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CONFUSION FACTOR ANALYSIS—
A COGNITIVE UPDATE*

By Jerre B. Swann**

I. INTRODUCTION

In 1961, in *Polaroid Corp. v. Polarad Electronics Corp.*, Judge Friendly articulated eight “variables” to be weighed in assessing likelihood of confusion between marks used on noncompeting goods. Utilization of these variables (and close variants) quickly spread to competitive goods cases, other circuits, and the Trademark Office. The variables today remain substantially intact; confusion factor analysis, indeed, occupies three sections of the Restatement (Third) of the Law of Unfair Competition.4

* This article is a further expression of my view that trademarks must be assessed in cognitive, marketing, economic, and linguistic contexts. It has evolved from my to be published “Likelihood of Confusion” chapter in *Lanham Act Surveys*, co-edited by Shari S. Diamond and Jerre B. Swann (2012) and from an address, Cognitive Analysis of Confusion Factors, that I gave to the Dallas Trademark Bar on March 28, 2008. I am grateful to Drs. Michel Pham (Columbia University, New York, New York) and Itamar Simonson (Stanford University, Palo Alto, California) for their reviews and contributions; I continue to thank Dr. Jacob Jacoby (New York University, New York, New York) for introducing me to the concept of pattern matching that stimulated my inquiry into how likelihood of confusion surveys work.

** Partner, Kilpatrick, Townsend, Stockton LLP, Atlanta, Georgia, Associate Member, International Trademark Association; former Editor-in-Chief and current member of the Advisory Board of *The Trademark Reporter*.

1. 287 F.2d 492, 495 (2d Cir. 1961).

2. *See* Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 29 (1st Cir. 1989); AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1538 (11th Cir. 1986); Beer Nuts, Inc. v. Clover Club Foods Co., 805 F.2d 920, 925 (10th Cir. 1986); Mutual of Omaha Ins. Co. v. Novak, 775 F.2d 247, 248 (8th Cir. 1985); Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984); Interpace, Inc. v. Lapp, Inc., 721 F.2d 460, 463 (3d Cir. 1983); Frisch's Rests., Inc. v. Elby's Big Boy, Inc., 670 F.2d 642, 648 (6th Cir. 1982); Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 259 (5th Cir. 1980); AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979); Helene Curtis Indus. v. Church & Dwight Co., 560 F.2d 1325, 1330 (7th Cir. 1977); in re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973).

3. The *Polaroid* “quality” factor has been frequently misinterpreted. It was Judge Friendly's view that marks applied to goods of substantially different quality were less likely to generate confusion. Senior mark owners, however, frequently argue that the superior quality of their products is a factor favoring a finding of likelihood of confusion (as opposed to harm), and junior users often unwittingly tout the equal quality of their offerings. *See, e.g.*, Beneficial Corp. v. Beneficial Capital Corp., 529 F. Supp. 445, 451 (S.D.N.Y. 1982). The misinterpretation is, however, of little consequence: a principal reason for the existence of modern trademarks is the consumer's inability to assess the hidden quality characteristics of products, Jerre B. Swann, *Anti-Monopoly: An Exercise in Economic Futility*, 78 TMR 65, 66 (1988), so that the quality factor rarely comes into play for likelihood of confusion purposes, and is not typically listed in the compilations of other circuits.

In terms of a consumer’s mental processing, the four principal marketplace factors, analyzed in virtually every case, are:

1. similarity of marks;
2. similarity of products;
3. strength of the senior mark; and
4. market proximity of the respective goods or services.5

The Restatement (echoing the courts) warns that the factors are not a “mechanistic formula,” are not all applicable in every case, and vary in relative importance depending on the facts of a particular case.6 Nonetheless, courts typically grind mechanically through all the variables, and the winner, more often than not, is the party that accumulates the most factors, with ties being resolved against the party with the burden of proof.7

Each factor has elsewhere been individually and exhaustively analyzed, and it is not my purpose to review or summarize the case law or the literature as to any variable. Now, however, that the trademark bar has had fifty years of experience with Polaroid and its progeny, it is appropriate to rank at least the principal factors and, more particularly, to relate them to how confusion occurs. It is time to understand how the variables work in consumers’ minds and in the marketplace to produce or preclude a likelihood of confusion.

