled out of hypothecation, the emphasis inevitably veers to the overprotection of IP. In other words, when the standard of confusion is then applied, stagnating in precision from precedent to precedent, it becomes a war of words initiated by trade mark proprietors aiming to encash the highest sum out of the ever-extending ambit of ‘likelihood’.<sup>37</sup> This amalgamation of imperfectly flexible factors based on concocted consumers and limitless discretion not averse to outcome-oriented manipulations can result in monopolies and consumer complacency. It can also not be discounted that within the group of consumers exist future innovators and entrepreneurs hit twice by this overprotection: lack of ‘choice’ in terms of competition and then a fence in entering a particular market as then the litigation becomes a battle between well-known brands. There exists a dichotomy between the need for a regulatory framework favouring consumers versus its rendition as an interventionist approach ultimately favouring corporations. Therefore, the material question in this juncture is whether there is still need for such rampant legal paternalism or if the stage of the prudent and informed consumer can be reached.

#### IV. LEGAL PATERNALISM

The concept of legal paternalism, a branch of the philosophical principle of paternalism, refers to judicial interference to protect the State and its citizens from harm.<sup>38</sup> Derived from the Latin word ‘pater’, meaning ‘father’, the concept legitimises the system by adopting a parent-esque defensive shield by imposing restrictions or mandating certain acts to maintain a state of lawfulness.<sup>39</sup> The driving force behind the adoption of paternalism as a jurisprudential or philosophical concept is simple- whether a person would be in a secure place if a certain action is taken.

This abstraction requires the paper to return to the Utilitarian flavour of paternalism officiated between the likes of John Stuart Mill, in his essay ‘On Liberty’ and Gerald Dworkin, in his work ‘Morality and the Law’.<sup>40</sup> Mill, stated that there can never arise a situation where a paternalistic action would result in the greatest good of the greatest number. According to Mill, no individual is equipped or has the faculties to take such a decision which would protect a majority of the

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<sup>37</sup> Thomas R. Lee, Glenn L. Christensen & Eric D. DeRosia, *Trademarks, Consumer Psychology, and the Sophisticated Consumer*, 57 EMORY L.J. 575, 580 (2008).

<sup>38</sup> Joel Feinberg, *Legal Paternalism*, 1 CANADIAN J. OF PHIL. 105,110 (1971).

<sup>39</sup> Natasha Treasurywala, *Legal Paternalism: The Indian Context*, 4 L.R. GLC 75, 80 (2005).

<sup>40</sup> Ravi Shekhar Bhardwaj v. Director General of Police, 2003 SCC OnLine Bom 663 (Bom.).

population, as there will always exist a minority who would bear the brunt of such actions.<sup>41</sup> Dworkin, on the other hand, has justified the adoption of legal paternalism as a principle upon the satisfaction of two conditions- when the action would defend against an irrational propensity, and when the intervention is restricted to a far-reaching and irreversible decision.<sup>42</sup>

As has been previously discussed extensively, Courts have been known to adopt a parent-esque defensive shield, like the one propagated by the principle of legal paternalism when it comes to the application of mind for determining what amounts to trade mark infringement. At the time of granting either interim or permanent injunctions vis-a-vis trade mark infringement, the Courts apply the principles enshrined in the Code of Civil Procedure, 1908, the most notable being in whose favour does the balance of convenience tilt by the mala fide act. This is where Mill's critique of paternalism falls flat, as it is not only the potential harm which could be caused to the plaintiff but also the sensibilities of the public and members of trade, or to put it in Mills' words, the greatest good of the greatest number is taken into account. Traditionally, this balance is created by considering the test of average intelligence and imperfect recollection, repeatedly upheld by Courts repeatedly. As has been elaborated herein-above, this test seems to falter in modern times.

