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Dedicated to Jerre B. Swann 1939–2025

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MULTICULTURALISM, MINORITY LANGUAGE
RIGHTS, AND TRADEMARK LAW:
PROTECTING THE LESS-THAN-AVERAGE
CONSUMER*

*By Ilanah Fhima***

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I. INTRODUCTION

Trademarks and minority rights may not seem like natural bedfellows.¹ However, this article argues that our approach to which marks we register, and the scope of protection they are afforded, once registered, play an important role in recognizing minority interests as part of a multicultural society.² In particular, it is argued that trademark law's frequent recourse to seemingly neutral "one size fits all" approach to the average consumer fails to take into account the particular need of minorities. While trademark law may not deliberately treat minorities worse than consumers generally, it is argued that protecting minority interests requires us to go beyond treating everyone the same, with a view to eliminating inequalities that might otherwise occur from different starting points and pursuing goals of equality and a wider understanding of non-discrimination. In particular, this article focuses on the United Kingdom's treatment of languages other than the majority language, English. It examines empirically and qualitatively the extent to which the UK Trade Mark Registry (the "Registry") and courts consider the meaning of a language that may be unknown to the majority of consumers when assessing descriptiveness in particular, and in judging confusion and misappropriation-type actions. This involves considering whether tribunals consider knowledge of terminology and pre-existing uses that may be known only to a limited subset of consumers on national, religious, or ethnic grounds. These narrow but important questions have much to tell us about how minorities are treated.

Drawing on political philosophy, this article identifies the importance of *recognizing* the language of minorities both as an intrinsic value, and also as part of the achievement of a multicultural society. Moreover, on a practical level, if the law does not take into account minority language meanings, there is a risk that the very harms that trademark law seeks to prevent will be suffered by minority group members (and indeed wider society if the term might enter the English language in the future). For example, terms that can be understood descriptively, but only by a limited

¹ Although there is some work in the United States on this issue. In particular, William Michael Schuster, Miriam Marcowitz-Bitton and Deborah R. Gerhardt have traced minority ownership of trademarks in *An Empirical Study of Gender and Race in Trademark Prosecution*, 94 S. Cal. L. Rev. 1407 (2022) and in terms of substantive trademark law Kevin J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, 58 Syracuse L. Rev. 431 (2008).

² There is further work to be done on marks that are offensive to particular minorities, but that is for another article. This has been the subject of considerable attention in the United States in the light of the Supreme Court's ruling that the bar on the registration of offensive terms, including racial slurs, was unconstitutional in *Matal v. Tam*, 582 U.S. 218 (2017) and *Iancu v. Brunetti*, 588 U.S. 388 (2019). See also Vicki Huang, *Trademarks, Race and Slur Appropriation: An Inter-Disciplinary and Empirical Study*, U. Ill. L. Rev. 1605 (2021).

subset of consumers, could be monopolized by third parties, impairing the ability of minority group members to use their own language to describe competing goods. Likewise, a failure to take into account meanings and uses of terminology that are known to a limited subset of consumers runs that risk that these consumers will suffer confusion, if a third party uses a similar term.

This article analyzes the approach to minority languages adopted by the Registry. It identifies a seeming tension between trademark law and adequate protection for minorities: trademark principles are judged through the eyes of the average consumer, and yet an “average” (in the colloquial, numerical mean sense) member of the UK population is unlikely to be familiar with the meaning of terms in Tamil, Arabic, Gaelic, or indeed any language other than English. Should trademark law pay attention to words that are unfamiliar to most UK consumers, and if so, how? The law on this issue is unclear, and indeed it will be demonstrated that the fundamental lack of consistency regarding how we view the average consumer in trademark law gives cause for concern. In particular, prior case law that ruled that the “average consumer” is some form of hypothetical generalization of the characteristics of a UK consumer remains prevalent, even though more recent decisions have held that there is greater flexibility to take into account that the body of UK consumers is diverse in many ways. This research identifies both approaches at the appellate level and tracks how this filters down to Registry decisions. It is argued that having clarity in this area is important, not just for minority language speakers.

We speak about the “average consumer” as if this average consumer is a single unified entity, but the reality is that consumers, particularly of mass-market goods, vary in many ways including age, (dis)ability, education and literacy level, and socio-economic status as well as ethnocultural background, as discussed in this article. If such differences cannot be taken into account, then we are accepting the possibility of vulnerable consumers being confused. To be clear, there is no suggestion that any institution or individual involved in making trademark decisions intends to discriminate against minorities or otherwise treat them unfavorably. Rather, the article suggests that following the ethnoculturally and linguistically neutral logic of trademark law without giving thought to wider social consequences can unwittingly lead us to places we do not want to go.

Part II introduces why acknowledging the meaning of foreign languages in trademark law is important, both on a practical level, and from the perspective of political philosophy, where the importance of recognition has been identified. Part III identifies the different, and often conflicting characteristics that have been attributed to the average consumer in the case law. Part IV considers quantitatively and qualitatively the way in which the

Registry has treated foreign language terms, with a particular emphasis on the role of the average consumer in those determinations. Part V discusses a number of allied problems faced in recognizing the meaning of foreign language trademarks. Part VI concludes with some lessons to be learnt, both in relation to the treatment of foreign language marks and more generally in terms of how the average consumer is understood in trademark law.