II. THE COGNITIVE UNDERPINNINGS OF CONFUSION

Top of mind8 brands exist in memory as clusters of information: as schemas (a) with source identifying (reputational) nodes at their center; (b) strongly linked to products or services in connection with which they are used; and (c) also linked to (often multiple) other associations that have been engrafted onto the

5. The remaining factors, in the majority of compilations, are:
   (5) the sophistication of consumers;
   (6) where goods differ, the perceived likelihood that either party will bridge the gap;
   (7) the intent of the junior user; and
   (8) evidence of actual confusion (for which survey evidence is typically the proxy).
6. Restatement (Third) of Unfair Competition § 21, Comment a.
7. See, e.g., the First Circuit’s analysis of the district court’s decision in Chrysler Corp. v. Silva, 118 F.2d 56, 59 (1st Cir. 1997), discussed infra. It should be noted that I served as appellate counsel for Chrysler.
8. As used herein, “top of mind” awareness (see Phyllis J. Welter, Trademark Surveys § 24.03[1][c] (1998)) refers to “distinctiveness acquired in the market,” as opposed to “inherent distinctiveness” (24 Hour Fitness v. 24/7 Tribeca Fitness, 447 F. Supp. 2d 266, 271 (S.D.N.Y. 2006)); and to commercial as opposed to conceptual strength (GoTo.com v. Walt Disney Co., 202 F.3d 1199, 1207 (9th Cir. 2000)). As appears below, commercial and conceptual strength vary in their relevance to a likelihood of confusion assessment, depending on marketplace conditions.
schema by advertising, word of mouth, or experience.\textsuperscript{9} “[A] unique brand name and cohesive brand identity are probably the most powerful pieces of information for consumers . . ., enabling them to efficiently organize, store, and retrieve information from memory.”\textsuperscript{10}

Confusion as to source, sponsorship, or affiliation can occur when a consumer sees a junior brand in the marketplace that cues a top of mind senior brand schema in memory.\textsuperscript{11} Alternatively, where the senior mark is not sufficiently accessible in memory to be triggered by a similar junior, confusion can occur when a consumer sees or is exposed, simultaneously or sequentially, to the two brands (under circumstances where both are sufficiently in cognitive workspace for purposes of comparison) and perceives that they are physically or conceptually similar or seem related.

The first of these two well-documented psychological processes is “pattern matching.”\textsuperscript{12} Consumers identify a stimulus “based on its similarity to what [they] already know,”\textsuperscript{13} and “[w]hen stimulus information offers a sufficient match to a [cluster or] schema possessed by the perceiver, the schema is called up from memory and used to guide inferences”\textsuperscript{14}—confusion is likely where there is a “fit between stored knowledge and a [junior] stimulus.”\textsuperscript{15}

The second phenomenon is a function of the “representativeness heuristic”—a consumer’s drawing of a same-source inference based on the perceived relatedness between key features of the junior mark and attributes of the senior mark:

In answering . . . questions [such as what is the probability that event A originates from process B], people typically rely on the representativeness heuristic, in which the probabilities are evaluated by the degree to which A resembles B. For


\textsuperscript{10} Jacoby, \textit{supra} note 9, at 1025; see Wayne D. Hoyer and Deborah J. MacInnis, \textit{Consumer Behavior} 183 (3d ed. 2004).

\textsuperscript{11} There is no bright or constant line between brands that are sufficiently top of mind so as to be cued in an internal search of memory, and those that are not; cuing may vary depending on the degree of similarity, and it may be facilitated by factors other than similarity (e.g., product identity); and often a pilot survey is the only way of assessing a brand’s accessibility in memory vis-à-vis a given stimulus.

