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Sophistication, Bridging the Gap, and the Likelihood of Confusion: An Empirical and Theoretical Analysis

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DEDICATION

GEORGE WILSON COOPER

1927-2008

Cervantes wrote, "There is a strange charm in the thoughts of a good legacy ... which wondrously removes or at least alleviates the sorrow that men would otherwise feel for the death of friends." George Cooper leaves behind a legacy of dedication to the international fraternity of trademark law and service to the International Trademark Association that is irreplaceable. His engaging and warm personality will be greatly missed by many.

George graduated from Columbia College in 1947 and from the Columbia Law School in 1950. He was an early specialist in international corporate and intellectual property law. George received early international training from the late Stephen P. Ladas while George was as an associate of Langner Parry. He later worked with the law firm of Pennie & Edmonds in New York. In 1960, he joined Avon Products, Inc., as its first international attorney. George advanced at Avon Products to the position of Corporate Vice-President, and he headed their international legal department until his retirement from Avon Products in 1979. He then returned to private practice at the firm of Grimes & Battersby in Connecticut, where he remained until his retirement in 2001.

George was active at INTA for decades, and his good service to the Association has left a legacy of excellence. While at Avon Products, George was a member of the Board of Directors of INTA. He also served as the Chair of INTA's International Committee and he personally represented INTA at two meetings of the World Intellectual Property Organization. In 1993, with Charlotte Jones, the Managing Editor of The Trademark Reporter, George assembled and edited the first issue of TMR’s popular International Annual Review of Trademark Jurisprudence. George also was an editor of The Trademark Reporter for many years, and during his tenure at TMR he identified and solicited many international trademark articles of special note.

George was truly a renaissance man whose winning personality, and his countless dear friendships throughout the world, clearly distinguished George from his peers.

George is survived by his wife Isolde, his sons Daniel and Richard, his daughter Julia, and several grandchildren.

_Ted Max, former Editor-in-Chief_
EDITOR'S NOTE

On January 3, 2008, the International Trademark Association hosted the Fourth Learned Professors’ Trademark Symposium in New York, NY, at the Offices of DLA Piper US LLP. This year the Symposium topic was “An Interdisciplinary Perspective on the Likelihood of Confusion.” The program was designed to provide an academic perspective on likelihood of confusion issues for professors of trademark law, for jurists who hear and decide important cases dealing with the likelihood of confusion and with novel legal arguments relating thereto, and for legal practitioners who specialize in trademark law and who wanted to enhance their knowledge of likelihood of confusion issues.

The 2008 Symposium examined the judicial factors that are utilized in the federal courts to assess the likelihood of confusion, and how tools and insights drawn from legal scholars and social scientists can inform and transform the law of likelihood of confusion, which expressly depends on assumptions about consumer psychology and behavior.

The Trademark Reporter is pleased to publish in this issue the 2008 Symposium articles presented by Thomas R. Lee, Professor of Law, Brigham Young University, and Ng-Loy Wee Loon, Faculty of Law, National University of Singapore.

Cliff Browning, Editor-in-Chief
AN INTERDISCIPLINARY PERSPECTIVE ON THE LIKELIHOOD OF CONFUSION: CONSUMER PSYCHOLOGY AND TRADEMARKS IN AN ASIAN SOCIETY

By Wee Loon Ng-Loy

I. INTRODUCTION

One of the themes of the Fourth Learned Professors Trademark Symposium was to explore whether, and to what extent, social science studies on consumer psychology and behavior support the assumptions underlying the court’s inquiry into the likelihood of confusion in trademark law. In this inquiry, one of the factors that the U.S. courts consider is the “sophistication of the consumer”:¹ the more sophisticated the consumer, the more care he will exercise in his search and purchasing decisions, and hence the less likely he will be confused as to the source or sponsorship of the goods or services he is buying. In this sense, the scope of trademark protection is inversely related to the law’s estimation of the sophistication of the consumers of the goods or services in question.² This prediction, according to the studies made by Professors Lee, Christensen and DeRosia, is supported by consumer psychology theory.³ To these professors, the key question becomes: How should the court distinguish between the sophisticated, careful consumer and the unthinking, credulous one? To this end, they developed a “consumer behavior model of sophistication” that identifies the various factors impacting the degree of care that consumers would exercise in their purchasing decisions. These factors are grouped into the categories of

¹ This is the eighth factor listed in Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961).
“motivation” to exercise consumer care or the “ability” to exercise consumer care. The professors also used this model to explain the inter-relationship between the two categories of factors: a sophisticated consumer is one who has both the motivation and the ability to exercise a high degree of consumer care. Therefore, a consumer who scores very high on the “motivation” factors but very low on the “ability” factors may not exercise that high of a degree of consumer care. The aim is that, through this model, courts, in making their findings, will move away from an ad hoc assessment of consumer care that relies too much on stereotyping toward the realities of consumer behavior.

This paper will examine if the likelihood of confusion in Asian case law supports the Lee-Christensen-DeRosia model. The author chose to analyze Singapore for several reasons. First, the population in Singapore is not homogeneous as in Japan or China. While most of the people residing in Singapore are Asian, there is nonetheless a rather cosmopolitan flavor within this society. According to the latest population census done in 2000, of the 4 million people in Singapore, 76.8 percent are Chinese (their ancestors being migrants from China), 13.9 percent are Malay (their ancestors being the indigenous people of the Singapore area or migrants from Indonesia) and 7.9 percent are Indian (their ancestors being migrants from Bangladesh, India, Pakistan, or Sri Lanka). This make-up in its population means that different languages are used for communication within Singapore. In fact, there are four official languages in Singapore: Mandarin, Malay, Tamil, and English. The situation is further complicated by the fact that different dialects were used by those within the same ethnic group (and, to some extent, they still are). For example, the dialects amongst the Chinese include Cantonese, Hokkien, and Teochew. The scene in Singapore thus presents a good case study for testing the impact on the level of sophistication possessed by the consumer in a multi-ethnic Asian society when encountering English brands and trademarks.

Second, Singapore has made a very rapid transition from Third World to First World in the past 44 years of its nationhood. In 1965, the GNI per capita of the newly independent Singapore


5. See Singapore Census Population 2000 (Singapore Department of Statistics 2001). The remaining 1.4 percent of the population is made up of “Others,” which include Eurasians, Caucasians and Arabs.

6. See Singapore Census Population 2000 (Singapore Department of Statistics 2001), and in particular, the survey on the extent to which Chinese dialects were spoken at home.
was a mere US $529. Today, Singapore’s GNI per capita of US $28,852 qualifies it as one of the World Bank’s “high income” countries.\(^7\) The Singapore experience presents a model for testing whether income levels and the rise of consumerism in a country are relevant factors in determining the level of consumer sophistication.

For a study of these issues, this author has undertaken a review of all the reported trademark cases from Singapore courts, including those decided when Singapore was still a British colony. The first reported trademark case was in 1887.\(^8\) Between 1887 and 2007, there were 51 trademark cases in which the court made a finding on the question of confusion.\(^9\) This may seem like an unreasonably small number of cases for so long a period. However, one must not forget that Singapore had only 1.9 million people at the start of its nationhood, and even in 2008 its population is but 4.6 million. Further, this small number of cases is not unusual for an Asian society where people tend to seek non-litigious means to resolve their disputes.\(^10\)

To put the findings of likelihood of confusion in these 51 trademark cases in context, Part II will set out the general legal

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7. Countries in the World Bank’s list of “high income” must have a 2006 GNI per capita of US $11,116 or more.