II. WHY IS THE INTERFACE BETWEEN LANGUAGES AND TRADEMARKS IMPORTANT?

Language, and the meaning behind the terms embodied therein, are fundamental to trademarks. Acknowledging meaning not only prevents registration of descriptive terms (so that such terms remain free to enable communication) rather than falling into the hands of a single undertaking, but also forms the basis for the conceptual comparison of marks that shapes the scope of protection against confusion. Sidelining the meanings of marks (perhaps unintentionally) means tolerating speakers of minority languages being unable to use terms that are most suitable in their language to refer to products and other artifacts and concepts. It could also distort confusion findings where the non-English meaning of a mark is not duly taken into account when assessing a mark's distinctiveness and conceptual similarity. Moreover, on a societal level, there are strong reasons for recognizing and protecting minority languages based on equality, dignity, and recognition. This section will consider the trademark-based and the societal-based concerns in turn.

A. Trademark Law and Monopolization of Minority Languages

A trademark indicates the commercial origin of goods to consumers. This facilitates consumer choice by enabling consumers to make repeat purchases of goods they have previously enjoyed, or to select goods from trusted traders. At the same time, protecting marks enables proprietors to ensure that their investment in marketing their goods and services will be attributed back to them and will not be diverted to other traders.³ Thus, the law grants exclusive rights to trademark owners to make use of their marks on the goods and/or services for which they are registered. The marks that are inherently best suited to this function are made-up terms or arbitrary words that have no direct connection to the goods. The

³ William Landes & Richard Posner, *The Economics of Trademark Law*, 78 Trademark Rep. 267 (1988).

registration of descriptive or generic terms in particular is barred⁴ in part because they do not lead consumers back to a single point of origin, but also because, in the interests of competition, other traders will need to use those terms in order to inform consumers about the characteristics of their goods or services.⁵ Trademark law has long recognized that if a descriptive term is registered as a mark, a single undertaking will be able to exercise a degree of control over the underlying product market because the proprietor will be able to prevent others from using that mark to describe their goods in the most effective way. The same argument holds true for terms that are descriptive in minority languages. However, as will be argued in this article, to date the meaning of foreign terms has generally not been acknowledged in trademark decisions in the UK.

The most profound effect that discounting the meaning of foreign terms will have is on the minority group whose members will not be able to receive information in a familiar language on competing offerings.⁶ It has also been argued that, if descriptive words are placed in the hands of a single undertaking, minority consumers familiar with that language may be deceived into believing that there is only one supplier of such goods in the jurisdiction in question.⁷ As discussed below, while the size of these populations may be small as a percentage of the entire UK population, speakers of each foreign language often amount to hundreds of thousands of people. However, as Mr. Alexander KC, sitting as Appointed Person (“AP”) has pointed out, the entire UK population is also potentially deprived if registration of minority

⁴ Although consumers can learn to recognize descriptive terms as trademarks that indicate commercial origin through the doctrine of acquired distinctiveness under section 3 of the Trade Marks Act. Trade Marks Act, 1994, c. 26, § 3(1) (U.K.) (“TMA”).

⁵ § 3(1)(c) TMA. The Court of Justice of the European Union (“CJEU”) identified the public interest behind the ban on the registration of descriptive marks in *Windsurfing Chiemsee*. Joined Cases C-108/97 & 109/97, *Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v. Boots- und Segelzubehör Walter Huber & Franz Attenberger*, ECLI:EU:C:1999:230, ¶ [26] (May 4, 1999).

⁶ Brauneis and Moerland also argue that traders from the jurisdiction whose language has not been recognized could also suffer if they are unable to export their goods bearing the original getup into the country where the descriptive term is a registered trademark, or otherwise they may have to invest in new packaging/branding. For example, if MATRATZEN is on the Spanish Trade Mark Register covering mattresses, then a German mattress maker might be unable to export mattresses bearing the descriptive term “Matratzen” into Spain. Consumers will ultimately lose out too, because fewer competing products will be on offer to them. See Robert Brauneis & Anke Moerland, *Monopolizing Matratzen in Malaga: The Mistreatment of Distinctiveness of Foreign Terms in EU and US Trademark Law*, GRUR Int. 1118 (2018).