\textsuperscript{12} Jacoby, \textit{supra} note 9, at 1035, 1037.

\textsuperscript{13} Hoyer & MacInnis, \textit{supra} note 10, at 102, 115-16 (“The cognitive networks in one’s memory . . . play a fundamental and often decisive role in interpreting incoming information from the outside world.”).


example, when A is highly representative of B, the probability that A originates from B is judged to be high. On the other hand, if A is not similar to B, the probability that A originates from B is judged to be low.\textsuperscript{16}

As the Court observed in lay terms in \textit{Beneficial Corp. v. Beneficial Capital Corp.}, “portions of the general public will make the reasonable assumption that . . . [similar] companies with similar names are likely to have a business connection.”\textsuperscript{17} As an ultimate expression of the representative heuristic, the court concluded in \textit{Wynn Oil Co. v. Thomas}, “[c]ases where a defendant uses an identical mark on identical goods . . . are ‘open and shut’ and do not involve protracted litigation to determine liability for trademark infringement.”\textsuperscript{18}

\textbf{III. THE COGNITIVE RANKING OF THE FACTORS}

\textit{A. Similarity of Marks}

As the Supreme Court observed in \textit{Kellogg Co. v. National Biscuit Co.}, “[s]haring in the goodwill of an article . . . is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.”\textsuperscript{19} The “general default rule” in trademark law is “free competition.”\textsuperscript{20} Confusion that arises solely or principally from the similarity of products is thus insufficient, as a matter of law, to support an infringement action.


\textsuperscript{17} 529 F. Supp. 445, 450-51 (S.D.N.Y. 1982). Because the source/affiliation question in the \textit{Beneficial} survey was “leading” and the survey did not replicate market conditions (the marks presented side-by-side in the source question were not physically proximate in the marketplace), the court appropriately held that it “establish[ed] no more than that the names [were] similar,” but the opinion nonetheless reflects judicial appreciation that, from their largely shared experiences in the marketplace, consumers have largely shared constructs of brands and largely shared perceptions as to how close a competitor or third party may come to another’s brand without encroaching on rights in that brand. See Jacoby, \textit{supra} note 9, at 1026 (a conclusion as to likelihood of confusion is not reflective “of a single person’s mind. Rather, . . . [t]he critical point is that, as a result of having been exposed to the same products . . ., advertisements and experiences . . ., many individuals develop cognitive networks regarding the same item [or construct] that possess many nodes in common.”); Jacob Jacoby, \textit{Sense and Nonsense in Measuring Sponsorship Confusion}, 24 Cardozo Arts & Ent. L.J. 63 (2006).

\textsuperscript{18} 839 F.2d 1183, 1191 (6th Cir. 1988) (quoting 4 Thomas J. McCarthy, \textit{Trademarks and Unfair Competition} § 23.3). As explained below, the conclusion is incorrect for goods bearing weak marks and travelling through different trade channels.

\textsuperscript{19} 305 U.S. 111, 122 (1938).

Rather, the Third Circuit has characterized similarity of marks as “the single most important factor.”21 In my view, it is better understood as the one essential factor. Some intrinsic “threshold resemblance” of marks or dress must exist “to trigger inquiry into extrinsic factors. . . .”22

In a related context, a control is often characterized in a likelihood of confusion survey as necessary to filter “noise” (inter alia, guessing, yea-saying, inattention, human error, demand effects, market share effects, inherent category confusion, preconceptions) from test cell results. In my view, it is better understood as permitting causal inferences that the mark component of a brand,23 as opposed to the product component or other non-trademark factors, is responsible for reported confusion.24

**B. Strength of the Senior Mark**

For pattern matching to occur or for the representativeness heuristic to guide inferences, a consumer must be able, in some form, to compare the brands at issue. Where and how the comparison takes place often turns on whether the senior mark is commercially or conceptually strong.25