8. Fraser & Co. v. Nethersole [1885-1890] 4 Ky 269. This was a decision of the Supreme Court of the Straits Settlement. The Straits Settlement comprised three of the British territories in Southeast Asia, namely, Malacca, Penang and Singapore.

9. This number excludes those cases that are interlocutory in nature, that is, in applications for summary judgment or interim injunctions. This number also excludes cases involving “parallel imports” (known as “grey goods” in the United States) and cases on “reverse passing off” or “inverse passing off” (which is known in the United States as “reverse confusion”). Parallel importation cases are excluded from this study because the courts in these cases are not concerned about a typical fight between a senior mark and a junior mark. These cases are about the senior mark owner trying to stop the defendant from importing the senior mark owner’s goods into Singapore. The “reverse passing off” cases are excluded from this study because the “reverse passing off” doctrine does not, strictly speaking, fit well within the traditional boundaries of trademark law and its requirement for confusion. See generally Gerald Dworkin, Unfair Competition: Is it Time for European Harmonisation? in Intellectual Property Rights: Critical Concepts in Law Volume IV (Vaver & Bently, eds.) (2006). In the United States, the criticism of “reverse confusion” has been expressed in this way: “reverse confusion” is not that “the public may wrongly believe that the defendant makes or sponsors the plaintiff’s product, but simply [that] the public wrongly believes that the plaintiff copied the defendant’s name,” and hence “reverse confusion” introduces into trademark law the concept of an actionable harm of “falsely being thought a pirate.” DeCosta v. Viacom Int’l, Inc., 981 F.2d 602, 609-10 (J. Breyer) (1st Cir. 1992).

10. For example, in one trademark where the question of confusion was an issue, the court decided against granting summary judgment in favor of the plaintiff so that the inquiry into confusion could be properly made at a full trial. This case, however, was settled very soon after the court’s decision. This settlement was the result of mediation efforts by the trade association of which both the plaintiff and the defendant were members. See Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd. v. Fragrance Foodstuff Pte Ltd. [2003] 1 S.L.R. 305, and the report of the settlement in the news article, Rival Companies Settle Trademark Dispute Out of Court, Streats, April 17, 2003, at 14.
principles that Singapore courts apply in this inquiry. In particular, it will look at the various factors that the courts look to when assessing if confusion is likely to occur. It will also look at how the courts have responded to attempts by owners of senior marks to create what may be called “presumptions of confusion” based on one or more of the factors.

Part III will focus on the factor known in Singapore as the “nature of the purchasing public.” This is where the court is looking at whether the consumer will exercise a high or low standard of care. This factor is the Singapore equivalent of the American concept of “consumer sophistication.” The aim of this Part is to identify, from the 51 cases under review, the attributes of the consumer in Singapore and to compare these attributes to the factors in the Lee-Christensen-DeRosia model of consumer behavior. More specifically, it will study the impact of the literacy rate in the English language, and the country’s economic stage of development, on the level of consumer sophistication.

The conclusion in Part IV includes a warning about the artificiality of a study of this nature. We are embarking on this exercise on the assumption that trademark protection is concerned with what is happening, or is likely to happen, in the marketplace. The premise therefore is that a court’s finding on confusion should not be “disconnected” from how the consumer behaves and responds in the real world. This assumption, however, needs re-examination because in truth, there may be other considerations at play in trademark law.

II. LEGAL PRINCIPLES GOVERNING THE INQUIRY FOR CONFUSION IN SINGAPORE

It is a well-established principle that the confusion inquiry in trademark cases is a question of fact to be determined by the court “in the light of evidence of surrounding circumstances.”\(^\text{11}\) Factual assessments invariably involve some amount of subjectivity on the part of the assessor. This has been openly acknowledged by the Singapore courts hearing trademark cases. Thus, it has been said that the inquiry for confusion is “more a matter of feel than of science,”\(^\text{12}\) and that “the whole question of confusion is one of


\(^{12}\) Wagamama Ltd. v. City Centre Restaurants Plc [1995] F.S.R. 713 at 732. The observation by Justice Laddie in this English case was cited with approval by the Singapore Court of Appeal in The Polo/Lauren Co. LP v. Shop-In Dep't Store Pte Ltd. [2006] 2 S.L.R. 690 at [35], and in Future Enters. Pte Ltd. v. McDonald's Corp. [2007] 2 S.L.R. 845 at [7]. Justice Laddie even went so far as to acknowledge that “a judge brings to the assessment of marks his own, perhaps idiosyncratic, pronunciation and view and understanding of them” (Wagamama, [1995] F.S.R. at 732).
perception.”

One court has even gone so far as to accept that “it is not always possible to reconcile all the [trademark] cases” because each judge decides on the facts before him and this sometimes gives rise to different outcomes. The subjective nature of this inquiry also means that an appellate court would not disturb the findings of fact of a trademark tribunal unless there is a material error of principle.

It is precisely to reduce the amount of subjectivity involved in this inquiry that judges in Singapore have devised a list of what they call “objective factors” to aid them in this task, all of which must be “balanced in as commonsensical and as fair a manner as possible.” These “objective factors” include the following:

(i) Degree of similarity between the marks;

(ii) proximity of the goods or services in question;

(iii) defendant’s intention in adopting the mark (whether there was intention to deceive or confuse the consumers);


15. Future Enters. Pte Ltd. v. McDonald’s Corp. [2007] 2 S.L.R. 845 at [7].


17. Some of the legal principles governing how the courts should make this assessment on similarity between the marks are as follows. First, the comparison of the marks should be for visual, aural and conceptual similarities (Richmont Int’l SA v. Goldlion Enter. (Singapore) Pte Ltd. [2006] 1 S.L.R. 401 at [8], where the marks BAUME & MERCIER and JEAN MERCIER were found to be dissimilar). Second, the marks should not be compared side-by-side and examined in detail because the consumer often makes the comparison from memory removed in time and space from the marks (Caterpillar Inc. v. Ong Eng Peng [2006] 2 S.L.R. 669 at [55], where the marks CAT and CATPLUS were found to be similar). Third, when comparing the marks for aural similarity, a teacher of elocution is not the reference point and the court must make allowances for imperfect recollection and careless pronunciation and speech (Future Enters. Pte Ltd. v. McDonald’s Corp. [2006] 4 S.L.R. 629 at [12], where the marks MCCAFE and MACCOFFEE were found to be similar).