#### **A. How this Paternalism has been Incorporated into the Indian IP Framework**

Indian legislation has always been a result of statutory interpretation reflective of the times be it the adoption of pre-existing British codes with a hint of Indian morality at the time of independence to re-working commercial and civil laws to be following international trade conventions such as TRIPS,<sup>43</sup> the UNCITRAL Model Codes as also hopefully, the GDPR. The adoption of legal paternalism in India may not be literal, but the harmonious interpretation of commercial and civil laws is tangled with the deep-rooted ideology of paternalism.<sup>44</sup> The repeal of the Trade and Merchandise Marks Act, 1958,<sup>45</sup> (the interpretation of which birthed the 'average intelligence' test as propagated in Corn Products and Amitdhara Pharmacy) and its replacement by the 1999 Act, somehow did not result in an evolved standard being adopted by the Courts for determining trade mark infringement, with the Supreme Court precedents still being cited as the law.

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<sup>41</sup> TREASURYWALA, *supra* note 39, at 77.

<sup>42</sup> Gerald Dworkin, *Paternalism*, 56 THE MONOIST 64, 67 (1972).

<sup>43</sup> TRIPS, *supra* note 2.

<sup>44</sup> Chhatrapati Singh, *The Ideological Roots of Legal Paternalism in India*, 24 JILI 84, 85 (1982).

<sup>45</sup> The Trade and Merchandise Marks Act, 1958, No. 43, Acts of Parliament, 1958 (India).

Often, legal paternalism has been criticised on the grounds that it comes in direct conflict with the freedom of choice, which forms an integral part of one's fundamental right to life.<sup>46</sup> The adoption of legal paternalism often blurs the line. *Caveat Emptor*, a common law doctrine, puts the onus on the consumer to apply due care and diligence prior to purchasing a good or availing a service.<sup>47</sup> In direct line with one's freedom to choose, the exercise of overarching restraining powers by the Courts in determining cases of infringement is a classic example of paternalism. Despite there not being a moral element attached to trade mark infringement, the adoption of a test as basic as 'average intelligence and imperfect recollection' does take heed of the maturing national literacy rates. The 2011 Census recorded the average literacy rate of India to be 74.04%- with it ranging from 93% in the state of Kerala to 42% in the state of Bihar.<sup>48</sup> This, coupled with widespread internet penetration, makes the world available at one's fingertips. In fact, about 87% of Indian households are expected to have internet coverage by the year 2025.<sup>49</sup> The broadening of horizons with regard to the goods and services available makes it a fit case for application of *caveat emptor* to trade mark law as well. Courts have time and again also laid emphasis on the principle of transborder reputation, albeit the standard being raised from the ruling in *NR Dongre v. Whirlpool Corporation*<sup>50</sup> to *Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Ltd.*<sup>51</sup> The exercise of permitting international entities to claim trade mark protection in the country solely on the basis of transborder presence makes the application of average intelligence of an unwary consumer redundant, as the two cannot exist in vacuum.

In the case of *Delhivery Private Limited v. Treasure Vase Ventures Private Limited*,<sup>52</sup> the settled position of law was reiterated- the class of persons to whom a service is rendered would be a relevant consideration to determine whether two trademarks are deceptively similar. This results in an anomaly being created in the tests being applied as it emits an entirely novel proposition- can there exist differing standards for ascertaining infringement when the mark is adopted for a good and/or for service? Section 2(1)(j) of the Act defines a good as 'anything which is the subject of trade or manufacture',<sup>53</sup> while Section 2(1)(z) of the Act defines a service as 'service of any description

<sup>46</sup> Navtej Singh Johar&Ors v. Union of India, (2018) 10 SCC 1 (India).

<sup>47</sup> Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 THE YALE L.J. 1133, 1136 (1931).

<sup>48</sup> C. Chandramouli, *The Census 2011*, 15 NCS. COI, available at <https://www.census2011.co.in>.

<sup>49</sup> Bhavya Dilipkumar, *India Will Witness Significant Increase in Frequency and Duration of Internet Access: Study*, TEC.TECH.(Apr. 26, 2022), available at <https://economictimes.indiatimes.com/tech/technology/india-will-witness-significant-increase-in-frequency-and-duration-of-internet-access-study>.

<sup>50</sup> NR Dongre v. Whirlpool Corporation, (1996) 5 SCC 714 (India).

<sup>51</sup> Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Ltd.,(2018) 2 SCC 1 (India).

<sup>52</sup> Delhivery Private Limited v. Treasure Vase Ventures Private Limited,(2021) 278 DLT 485 (India).