Commercially strong marks are, to iterate, frequently “top of mind”26; they reside on the surface of memory; their images travel with the consumer and are readily accessible for comparison (and cuing) whenever a similar mark is encountered in commerce; they

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21. See A&H Sportswear, Inc. v. Victoria’s Secret Stores, Inc., 237 F.3d 198, 214-16 (3d Cir. 2000) (“If products are directly competing, and the marks are clearly very similar, a district judge should feel free to consider only the similarity of the marks themselves.”).


24. See Shari S. Diamond, Reference Guide on Survey Research, Reference Manual on Scientific Evidence 257 (2004) (“It is possible to adjust many survey designs so that causal inferences about the effect of a trademark . . . become clear and unambiguous. By adding an appropriate control group, the survey expert can test directly the influence of the stimulus.”); Cumberland Packing Corp. v. Monsanto Co., 32 F. Supp. 2d 561, 574 (S.D.N.Y. 1999) (“In a test of a causal proposition the appropriate use of controls is critical.”).

25. See supra note 8.

26. See Simon & Schuster v. Dove Audio, Inc., 970 F. Supp. 279, 292 (S.D.N.Y. 1997). Technically, a “top of mind” mark is the first typically mentioned by consumers (Coke, Hertz, Nike), but the phrase is used here also to encompass those strong brands—Pepsi, Avis, adidas—that may not be the category leaders, but are readily cued by similar juniors.
may thus be tested with the unaided Eveready survey format;\textsuperscript{27} and their reach is not limited to proximate marketplace goods.\textsuperscript{28}

In the Fourth Circuit, commercial strength has been characterized as the “first and paramount” confusion factor.\textsuperscript{29} At least for purposes of pattern matching in the mind, and likelihood of confusion of marks for noncompeting and unrelated (i.e., essentially nonproximate) products, as well as for free riding,\textsuperscript{30} the Fourth Circuit is correct.

Where the comparison takes place in the marketplace, as it does with respect to senior marks that are only conceptually strong (or that enjoy no strength), it is intuitive that similar marks that do possess conceptual strength characteristics (e.g., uniqueness) are more likely to be considered related for purposes of a likelihood of confusion assessment than are similar marks without such characteristics. In a Squirt-variant confusion study (an array or a sequential line-up), respondents look for clues in answering closed-ended questions, and shared uniqueness will enhance similarity in generating same/affiliated company inferences.

\section*{C. Market Proximity}

For marks that are not top of mind, a relatedness-based inference as to source requires that the marks exist in sufficient physical or temporal proximity so as to create “‘real world

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\bibitem{27} Jerre B. Swann, \textit{Likelihood of Confusion Studies and the Straightened Scope of Squirt}, 98 TMR 739, 742-45 (2008) (this article will be substantially updated in Diamond and Swann, \textit{Lanham Act Surveys}).

\bibitem{28} “A mark that is strong . . . is likely to be remembered and more likely to be associated in the public mind with [or triggered by] a greater breadth of products . . ., than is a mark that is weak because it is relatively unknown.” James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 276 (7th Cir. 1976).

\bibitem{29} Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984).