18. The following factors are taken into account in determining whether the plaintiff’s goods/services are similar to the defendant’s goods/services: (i) the respective uses and users of the goods/services; (ii) the physical nature of the goods or acts of services; (iii) the respective trade channels through which the goods/services reach the market; (iv) in the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are or are likely to be found in the same or different shelves; (v) the extent to which the respective goods/services are competitive including how the trade classifies them (Johnson & Johnson v. Uni-Charm Kabushiki Kaisha (Uni-Charm Corp.) [2007] 1 S.L.R. 1082 at [14], where sanitary napkins and tampons used by females were found to be similar to napkins used by persons suffering from urinary incontinence). Where the parties’ goods/services are not in competition with each other, it is often said that there is no “common field of activity,” in which case it is more difficult to convince the court that there is a likelihood of confusion (CDL Hotels Int’l Ltd. v. Pontiac Marina Pte Ltd. [1998] 2 S.L.R. 550 at [63]-[66]).
(iv) strength of the senior mark;  
(v) significant price differential between the goods or services of the parties;  
(vi) steps taken by the defendant to differentiate his goods or services from those of the plaintiff;  
(vii) actual incidents of confusion; and

19. The courts have made it very clear that it is not necessary to prove that the defendant harbored an intention to deceive or confuse the consumers (CDL Hotels Int’l Ltd. v. Pontiac Marina Pte Ltd. [1998] 2 S.L.R. 550 at [70]). What matters is not the state of mind of the defendant, but the impact on the consumers to whom the misrepresentation is addressed (Nation Fittings (M) Sdn Bhd v. Oystertec Plc [2006] 1 S.L.R. 712 at [165]). If the impact on these persons is such that they would be confused, the defendant is liable in trademark law even if he was innocent in adopting the junior mark (Johnson & Johnson v. Uni-Charm Kabushiki Kaisha (Uni-Charm Corp.) [2007] 1 S.L.R. 1082 at [25]). However, while proof of an intention to confuse is not necessary, it is not altogether irrelevant: if such intention is established, the burden on the plaintiff to prove confusion is lessened (Saga Foodstuffs Mfg. Pte Ltd. v. Best Food Pte Ltd. [1995] 739 at 749). In other words, courts will more readily find existence of confusion if it is satisfied that the defendant set out to deceive or confuse the consumers. More will be said about this factor in Part IV, infra, notes 80–82 and accompanying text.

20. The Polo/Lauren Co. LP v. Shop-In Dep’t Store Pte Ltd. [2006] 2 S.L.R. 690 at [34]; Caterpillar Inc. v. Ong Eng Peng [2006] 2 S.L.R. 669 at [59]. In determining the strength of the senior mark, it is relevant to take into account the distinctiveness of the mark (e.g., whether the mark comprises an ordinary word or is an invented word). In this regard, if the senior mark has some descriptive connotations (in relation to the goods/services in question), it would be more difficult to prove confusion because the courts will readily regard a slight difference between the senior mark and the junior mark as being sufficient to distinguish them (Lifestyle 1.99 Pte Ltd. v. S$1.99 Pte Ltd. (t/a ONE.99 SHOP) [2000] 2 S.L.R. 766 at [39]).

21. Nautical Concept Pte Ltd. v. Mark Richard Jeffery [2007] 1 S.L.R. 1071 (very much less than a hundred dollars for the defendant’s JWEST shoes versus several hundred dollars for the plaintiff’s JEFFERY-WEST shoes); The Polo/Lauren Co. LP v. Shop-In Dep’t Store Pte Ltd. [2006] 2 S.L.R. 690 (US $5–US $8 for the defendant’s POLO PACIFIC t-shirts versus US $30–US $70 for the plaintiff’s POLO BY RALPH LAUREN t-shirts); Nation Fittings (M) Sdn Bhd v. Oystertec Plc [2006] 1 S.L.R. 712 at [106]-[107] and [168] (the defendant’s goods were about 25 percent cheaper than the plaintiff’s goods); Clairol Inc. v. Too DIT Co. [1980-1981] S.L.R. 274 (US $1.50–$2.30 for the defendant’s shampoo versus S $3 for the plaintiff’s shampoo). In all these cases, price disparity was one of the reasons given by the court for its finding that there was no likelihood of confusion. Contrast with Pontiac Marina Pte Ltd. v. CDL Hotels Int’l Ltd. [1997] 3 S.L.R. 726, at [99] (price differential in the room rates for the defendant’s 4-star hotel and the plaintiff’s super-deluxe 6-star hotel did not prevent the trial judge from finding confusion in the case), a decision affirmed by the Court of Appeal at [1998] 2 S.L.R. 550. In another case, the court found confusion in spite of a price differential. The court explained that there was still a possibility of confusion in the mind of the consumer because, on learning of the difference in price, he might think that the goods were of two different qualities, not that they were the product of two different manufacturers: Re Application by Li Long Yu (1941) 10 M.L.J. (S.S.R.) 10 at 12.

22. The Polo/Lauren Co. LP v. Shop-In Dep’t Store Pte Ltd. [2006] 2 S.L.R. 690 at [8].

23. See, e.g., Excelsior Pte Ltd. v. Excelsior Sport (S) Pte Ltd. [1984]-[1985] S.L.R. 591 (telephone inquiries meant for the defendant misdirected to the plaintiff; letters addressed to the plaintiff wrongly delivered to the defendant); Jumbo Seafood Pte Ltd. v. Hong Kong Jumbo Seafood Restaurant Pte Ltd. [1998] 1 S.L.R. 860 (customers who had made
(viii) the nature of the purchasing public.\textsuperscript{24}

It is impossible to assign a particular weight to each of these factors, and none of these factors is itself conclusive of the outcome of the inquiry.\textsuperscript{25} In fact, the courts in two Singapore cases have reacted negatively to attempts by the owners of senior marks to develop “presumptions of confusion” based on any of these factors.

The first case is \textit{McDonald’s Corp. v. Future Enterprises Pte Ltd.},\textsuperscript{26} in which the senior mark owner was McDonald’s, the fast food chain. In Singapore, McDonald’s had obtained registrations of, \textit{inter alia}, the following marks: BIG MAC, MAC FRIES, SUPERMAC, EGG McMUFFIN, McC\textregistered{}HICKEN, and McNUGGETS all for restaurant and catering services. The junior mark was MACTEA & Eagle Device that was used by a local company, Future Enterprises, in relation to instant tea mixes. Relying on the reputation that it enjoyed in the “Mc” and “Mac” prefixes in the fast food industry, McDonald’s opposed the registration of the junior mark on the basis that the public would wonder if there was a commercial association between the instant tea bearing the composite mark and McDonald’s. The essence of McDonald’s case for confusion amounted to the following: because it had a substantial reputation in the “Mc”/“Mac” prefix used together with a fast food descriptive, and Future Enterprises had used the “Mc”/“Mac” prefix together with a fast food descriptive, it must follow that there would be confusion in the marketplace. In short, McDonald’s was asking the court to make a finding on confusion based almost solely on the fourth factor in the list above, namely, the strength of the senior mark. This “reputation-therefore-confusion” approach suggested by McDonald’s was rejected by both the High Court and the Court of Appeal. Strength of the senior mark is but one of the surrounding circumstances that is relevant in the inquiry for confusion. This factor could not be the overriding consideration. In this case, the High Court found that the other surrounding circumstances of the case weighed against reservations at the plaintiff’s restaurant found themselves or their guests at the defendant’s restaurant by mistake). In some cases, the evidence of actual incidents of confusion took the form of confusion amongst the respondents in a market survey. See Future Enters. Pte Ltd. v. Tong Seng Prods. Pte Ltd. [1998] 1 S.L.R. 1012. However, even if there were actual incidents of confusion, the question of confusion is entirely a matter for the judge and he must not surrender his own independent judgment to the witness who is confused: Tong Guan Food Prods. Pte Ltd. v. Hoe Huat Hng Foodstuff Pte Ltd. [1991] S.L.R. 133 at 142; Saga Foodstuffs Mfg. (Pto) Ltd. v. Best Food Pte Ltd. [1995] 1 S.L.R. 739 at 747.

\textsuperscript{24} Tong Guan Food Products Pte Ltd. v. Hoe Huat Hng Foodstuff Pte Ltd. [1991] S.L.R. 133 at 142.