<sup>53</sup> The Trade Marks Act, 1999, § 2(1)(z), No. 47 Acts of Parliament, 1999 (India).

which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising'.<sup>54</sup> As the Act makes a clear distinction between a good and a service but at the same time provides equal footing to goods and services, the idea of classism being the basis for the determination of infringement does not sit right. If the class is to act as the basis for determining infringement it would be unfit to ignore the nature of the goods from this parley.

Another area adding complexities to the discourse is where the Court and a legal practitioner's experience as consumers are in direct conflict with one another. The conclusions of practitioners as to whether there is a likelihood of confusion in any given case is at best only an inference as to the future probability that an appreciable number of others, in this case, being the relevant consumers, will experience confusion in actual marketplace circumstances. In order to reach this dispositive inference from the evidence presented, the Court draws underlying inferences that are categorised according to one of the traditional multifactor inquiries. Certainly, the goal of traditional inquiries is to focus on circumstantial evidence that may support such underlying inferences and, thereby, make the analysis objective.<sup>55</sup>

## B. Striking a Delicate Balance

Nonetheless, the purpose of this article is not to push the present discussion into the periphery of what the realistic standard of intelligence ought to be, nor would it be fair to haphazardly hold the Indian population to the intelligence standard of a developed nation. There continue to exist limitations both in economic and sociological dissimilitude which should not be expected to meet an ambitiously higher standard without the State's positive obligations to erase such differences. For example, extensive empirical research in the United States of America, conducted by Professors Barton Beebe and Jeanne Fromer, states that with the passage of time- frequently-used English words, common American surnames and pronounceable neologisms have all been recent subjects of being accorded exclusive protection under trade mark law.<sup>56</sup> Such broad allowances

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<sup>54</sup> *Id.*

<sup>55</sup> Ronald Goldstein, *Inference Versus Speculation in Trademark Infringement Litigation: Abandoning the Fiction of the Vulcan Mind Meld*, 94 TMR 1229,1232 (2004).

<sup>56</sup> Daniel J. Hemel and Lisa Larrimore Ouellette, *Trademark Law Pluralism*, 88 U. CHI. L. REV. 1025,1026 (2021).

which are difficult to account for in the Indian context act as overzealous leeways to corporations due to a large majority of the population's unfamiliarity with the language. At the same time, an immediate bar on the same would underplay the developments in consumer perception, and the efforts of a brand to establish themselves as a strong player in the market.

In this regard, due credit must be given to the Act wherein Section 9 of the Act absolutely prohibits the registration of a trade mark which is devoid of any distinctive character. A Single Bench of the High Court of Delhi in *Vijay Kumar Ahuja v. Lalita Ahuja*<sup>57</sup> held that when a trade mark is a common English dictionary word, neither party has a proprietary right over the mark unless significant secondary meaning can be shown to have been acquired in the mark. Sections 9 and 11 of the Act state the absolute and relative grounds for prohibition of registration of a trade mark,<sup>58</sup> and Section 29 of the Act lists a detailed check-list of what would amount to infringement.<sup>59</sup> Being non-native English speakers, the far-sightedness of the Act coupled with the test of 'average intelligence' does come in handy at the time of Courts ascertaining infringement, which in the opinion of the authors would amount to a fair adoption of the test. Furthermore, the analytical inquiry done by the Court includes consumer consciousness pacing beyond the open-ended protection given to the plaintiffs in the Corn Products case.

There appears to be a tussle between the Legislature and the Judiciary in drawing the line separating consumer protection and promoting consumer awareness. One could argue that the Directive Principles of State Policy ('DPSPs'), enumerated in Part IV of the Constitution of India,<sup>60</sup> are the touchstone for paternalistic standards to be maintained. The DPSPs, though fundamental to the governance of our country, cannot be legally enforced before a Court of law in the event of a violation. This raises a pertinent question: does the adoption of paternalistic standards by our Courts, in protecting the interests of consumers, amount to the line between the legislature and the judiciary being blurred?

Behavioural Economics plays a critical role in shaping consumer preferences, with product quality being the last thing on a consumer's mind at the time of purchasing goods off the counters of a store. A cross between economics and the law, behavioural economics studies the errors even the most intelligent consumers could be making, and how it becomes a duty to offer protection to the

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<sup>57</sup> *Vijay Kumar Ahuja v. Lalita Ahuja*, (2002) 95 DLT 3 (India).