\bibitem{30} In the marketplace, “familiar [top of mind] brands are selectively given more exposure, attention, comprehension and retention by consumers,” Steve Hoeffler and Kevin Lane Keller, \textit{The Marketing Advantages of Strong Brands}, 10 Brand Mgmt. 421, 424 (2003); their owners get “dramatically more impact from the same communications budget,” David A. Aaker, \textit{Managing Brand Equity} 186 (1992); and they function much in the manner of a picture of a celebrity on the cover of a magazine in a sidewalk kiosk—they attract attention in an otherwise hurried and cluttered environment, Peter & Olsen, \textit{Strategy, supra} note 9, at 118-19. Use of a strong brand on divergent goods often thus reflects an effort to capitalize (free ride) on such attributes. \textit{See, e.g.,} Federal Express Corp. v. Federal Espresso, Inc., 201 F.3d 168, 170 (2d Cir. 2000) where the defendant admitted thinking that “Federal Espresso” would be an easy name to remember [for a coffee shop] because of its similarity to the name ‘Federal Express,’ which she knew to be well-known. . . . \textit{See also} Luk Warlop and Joseph W. Alba, \textit{Sincere Flattery: Trade Dress Imitation and Consumer Choice}, 14 J. Consumer Psychology 21 (2004); and Judith L. Zaichowsky, \textit{The Psychology Behind Trademark Infringement and Counterfeiting} 67-68 (2006):

[Creating] a positive attitude toward [a] product is a major task. . . . While there are several complex, time-consuming, and expensive ways to build positive attitudes . . ., a very simple way is just to associate [a] good to an object toward which consumers already have a very positive attitude.
situations in which both marks at issue are likely to be evaluated sequentially or side by side.” 31 Without commercial strength or proximity, even identical marks for identical or similar goods are unlikely to cause confusion, 32 and the proximity requirement inherently limits the reach of marks that are only conceptually strong (if that) to similar or related products sold to overlapping customers or in overlapping markets.

In virtually all cases, brand strength (often undifferentiated between commercial and conceptual) and proximity are analyzed (each often at length) under separate headings. In many cases, however, only one of the two is the real world basis for brand comparison opportunities and a likelihood of confusion assessment.

In, for example, Chrysler Corp. v. Silva, involving the likelihood of confusion caused by a replica of the Dodge Viper “muscle car,” the district court: (a) found similarity and (marketplace) strength of trade dress in the plaintiff’s favor, but found proximity (split into channels of trade and advertising) and intent in the defendant’s favor; and (b) entered judgment for the defendant, given an even split of the confusion digits. 33 In reversing, the First Circuit observed:

A substantial part of the [district] court’s opinion is devoted to [the lack of proximity and to differences in prospective purchasers], concluding that purchasers would not be misled. Chrysler concedes this . . . Rather, its case depends on what is known as post-sale confusion—viewers who have an interest

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31. Thoip v. Walt Disney Co., 690 F. Supp. 2d 218, 235 (S.D.N.Y. 2010). In my view, the Court in Thoip excessively focused on physical (“close”) proximity, as opposed to temporal proximity. There is a “recency effect” in memory—we more readily remember what we had for breakfast this morning that what we had ten days ago; our memory of a morning’s meal has not eroded or become lost in the clutter of a day’s activity. Hoyer & MacInnis, supra note 10, at 185. We may, therefore, carry even a weak brand in mind for some time after seeing it advertised or beyond the counter on which it appears, particularly if the brand is conceptually strong (e.g., unique). Whether a Squirt variant (in Thoip, a sequential line-up) is an appropriate test for confusion may thus often turn on the duration of the recency effect—i.e., on how long a brand with only conceptual strength (if any) remains in the mind to facilitate comparison with an alleged infringement. In my view, the unique Disney shirts in Thoip (and likely the plaintiff’s offerings) would have travelled with consumers for arguably high involvement children’s character t-shirts from store to store—easily placing those two somewhat geographically divergent marks in the mind for sequential comparison and assessment.

32. In a 1989 case, Dr. Hans Zeisel, the father of surveys for trademark litigation, was confronted with a traditional Squirt reflecting 35% “same company” responses as to “Workforce” jeans sold by Gap and “Workforce” socks sold by Sears Roebuck. He conducted two studies “to measure the likelihood that consumers would ever encounter both [brands]” and found that the likelihood ranged between .5% and 1%; he concluded that the “likelihood of consumer confusion was not 35%, but less than 1% among [a universe of] Gap customers. . . .” Hans Zeisel and David Kaye, Prove It with Figures 167-69 (1997).