\textsuperscript{25} This is also the conclusion reached by Professor Barton Beebe in his survey of the U.S. trademark scene. \textit{See} Barton Beebe, \textit{An Empirical Study of the Multifactor Tests for Trademark Infringement}, 95 Cal. L. Rev. 1581 (2006).

\textsuperscript{26} [2004] 2 S.L.R. 652 (HC); [2005] 1 S.L.R. 177 (CA).
the existence of confusion, a finding that was upheld by the Court of Appeal.

In the second case, the senior mark owner also relied heavily on the reputation or strength of the senior mark. In The Polo/Lauren Co. LP v. Shop in Department Store Pte Ltd., the Ralph Lauren company had registered its POLO word mark in Class 25 (covering clothing, footwear, headgear, and excluding those adapted for use in horse riding or the playing of polo). The junior mark was a stylized word mark PACIFIC POLO used for clothing, handbags and shoes. The High Court found that there was no likelihood of confusion. One of the factors weighing against the existence of confusion was the lack of similarity between the marks, that is, the court considered the marks to be dissimilar. The Ralph Lauren company argued that the proper approach to trademark infringement was to take a “global assessment” of all factors relevant to the circumstances of the case, and in particular, the reputation of the senior mark. In this “global assessment,” the Ralph Lauren company argued, the distinctiveness and strength of its POLO mark lessened the requisite degree of similarity between the marks. The High Court refused to accord such importance to the strength of the senior mark. Similarity between marks was held to be a “threshold question.” In assessing this “threshold question” of similarity, the court may consider all the circumstances, but it did not follow from this that the court should find the existence of confusion notwithstanding the lack of any similarity in the marks. The High Court’s

27. These circumstances or factors were as follows: (i) the marks were considered dissimilar; (ii) the parties were in different fields of activity (McDonald’s products were sold in their fast food outlets whereas Future Enterprises’ products were sold through supermarkets); (iii) there was no bad faith on the part of Future Enterprises in adopting the composite mark (its choice of the “Mac” prefix being motivated by the desire to project a Western image).


29. The other factors that weighed against the existence of confusion were as follows: (i) the senior mark POLO was not very strong (the court noting that “polo” is an ordinary English word and the Ralph Lauren company’s products were never sold under the mark POLO simpliciter but instead this mark was always accompanied by the words RALPH LAUREN); (ii) different trade channels (the Ralph Lauren company’s goods were sold in exclusive boutiques located in the glamorous shopping belt in Singapore whereas the defendant’s goods were sold in shops located in the modest suburban shopping malls; and (iii) significant price differential (US $30–$70 for the Ralph Lauren company’s t-shirts versus US $5–$8 for the defendant’s PACIFIC POLO t-shirts).


reasoning was endorsed by the appellate court. Two further points were made by the Court of Appeal. First, similarity between marks \textit{per se} does not automatically mean that there will be a likelihood of confusion. Second, even in cases where there is convergence of similarity between marks and of similarity between goods, it does not mean that there will be \textit{ipso facto} confusion in the mind of the public. The Court of Appeal put it this way: “there is no presumption of confusion once the two aspects of similarity are present.”  

There is, though, one factor in the list that appears to pack more of a punch than the others. This is the third factor: the defendant’s bad faith. Within the sample of 51 Singapore cases reviewed in this study, the court found confusion likely in every case where it was satisfied that the defendant intended to deceive or confuse the consumers through the defendant’s adoption of a mark that was identical with or similar to the senior mark. A similar result was detected in a study made of U.S. cases. Even so, it is not true that the defendant’s bad faith \textit{per se} creates a presumption of confusion. This was the position taken in \textit{Saga Foodstuffs Manufacturers (Pte) Ltd. v. Best Food Pte Ltd.} In this case, the court acknowledged that the plaintiff faced only a “small step” to prove that the defendant had succeeded in achieving what he had intended (to confuse the public), but issued a reminder that “this is still a step, even though it be a short step.” In other words, the defendant’s bad faith in itself may lessen the burden on the plaintiff to prove likelihood of confusion, but it is not conclusive of this question.

In summary, as in U.S. courts, Singapore courts rely on a multifactor test to aid them in the assessment for confusion. Each of the factors in this test is not in and of itself conclusive in this study.


34. See Beebe, supra note 25. In this study of cases where the court found bad faith, a finding of confusion ensued in all but two of the cases. In these two cases, there was no confusion because the marks were dissimilar.


36. \textit{Id.} at 749.
inquiry. More specifically, courts have refused to accept presumptions of confusion based on certain factors in the list, such as “reputation-therefore-confusion” (the McDonald’s case), “similarities-therefore-confusion” (the Polo case) and “bad faith-therefore-confusion” (the Saga Foodstuff case).

III. “NATURE OF THE PURCHASING PUBLIC” IN SINGAPORE

The eighth factor in the multifactor test in Singapore is that of the “nature of the purchasing public.” This is where the Singapore court is looking at whether the purchasing public would be exercising a high or low standard of care. This factor, therefore, is the equivalent of what the American courts call “sophistication of the consumer.”

The Singapore courts have provided the following guidelines on the “nature of the purchasing public.” First, the relevant “purchasing public” comprises purchasers of the goods or service of the kind in question. The relevant public is not necessarily the general public; in particular, the relevant public for more specialized products can be a more specific cross-section of the public. Therefore, the court must take the trouble to ascertain the precise nature of the target consumers.

The review of the 51 Singapore trademark cases indicates that, when the court is evaluating the level of consumer sophistication within the target group of consumers, the following factors are relevant: (a) price of the goods; (b) length and complexity of the purchase transaction; and (c) professional buyers. However, over and above these factors, there appears to be an overriding consideration, namely, the level of education among the general public in Singapore. The cases reveal the following trend: as the education level in Singapore (measured in terms of the literacy rate in Singapore) rose over the years, there was a corresponding rise in the minimum standard of consumer care imposed by the courts on the average consumer in Singapore. The approach of the courts today is to use this minimum standard of consumer care as a starting point, and then to ask whether the target group of consumers in the particular case before the court would exercise this minimum standard of care, and if not, whether the target consumer would exercise a higher or lower standard of

40. Id. at [102].
care than this minimum. In answering the latter question, the court will look at the other factors, such as the price of the goods, length and complexity of the purchase transaction, and whether the target consumers are professional buyers.

A. Education

In the Lee-Christensen-DeRosia model of consumer behavior, education falls within the “ability to exercise consumer care” category of factors. According to social science research on consumer behavior, greater education attainment improves information processing abilities, thereby enhancing the ability of the consumer to exercise care when making source-identification decisions. The conventional theory, therefore, is that (all things being equal) consumers who are highly educated are more sophisticated and careful, and hence, less likely to be confused.41

In the Singapore cases where education featured as a factor, the court was primarily concerned with the literacy of the consumer in the English language (as opposed to literacy in any language) rather than the level of the education attained by the consumer—for example, whether they have a college education. This is because the trademarks in these cases included English words. For a reason that will become clear very soon, the analysis of these cases was divided into four time periods: before 1970; 1971–1989; 1990–1999; and 2000 and beyond.