<sup>58</sup> The Trade Marks Act, 1999, §§ 9,11, No. 47, Acts of Parliament, 1999, (India).

<sup>59</sup> *Id* at § 29.

<sup>60</sup> INDIAN CONST. art. 36-51.

consumers.<sup>61</sup> It is the latest deals on e-commerce platforms which influence the purchasing habits of an online shopper, particularly when the pictures must suffice. A trade mark, under Section 2(1)(zb) of the Act, is defined as ‘a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.’ The definition makes the economic role of a trade mark very clear; it acts as an indicator of the source of where the goods and/or services originate. By according trade mark protection, we are not only recognising the intellectual right in a name, shape, packaging, or combination of colours but also adding to the brand value of goods and/or services. The idea of offering protection to intellectual property is an application of John Locke’s ‘Labour Theory of Intellectual Property’- exclusive rights over what has been created.<sup>62</sup> But as a result of this protection, it’s the ‘brand’ we end up granting protection to. The Courts are tasked with considering the eventualities of how the misuse of a registered trade mark to sell goods or offer services which are sub-standard; how an unwary consumer with average intelligence and imperfect recollection could purchase the wrong product. But as mentioned herein-above, the maintenance of paternalistic standards is not enforceable by the judiciary; the State is obligated to enforce these.

The enactment of the Consumer Protection Act, 2019,<sup>63</sup> the Food and Safety Standards Act, 2006 and the subsequent regulations under the same are some laws to maintain the integrity of the quality of goods available in the marketplace.<sup>64</sup> These legislations apart from consumer awareness programs were implemented with the hope of increasing vigilance vis-à-vis the quality of goods which are to be sold under brand names. In times where the legislature has taken active steps towards adopting a paternalistic stand, as was sought in the DPSPs enshrined in the Constitution of India, the question we are left to consider is whether the judiciary is ought to consider a rudimentary standard to enforce any consumer protection law when this might not even be their duty in the first place.

## V. CONCLUSION

For a purely academic exercise, this paper has confined itself to brick-and-mortar stores and very vaguely dealt with digital markets- as is the case one can see in Courts. Evidence of goods being sold online, or e-services being provided act as secondary evidence, with primary focus being laid

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<sup>61</sup> Stacey Dogan, *Bounded Rationality, Paternalism and Trademark Law*, 56 HOUSTON L. REV. 270, 274 (2018).

<sup>62</sup> Tarun Krishnakumar, ‘All Your Intellectual Property are Belong to us’: How Copyright and Patent ‘Trolls’ are Questioning the Jurisprudential Foundations of Treating Intellectual Property as ‘Property’, 9 IJIP 179, 183 (2018).

<sup>63</sup> The Consumer Protection Act, 2019, No. 35, Acts of Parliament, 2019 (India).

<sup>64</sup> The Food and Safety Standards Act, 2006, No. 34, Acts of Parliament, 2006 (India).

on products available over the counter. The COVID-19 pandemic, as also the overall convenience of shopping online has resulted in the colossal expansion of the e-commerce market space in India. The broadening of the definition of a '*market*', and as a result, of a '*consumer*' is only going to make the application of the test of '*average intelligence and imperfect recollection*' more and more difficult. It is time that with spreading awareness, the onus is shifted on the consumers or to pierce the veil of '*likelihood of confusion*' with actual confusion.

Through the course of this paper, the authors have reflected upon the well-meaning, albeit overarching role our Courts have adopted from their inception till today in protecting consumer interests at the time of granting relief in trade mark suits. However, in the opinion of the authors, the Courts also fail to take into account catalysts such as advertising across media and factors such as cost of the goods and/or services which play a critical role in influencing purchase choices. In the 21st century, the Courts are worried about policing the decisions made by hypothetical '*unwary consumers*' considering the dominant monopolistic competition at play, unwittingly stimulating the same. In summation, the authors believe that Indian Courts ought to exercise due caution in the application of this test at the time of determining instances of infringement, as repeated application of a redundant doctrine makes it all the less effective.