33. 118 F.2d 56, 59 (1st Cir. 1997).
from the standpoint of an original creator’s reputation and may be misled.\textsuperscript{34}

For post-sale confusion, top of mind awareness is essential and proximity is irrelevant.\textsuperscript{35} The district court’s extensive discussion of proximity in \textit{Silva} was thus essentially a waste of judicial resources. Where a mark is top of mind, it travels with a consumer and is available for comparison whenever a junior use is encountered—it does not depend on proximity to a junior use for a confusion assessment to occur. It was properly “difficult [for the First Circuit] to understand why Chrysler, who prevailed on similarity and [commercial] strength of trade dress [on similar products], should lose its case ...”\textsuperscript{36} and it is that combination that often is “open and shut” (unless, of course, consumers are highly sophisticated and there is no actual confusion after years of co-existence).\textsuperscript{37}

\textbf{D. Similarity of the Products}

The more schema memory traces that are activated by a stimulus, the more likely that pattern matching is to occur. The more similarities shared by proximate brands, the more likely relatedness-based inferences are to be drawn. Similarity of products clearly impacts consumer evaluations as to brand relationships.

Similarity of products can, indeed, frustrate actionable confusion assessments. I have witnessed surveys, for example, that produced noise exceeding 40-percent attributable to market share effects and I have seen side-by-side results that predominantly flowed from the identity of the product component of the brands being tested. To iterate, one frequent purpose of a control is to inform the survey expert whether product similarity is legi-

\textsuperscript{34.} \textit{Id.}

\textsuperscript{35.} Beyond a point of sale analysis, it is often difficult, indeed, to ascertain the frequency of real world opportunities for brand comparisons. Professor McCarthy suggests, e.g., that a sequential line-up study “is an attempt to replicate the marketplace process of advertising exposure to a brand or trade dress, followed by being confronted in the market with both similar and differing brands or trade dresses.” McCarthy, \textit{supra} note 18, at § 32:177. In my view, the rationale should be accompanied by proof as to the level and awareness of the “advertising exposure”—i.e., by some effort to estimate the duration of its recency effect.

\textsuperscript{36.} 118 F.2d at 59.

timately contributing to consumer confusion triggered by a similarity of marks (and warranting an injunction) or whether it is principally causing “confusion” responses (in the context of legitimate competition) by reason of, for example, preconceptions as to category conglomeration or category brand dominance.

IV. CONCLUSION

Confusion is possible whenever two similar marks are in cognitive workspace for the purposes of comparison. With respect to top of mind marks, the comparison takes place in the mind, and marketplace strength, in addition to similarity, is critical—the senior mark must exist sufficiently close to the surface of memory so as to be cued by a similar junior. As to marks that are not top of mind, the comparison takes place in the marketplace, and it is critical that the brands (or their proxies such as advertising) are sufficiently proximate, physically or temporally, so as to facilitate their simultaneous presence in consciousness.

As Silva illustrates, a rote analysis of equally weighted “digits” and the use of addition to determine the winner in a trademark battle are invitations for reversal. In rough magnitudes: (1) similarity of marks is always required; (2) commercial strength is often sufficient (particularly as to similar goods) and dictates whether a survey expert uses an unaided (Eveready) format to test (internally) consumers’ memories or uses an aided (Squirt variant) format to replicate (externally) marketplace conditions; (3) proximity is essential as to marks that are not top of mind, and proximity, in turn, is often demonstrable only as to like or closely related goods; and (4) similarity of products almost always enhances a likelihood of confusion, sometimes improperly so.

The principal confusion factors can work separately or together or in various combinations. Rarely are they all present or relevant. Their importance fluctuates with the type of mark and confusion at issue. Fundamentally, the factors must be evaluated in the cognitive and marketing contexts of how confusion is likely to occur (or not to occur) in a given case.