1. Before 1970

The period before 1970 was one in which the majority of the public in Singapore was not literate in English. This, however, does not mean that the majority was uneducated. As mentioned in Part I of this article, there are different ethnic groups in Singapore (Chinese, Malays and Indians) whose forefathers migrated from China and India among others. In the early days, these migrants set up schools for the education of their children that were conducted mainly in their own languages. Therefore, a significant number of people in Singapore were able to read Chinese, Malay or Tamil, even if they were not literate in English. This is borne out by the population census conducted in 1970.42 According to this census, the general literacy rate (that is, literacy in at least one of the official

41. See, however, the further studies made by Professors Lee, DeRosia and Christensen on the effect of education in cases of brand extension, revealing that it is possible in such cases for a better educated consumer to be more likely to suffer confusion, Lee et al., supra note 3, 98 TMR at 913.

four languages of Singapore, namely, English, Chinese, Malay, or Tamil) was 72.2 percent, while the literacy rate in English was much lower at 33.7 percent.

The fact that the majority of the people in Singapore were only literate in Chinese, Malay or Tamil did not make them “uneducated” and less sophisticated in terms of their ability to process source-identification information in general.\(^4\) However, where the source-identification information is in the form of trademarks comprising English words, those who are only literate in Chinese, Malay or Tamil would have more difficulties differentiating these English words.

This reason explains the few findings of confusion in cases decided prior to 1970. One example is the 1933 case of *The Nestle & Anglo-Swiss Condensed Milk Co. v. The East Asiatic Co. Ltd.*\(^4\) in which the plaintiff sold sweetened condensed milk under a trademark comprising the word mark ROSE BRAND and the design of a red rose. This product was usually used to sweeten coffee drinks and the typical purchaser of this product was the operator of what is commonly known in Singapore as a “coffee-shop” that was frequented by what the court described as “the more illiterate classes,” referring to illiteracy in the English language. The coffee-shop operators were themselves usually “illiterate.” For this reason, the purchaser would focus on the pictorial design aspect in the plaintiff’s mark (the flower) and not on the English word in the plaintiff’s mark. The plaintiff’s product thus became known to these purchasers as *Whay Piau* (花票) or *Chop Bunga*, these being respectively the Chinese and Malay words for “flower brand.”\(^4\) When the defendant introduced condensed milk into the market under a trademark comprising the word mark LOTUS BRAND and the design of a lotus flower, the court found that the “illiterate Asiatics in Malaya” (Singapore being part of Malaya at that time) would mistake the defendant’s product for the plaintiff’s product. The standard of care expected of

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\(^4\) This was explicitly recognized by the Court of Appeal more recently in *Super Coffeemix Mfg. Ltd. v. Unico Trading Pte Ltd.* [2000] 3 S.L.R. 145. The senior and junior marks were SUPER COFFEEMIX and INDOCAFE coffeemix respectively. The goods in question were 3-in-1 coffee mixes. The purchasers of this product were members of the general public. The Court of Appeal considered the question of confusion from the perspective of the English-educated, the Chinese-educated and the completely illiterate in the general public, and found that none of these segments would be confused because the senior mark’s packaging was very distinct from the junior mark’s packaging. In making the differentiation between the English-educated and the Chinese-educated, the court took pains to point out that the Chinese-educated were not any less discerning than the English-educated. The court said that “the fact that a consumer is Chinese educated does not mean that he does not possess the usual faculties to differentiate” (*id. at [46])*.

\(^4\) (1933) 2 M.L.J. 30.

\(^4\) *Id.* at 31.
the purchasers was very low as the court spoke of them as “incautious purchasers.”

Another example is the 1965 case of *White Hudson & Co. v. Asian Organisation Ltd.* The products in question were cough drops usually taken by people as a relief or suppressant for coughs. The plaintiff’s mark was the word HACKS and its cough drops were wrapped in red/orange cellophane paper. The court found that the majority of the general public in Singapore were non-English speaking, and to these people, English word marks were insignificant. Rather, it was the get-up or packaging of the product that was all important. There was evidence that the people looking for the plaintiff’s product would ask for “red paper cough drop” in their own language or dialect. The defendant’s mark was PECTO (which was very different from the plaintiff’s HACKS mark) but the defendant had chosen to wrap its cough drops in red/orange cellophane paper. This similar packaging, the court found, was what would lead the purchasing public to think that the defendant’s cough drops originated from the plaintiff.

In the two examples discussed above, the impact of illiteracy in English resulted in a finding that there was a likelihood of confusion, even though the senior (English) and junior marks were visually and phonetically different. However, this is not invariably the conclusion. In the 1937 decision of *Malayan Tobacco Distributors Ltd. v. United Kingdom Tobacco Co. Ltd.*, illiteracy in English worked to the advantage of the junior mark. The goods in question were cheap cigarettes aimed at the “coolies” (an English word used by the European colonial masters for manual laborers in

46. *Id.* at 34. The term “incautious purchaser” was also used in *Fraser & Co. v. Nethersole* [1885-1890] 4 Ky 269.


48. For some other examples of cases where the court found confusion even though the English senior mark was visually and phonetically different from the English junior mark, see *M.I. & M. Corp. v. A. Mohamed Ibrahim* (1964) 30 M.L.J. 392; *Ronuk Ltd. v. Sin Thye Hin & Co.* (1962) 28 M.L.J. 383 and *Asian Organization* (1965) 31 M.L.J. 186. In *M.I. & M.*, the product was cooking oil. The plaintiff’s label had the word mark FLOWER BRAND and CHOP BUNGA (Malay for “flower brand”) and the picture of a hibiscus flower. The defendant’s label had the English word “Sunflower” and a picture of a flower with red petals (but one which did not resemble the hibiscus flower). The court found confusion because the illiterate purchasers would not be able to read English, and hence the appearance of the English word “Sunflower” on the defendant’s label was not sufficient to distinguish the defendant’s product from the plaintiff’s. In *Ronuk*, the goods were more specialised products, namely, “steel wool and steel shavings for cleaning purposes.” The senior mark and the junior mark were respectively PANDA and BEAR BRAND & Bear Design. The court found confusion because the non-English speaking purchaser of these specialised products referred to the senior mark as *Chop Bruang* or *Kow Him*, which were respectively the Malay and Chinese words for “bear brand.”

Asia).\(^{50}\) The senior mark was comprised of the device of crossed swords and the number “21.” The junior mark was comprised of a representation of an ace and king of hearts, and the English words “Twenty-One.” There was evidence that the senior mark was widely known amongst the coolies as “twenty-one” in their own dialect or language (e.g., 二十一 or Yee Sup Yet, which means “twenty-one” in the Cantonese dialect; Duo Puloh Satu, which means “twenty-one” in Malay). These consumers could not read English, and therefore, the appearance of the English words “Twenty-One” in the junior mark meant nothing to these consumers. Instead, the court found that the consumers were able to distinguish between the parties’ cigarettes because they were different in size and color.

There was also no confusion found in the 1965 case of Nestle’s Products Ltd. v. Asia Organisation Ltd.,\(^{51}\) which took place in Sarawak. The good was condensed milk, which the court found was bought by the completely “illiterate country dweller” who would not be able to read English or even Chinese. The senior mark comprised, \textit{inter alia}, the English words MILKMAID BRAND and the Chinese characters 牛奶 (meaning “milk”) written in red. The junior mark comprised, \textit{inter alia}, the English words LIBERTY BRAND and the Chinese characters 牛奶 written in black. Because they were completely illiterate, the purchasers could not even read the Chinese words in the senior and the junior marks. Instead, they knew the senior mark as Ang Jee (红字 meaning “red letter” in the Hokkien dialect), referring to the red-colored Chinese words in the senior mark. When the junior mark appeared on the market, the illiterate purchaser called it Oh Jee (黑字 meaning “black letter” in the Hokkien dialect), referring to the black-colored Chinese words in the junior mark. The ability of these purchasers to distinguish the two marks meant that there was no likelihood of confusion.

Of the trademark cases under review, 13 cases were decided between 1887 and 1970. There was a finding of confusion in 69 percent of these cases.

2. 1971–1989

In the 1970s, the government of the new Singapore embarked on a two-language or bilingualism policy in education. English became the first language of instruction in most schools, and the native language of the child was taught to the child as his second

\(^{50}\) The term “coolie” was used, for example, by Justice Burton sitting in the Court of Appeal of the Straits Settlement hearing this case: The Nestle & Anglo-Swiss Condensed Milk Co. v. The East Asiatic Co. Ltd. (1933) 2 M.L.J. 1 at 10.

\(^{51}\) [1965] 2 M.L.J. 195. Sarawak is in East Malaysia. At the date of the judgment of this case (June 10, 1965), Singapore was a part of Malaysia. Therefore, this case is considered a Singapore case for the purposes of this review.
language. As a result of this policy, English gradually became the lingua franca in school, at work and in businesses. By 1980, a slight majority (55 percent) of the population was literate in English.\textsuperscript{52}

Of the trademark cases under review, eight cases were decided between 1971 and 1989.\textsuperscript{53} There was a finding of confusion in 75 percent of these cases.

3. 1990–1999

By 1990, a clear majority (65.5 percent) of the population had become literate in English.\textsuperscript{54} This fact was noted by the Court of Appeal in a 1991 decision, and this was a reason for the court’s finding that there was no confusion in the case. In \textit{Tong Guan Food Products Pte Ltd. v. Hoe Huat Hng Foodstuff Pte Ltd.},\textsuperscript{55} the goods were peanuts and cashew nuts eaten as snack food that were purchased by members of the general public. The senior and junior marks were in English letters or words, namely, TONG GUAN and DEER BRAND, respectively. Both parties packaged their products in aluminum foil packs in dark blue and white with arc color separation. The plaintiff’s case relied heavily on this similarity in packaging. The court found that this similarity was not likely to cause confusion, especially when the word marks prominently displayed on the packaging were totally different. On this, the court said:

\textit{[A]lthough illiteracy has been referred to in many of the previous cases, this must be an evaporating consideration in the Singapore of today.}\textsuperscript{56}

While downplaying the relevance of illiteracy, the minimum standard of consumer care and sophistication that the court expected of the average consumer in Singapore was not a very high one. According to the court in \textit{Tong Guan}, he must not be “the moron in a hurry” or the “unobservant” purchaser.\textsuperscript{57} The minimum standard expected of the average consumer was that he must exercise “ordinary care.”\textsuperscript{58} In another case involving clothing, the court described the target consumers, who would be members of


\textsuperscript{53.} These eight cases were decided in the period between 1980 and 1989. Between 1970 and 1979, there was no reported trademark case where confusion arose as an issue.

\textsuperscript{54.} \textit{See Singapore Census of Population 1990} (Release No. 3—Literacy, Languages Spoken and Education) (Department of Statistics, Singapore).


\textsuperscript{56.} \textit{Id.} at 143.

\textsuperscript{57.} \textit{Id.} at 142.

\textsuperscript{58.} \textit{Id.} at 143.
the general public, as “persons not with “tutored minds” but ordinary and reasonable persons.”59

Of the trademark cases under review, 15 cases were decided between 1990 and 1999. There was a finding of confusion in 60 percent of these cases.

4. 2000 and Beyond

By 2000, the literacy rate in English amongst the Singapore population had risen to a high of 71 percent.60 Further, the general literacy rate (that is, literacy in at least one of the four official languages) had reached 93 percent, indicating how widespread basic education has become in Singapore. The “depth” of education has also increased over the years. In 1970, only 8.4 percent of the population had at least 10 years of formal education (that is, completed secondary school). By 2000, this category of people accounted for 57.4 percent of the population.

Of the trademark cases under review, 15 cases were decided between 2000 and 2007. There was a finding of confusion in 40 percent of these cases.

In two of these 15 cases, where the court found no confusion, there was some discussion about the level of consumer care and sophistication possessed by the average person in Singapore. In the 2002 decision of Polo/Lauren Co. LP v. United States Polo Association,61 the goods in question were clothing (t-shirts). The senior mark was Ralph Lauren’s device mark showing a polo player on horseback with a polo club on the upswing. The junior mark belonged to the United States Polo Association (USPA) and it also depicted a polo player on horseback but with polo club on the low swing. The court accepted that a person familiar with the senior mark might, in a quick and hurried moment, wonder if the junior mark was the senior mark. However, to the court, the perception of this person “in a hurry” was irrelevant. The relevant person was the purchaser exercising “ordinary care and intelligence,” and according to the court, this person was not “an indecisive customer who ponders over an item for hours” nor someone who will take advantage of “a grab-as-much-and-as-fast-as-you-can” store promotion.62 Rather, the court was concerned only with persons who

59. RH Macy & Co. Inc. v. Trade Accents [1992] 1 S.L.R. 581. See also Kellogg Co. v. Pacific Food Prods. Sdn Bhd [1999] 2 S.L.R. 651 (a case involving snack foods). The purchaser of such goods was described by the court as “persons of ordinary care and intelligence . . . who are endowed with general, but not perfect, recollection” (id. at [32]).


62. Id. at 332.
would spend “a reasonable time to observe the mark and pay a modicum of attention to what they are doing.”

The second case is the 2004 decision of McDonald’s Corp. v. Future Enterprises Pte Ltd., which has been discussed earlier. In determining whether members of the general public would think that MACTEA & Eagle Device instant tea mixes originated or were sponsored by McDonald’s the fast food chain, the Court of Appeal considered the consumer care and sophistication of the average person in Singapore at a rather high level when it said:

With widespread education and a public which is constantly exposed to the world, either through travel or the media, one should be slow to think that the average individual is easily deceived or hoodwinked.

5. Summary: Impact of Education and Literacy on Consumer Sophistication

The table below summarizes the discussion on the impact of education and literacy in English on the findings of confusion made by the courts in the 51 trademark cases reviewed.

<table>
<thead>
<tr>
<th>Year</th>
<th>1970 (The Nestle &amp; Anglo-Swiss Condensed Milk Co case in 1933: ‘illiterate Asians’, ‘incautious purchaser’)</th>
<th>1980</th>
<th>1990 (Tong Guan case in 1991: illiteracy as an evaporating consideration; the average consumer was not the ‘moron in a hurry’)</th>
<th>2000 (McDonald’s case in 2004: widespread education; the average consumer was ‘not easily deceived or hoodwinked’)</th>
</tr>
</thead>
<tbody>
<tr>
<td>General literacy rate</td>
<td>72%</td>
<td>84%</td>
<td>90%</td>
<td>93%</td>
</tr>
<tr>
<td>Literacy rate in English</td>
<td>33.7%</td>
<td>55%</td>
<td>65.5%</td>
<td>71%</td>
</tr>
<tr>
<td>% of persons with minimum (10 years of) secondary school education</td>
<td>8.4%</td>
<td>20.8%</td>
<td>39%</td>
<td>57.4%</td>
</tr>
<tr>
<td>% of cases where confusion was found</td>
<td>1887-1979: 69%</td>
<td>1980-1989: 75%</td>
<td>1990-1999: 60%</td>
<td>2000-2007: 40%</td>
</tr>
<tr>
<td></td>
<td>72%</td>
<td>50%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

63. Id. at 331.
64. [2005] 1 S.L.R. 177 (CA). See discussion of the case at supra note 26 and accompanying text.
65. Id. at [64].
There is a significant dip in the incidence of the court’s findings after the 1980s (from 72 percent down to 50 percent). This corresponds with an increase in the level of consumer care and sophistication imposed by the courts on the average consumer. This increase coincides with the rise in the level of education. The impact of literacy in English on the level of consumer sophistication is also seen in cases where the marks comprise English letters and/or words.

Apart from education, there seems to be another factor that has an impact on the level of sophistication of the average consumer in a country. When the court in the McDonald’s case explained that the consumer in Singapore would not be easily deceived or hoodwinked because of widespread education, the court also gave another reason, namely, the fact that the public in Singapore was “constantly exposed to the world, either through travel or the media.”66 This potentially describes an affluent society. This, however, was not always the case in Singapore. As mentioned in Part I, above, the early days of Singapore were difficult ones. From a “low income” country in 1965, it has grown to become one of the “high income” countries.67 Tracking the economic development of Singapore, and comparing it with the data from the table above, it would seem that as the standard of living and, hence, consumerism rises, the court sees the average consumer becoming savvy and more sophisticated.

Education, literacy and perhaps the standard of living are factors that determine the level of consumer sophistication of the average consumer in Singapore. This level operates as a minimum standard. A Singapore court has described this minimum standard as “the starting point.”68 Other factors may vary this minimum standard. The discussion that follows will look at these other factors.

**B. Price**

In the Lee-Christensen-DeRosia model of consumer behavior, price of the goods—whether they are expensive or inexpensive items—falls within the “motivation” category of factors that have an impact on how much care the consumer exercises during the purchase of the goods. The impact of price of the goods is explained

66. McDonald’s Corp. v. Future Enters. Pte Ltd. [2005] 1 S.L.R. 177 at [64] (CA). (This case is discussed at supra note 26 and accompanying text).

67. In the World Bank’s ranking of countries based on their 2006 GNI per capita, Singapore occupies the 33rd position.

68. The Polo/Lauren Co. LP v. Shop-In Dept Store Pte Ltd. [2005] 4 S.L.R. 816 at [36] (HC). (This case is discussed at supra note 28 and accompanying text).
from the perspective of “perceived financial risk.” The theory is that, all other things being equal, when consumers purchase expensive products requiring a significant percentage of their disposable income, thereby perceiving an increased financial risk, they are more motivated to exercise care when purchasing that product.\(^6\)\(^9\) Conversely, if the product is inexpensive, and the perceived financial risk is less, consumers are less motivated to take care and therefore increases the likelihood of confusion.

One of the Singapore cases that took into account this factor when determining the level of consumer sophistication is *Future Enterprises Pte Ltd. v. Tong Seng Products Pte Ltd.*\(^7\)\(^0\) The goods in question were “3-in-1” instant beverages. These are a mixture of coffee, creamer and sugar packaged in an individual foil sachet, and all that is required to complete the beverage is the addition of hot water. A pack of 20 sachets of these 3-in-1 coffee mixes cost less than US $5 in Singapore. Both the plaintiff and the defendant were manufacturers of this product. The plaintiff’s mark was MACCOFFEE & Eagle Device,\(^7\)\(^1\) while the defendant’s mark was A MAXCOFFEE. The court found that the purchaser was likely to mistake one product for the other because, *inter alia*, the purchaser would not spend too much time studying the different products.\(^7\)\(^2\) The court reasoned:

> Since the product in question is not a very expensive item and would usually be purchased by a consumer in the course of stocking up on various provisions and not just coffee mix, such purchaser is likely to simply pick the product off a shelf or ask the vendor for it without examining it very closely. The product would not get the same kind of scrutiny that a more expensive item like a camera or television set would.\(^7\)\(^3\)

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69. See Lee, Christensen & DeRosia, *supra* note 3, 57 Emory L.J. at 603-04.

70. [1998] 1 S.L.R. 1012. See also Mechanical Handling Eng’g (S) Pte Ltd. v. Material Handling Eng’g Pte Ltd. [1993] 2 S.L.R. 205 (which is discussed at *infra*, note 75 and accompanying text); The Polo/Lauren Co. LP v. Shop-In Dep’t Store Pte Ltd. [2005] 4 S.L.R. 816 at [36] (HC) (which is discussed at *supra* note 29 and accompanying text).

71. Apart from this case, the plaintiff in this case was involved in trademark battles in two other cases. The first case was where McDonald’s objected to the plaintiff’s registration of MACTEA & Eagle Device in the name of the plaintiff, and McDonald’s lost this battle (see the discussion of this case at *supra*, note 26 and accompanying text). In the second case, McDonald’s objected to the plaintiff’s registration of the word mark MACCOFFEE *simpliciter* (that is, without the appearance of the eagle design). This time round, McDonald’s won; that is, the court found that the public would think that MACCOFFEE products came from or were sponsored by McDonald’s. See *Future Enters. Pte Ltd. v. McDonald’s Corp.* [2007] 2 S.L.R. 845.

72. Other reasons include the high degree of similarity between the marks and actual incidents of confusion (amongst respondents to a survey).

This reasoning resonates with the explanation given by the Lee-Christensen-DeRosia model of consumer behavior.

However, a higher price *per se* does not automatically translate into a higher degree of consumer sophistication. The Lee-Christensen-DeRosia model stresses the importance of *perceived* financial risk. For goods aimed at the wealthy, a price tag that may seem to be high from the perspective of the average consumer may not be a financial risk for the wealthy who can afford the high price. This theory may explain the finding of confusion in a case involving expensive “designer” cigarettes. In *Tiffany & Co. v. Fabriques de Tabac Reunies SA*, the senior mark was the TIFFANY mark owned by an American company (Tiffany) that designed luxury consumer goods, such as jewellery, and personal items like pens and cardholders. The junior mark was TIFFANY used by the Philip Morris company for its line of “designer” cigarettes. These were expensive items. The evidence showed that the target clientele of both Tiffany and Philip Morris was the same: “the well-heeled and observant” and “the sophisticated, style-conscious trendsetters.” Philip Morris’ “designer” cigarettes were expensive items to the general public, but not necessarily so to the “well-heeled.” To this target group, they might not perceive buying “designer” cigarettes as giving rise to more than the usual financial risk involved in other purchases.

### C. Length and Complexity of Purchase Transaction

This factor was considered by the court in *Mechanical Handling Engineering (S) Pte Ltd. v. Material Handling Engineering Pte Ltd.* The parties designed and manufactured heavy industrial systems such as cranes and conveyors. The court found that the consumers in this business, who were “sophisticated companies,” would not be confused because the typical transactions involved sums of at least five or six figures and the “customized nature of the products requires face-to-face contact between the potential customers and the suppliers.”

The first reason for the court’s finding is the high price of the goods, a factor that has an impact on the “motivation” of the consumer to exercise care. This has been discussed above. The second reason is referred to in the Lee-Christensen-DeRosia model as the “length and complexity of the purchase transaction,” and this factor has an impact on the “ability” of the consumer to exercise care. The theory is that the purchasing environment may

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74. [1999] 3 S.L.R. 147.
75. [1993] 2 S.L.R. 205.
76. *Id.* at 221.
77. See Lee, Christensen & DeRosia, *supra* note 3, 57 Emory L.J. at 609.
facilitate, require or reduce opportunities for the exercise of consumer care. The extended interaction and exchange between the sales personnel and the consumer in the Mechanical Handling Engineering case is an example where the purchasing environment requires the consumer to exercise consumer care.

The next case provides an example of when the purchasing environment reduces the opportunity for the exercise of consumer care. In M.I. & M. Corporation v. A. Mohamed Ibrahim, the goods in question were cooking oils. At the material time—this was in the 1960s—supermarkets were not the norm. Products such as cooking oil were sold in an environment described by the court as follows: “dark grocers” shops where large quantities of goods are crowded in a disorderly manner into a very small space. The court concluded that the consumers shopping in this environment would mistake the defendant’s SUNFLOWER brand of cooking oil for the plaintiff’s FLOWER BRAND of cooking oil. This finding of confusion could be explained on the basis that the purchasing environment inhibits inspection of the goods, thereby reducing the opportunity for the consumer buying under such conditions to exercise care. Given this low ability to exercise care, there is a higher chance for confusion to arise.

D. Professional Buyers

The Lee-Christensen-DeRosia model explains that professional buyers tend to exercise a higher level of consumer care because of their ongoing interest and concern about the product (“motivation” to exercise care) and because of the opportunity they have on the job to develop expertise and greater knowledge about the product (“ability” to exercise care). However, the model also acknowledges the possibility that the consumer’s professional interest in the product and more developed knowledge structure may lead him to become more confused. There is one Singapore case that falls into the general rule, and another case that could be explained by the caveat.

In Nation Fittings (M) Sdn Bhd v. Oystertec Plc, the goods in question were pipe fittings. The plaintiff claimed that the defendant, whose pipe fittings had a shape similar to the plaintiff’s pipe fittings, was attempting to pass off its goods as the plaintiff’s goods. The court found that the typical consumers of this type of goods were plumbers and contractors. In the court’s assessment, the level of sophistication among plumbers and contractors vis-à-vis-
vis pipe-fittings was higher than the minimum standard of “ordinary care and intelligence” possessed by a member of the general public because they “would not only be fully aware of the brands of pipe fittings available for sale but would also purchase pipe fittings based on the particular specifications and attributes of the products needed to perform their trade.”  

The court concluded that confusion amongst this target group was not likely. This case falls into the general rule within the Lee-Christensen-DeRosia model.

In Caterpillar, Inc. v. Ong Eng Peng, both the plaintiff and the defendant were in the business of designing and selling industrial, agricultural and construction machinery. The plaintiff’s mark was CAT and the defendant’s mark was CATPLUS. The court accepted that the probable purchasers and users—but not all of them—would possess a level of knowledge of such goods “beyond that of the average man in the street.” Nonetheless, the court found that they would believe that the defendant’s products were enhanced or upgraded models of the plaintiff’s products. This finding, in the author’s view, is to some extent influenced by the structure of the marks in this case (CAT versus CATPLUS). This case falls into the exception within the Lee-Christensen-DeRosia model.

The third case where the court found a likelihood of confusion, in spite of the fact that the target group comprised professional buyers, is the 1953 decision, Re Lovens Kemiske Fabrik Ved a Konsted’s Application for Registration of “LEOCILLIN” Trade Mark. The goods in this case were pharmaceutical drugs. The senior mark was LEDERCILLIN and the junior mark was LEOCILLIN. The products were usually sold to medical practitioners, and once prescribed by these medical practitioners, the products were dispensed to the patients by chemists or pharmacists and administered by sisters and nurses in various hospitals and clinics. The target purchasers and users were therefore not the general public but professionals. The motivation and ability to exercise greater consumer care that one might expect from this group of professionals, however, was displaced by a very important fact, namely, most of them were Chinese-educated and were not very conversant in the English language. The trademark tribunal (an English man) was quick to point out that it was no reflection upon the qualifications of the practitioners. But it did mean that these professionals might have

82. Id. at [105].
84. Id. at [60].
some difficulties in distinguishing between the English word marks LEDERCILLIN and LEOCILLIN. The Lee-Christensen-DeRosia model would explain this case on the basis that the lack of ability to exercise consumer care in this case outweighed the motivation of professionals to exercise care.

IV. CONCLUSION

In providing an Asian perspective on the inquiry for confusion in trademark cases, the ultimate aim of this article has been to determine whether the courts’ findings on this question of confusion can be supported by social science research on consumer behavior and psychology. The review of the Singapore cases on the basis of consumer sophistication shows that by and large the courts in this multi-ethnic Asian society do take into account the factors that social scientists say affect the motivation and the ability of the consumer to exercise care.

However, we must not lose sight of the fact that consumer sophistication is only one of the factors in the multi-factor test used by the courts in their confusion inquiry. As indicated in Part III, courts in Singapore have rejected presumptions of confusion based on any single factor in the multi-factor test (such as “reputation-therefore-confusion,” “similarities-therefore-confusion,” or “bad faith-therefore-confusion”). Equally, even an accurate determination of the degree of consumer sophistication within the target group of consumers in a case—achieved by ticking the “checklist” of factors in social scientist research on consumer behavior—will not necessarily result in a better prediction on the outcome of the case. Any belief to the contrary wrongly assumes that the judge is only concerned that his conclusion on the question of confusion accurately reflects what is happening or is likely to happen in the marketplace. The truth of the matter is that the judge may have other considerations. Two examples will illustrate this point.

The first example lies in the international principle that trademark law must presume the existence of a likelihood of confusion where the junior mark is identical with the registered senior mark and the goods are identical. The owner of the senior mark is not required to prove likelihood of confusion where, say, the defendant is selling counterfeit ROLEX watches for US $10 in a dingy hole-in-the-wall located in the suburbs of Singapore. Yet, from the perspective of the social scientist studying consumer behavior, even the “moron in a hurry” would hardly mistake this US $10 watch as the real McCoy.

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86. See Art. 16(1) of the TRIPS Agreement. This international principle is implemented in Singapore by way of Section 27(1) of its Trade Marks Act 1998.
The second example is the weight given to the defendant’s bad faith in adopting a mark. It has been mentioned that the court had made a finding of confusion in every one of the 51 Singapore cases where the court was satisfied that the defendant, in adopting a mark that is identical with or similar to the senior mark, intended to deceive or confuse the consumers.87 The defendant’s bad faith, therefore, is very relevant (though not conclusive) in this inquiry. Yet, from the social scientist’s perspective, why should the defendant’s bad faith have an impact on whether the consumer will be confused? The relevance of the defendant’s bad faith has been justified in this way: why should the court be astute enough to say that the defendant cannot succeed in doing what the defendant is straining every nerve to do?88 The real reason, as one court has acknowledged, is that “the issue becomes one of unfair competition and the defendant seeking to seek where he has not sown.”89

The inquiry into confusion in trademark law is a tool for the judges to use to get at what they perceive to be an unfair trading practice of the junior mark owner. In the pursuit of this aim in a case, it is possible for there to be some “disconnect” between, on the one hand, the judge’s conclusion on the question of confusion and, on the other hand, the true reaction of the consumer to the junior mark as analyzed from the perspective of the social scientists studying consumer behavior. This review of the Singapore trademark cases must be viewed in this light.

87. See supra note 33 and accompanying text.