⁷ Anne Gilson LaLonde, *Far from Fluent: Making Sense of the Doctrine of Foreign Equivalents*, 112 Trademark Rep. 771, 780 (2022), adapted and reprinted from Gilson on Trademarks with permission. Copyright © 2022.

descriptive words prevents the development of markets that may expand to offer products to the entire UK population.⁸

There are only a limited number of published Registry decisions (including Hearing Officer (“HO”) and AP decisions⁹) that have considered whether descriptive foreign terms should be refused pursuant to the bar on the registration of descriptive marks contained in Section 3(1)(c) of the Trade Marks Act 1994 (“TMA”). While the low numbers may just reflect the fact that that few such applications are being made, it should be noted that, in general, most objections raised on absolute grounds are resolved between the applicant and the primary examiner, such that they do not require a hearing before an HO. Unfortunately, examination records are not easily accessible in the UK, so it is difficult to see how such applications are treated on a routine basis. However, based on an analysis of objections raised on relative grounds (i.e., where the owner of an earlier trademark objects to a later application because of a perceived conflict between the marks), it seems unlikely that many foreign-language descriptive marks will be refused on the basis of Section 3(1)(c) of the TMA. It is reasonable to presume that applications for this type of mark are being filed in the UK because there are examples of applications for purely descriptive terms in foreign languages taking place in other jurisdictions. For example, the Australian Trade Marks Manual identifies applications including the term “Australian beef” in Chinese characters for “beef” in Class 29 and “unlimited calls” in Arabic for “telecommunication services” in Class 38.¹⁰

As foreshadowed above, the majority of Registry decisions that have considered the meaning of foreign terms are relative grounds decisions. In particular, HOs and APs are asked to consider the impact that a foreign term included in one or both marks has on likelihood of confusion. Here, the conceptual analysis of the mark is particularly relevant. For example, one of the marks under consideration may include a foreign term and the other mark may include the equivalent English term, but unless the meaning of the foreign term is acknowledged, there is no conceptual similarity. Two

⁸ O/224/16, *In re Elite Ocakbasi Restaurants Ltd.* [2016], ¶¶ [8]-[9] (UKIPO) [*BEST MANGAL*]. See also O/782/21, *Qima Coffee Ltd v. The Cooperative Union of Yemeni Coffee Producers Ass’n* [2021], ¶ [40] (UKIPO) (considering the arguable descriptiveness of a new coffee variety).

⁹ Parties to trademark proceedings can request that their dispute be heard by a senior examiner, known as a “Hearing Officer” if the issues therein cannot be resolved as the examination or opposition stages. See *Trade mark disputes resolution: hearings*, Gov.uk, www.gov.uk/guidance/trade-mark-disputes-resolution-hearings (last visited May 28, 2025). If the parties are dissatisfied after the hearing, then an appeal either to the civil court or to a senior lawyer, known as an “Appointed Person” is possible. See *id.*

¹⁰ IP Australia, *Trade Marks Manual of Practice and Procedure*, 22.11.2 (Dec. 19, 2022) [hereinafter *Trade Marks Manual*], <https://manuals.ipaustralia.gov.au/trademark/11.-words-in-languages-other-than-english>.

marks may even contain a term that is descriptive in a foreign language. While common use of a descriptive term is rarely decisive in a finding of similarity, where the descriptive term is in a foreign language, it will be at best neutral to similarity of marks.¹¹ This is seen in a decision involving the senior FRANGOS mark for “restaurant services,” shown in Figure 1 and the junior FRANGO mark, shown in Figure 2, registered for the same services.

Figure 1



Figure 2



The word “frango” means “chicken” in Portuguese. However, because the HO found that the word would not be known to the average UK consumer, the word “FRANGO” was deemed “neither allusive nor descriptive” and therefore had a “high degree of inherent distinctive character.” Although the chicken device and other verbal elements were of low distinctiveness, the prominence of the “highly distinctive” word “FRANGO”¹² in both marks was significant in the ultimate finding of likelihood of confusion.¹³ In other words, the “foreignness” of the descriptive term makes a likelihood of confusion *more* likely, whereas, had the descriptive meaning of the word been acknowledged, the mark’s level of distinctiveness would be low, reducing the likelihood of confusion. The result of the HO’s approach is that descriptive foreign terms get an enhanced degree of protection (because they are viewed as meaningless in English), extending the penumbra of protection against third-party uses that will be viewed as confusingly similar, and therefore infringements.

An earlier example of this phenomenon can be seen in *KIAP MOU*, an early decision of the General Court of the EU (“GC”).¹⁴ The senior mark was MOU, registered in the UK for various food products including meat. The junior mark was KIAP MOU, applied

¹¹ This phenomenon is identified in Brauneis and Moerland. Brauneis & Moerland, *supra* note 6. See also Ilanah Fhima & Dev S. Gangjee, *The Confusion Test in European Union Trade Mark Law* 58-61 (2019).

¹² O/558/19, *Chadha v. Frango UKI Ltd.* [2019], ¶ [52] (UKIPO).

¹³ *Id.* at ¶ [55].

¹⁴ Case T-286/02, *Oriental Kitchen SARL v. OHIM*, 2003 E.C.R. 311.

for as an EUTM also for food products. The proprietor of the MOU mark opposed the EUTM application, claiming a likelihood of confusion. The applicant countered that as “mou” means “pork” in Indochinese languages, the registration for MOU was, in fact, invalid for descriptiveness. The GC rejected the applicant’s arguments because there was nothing to suggest that a “significant proportion” of the UK public for the foodstuffs in question would be familiar with Thai or Laotian.¹⁵ Consequently, the term was distinctive and dominant in both marks, and its presence in both marks meant that there was a likelihood of confusion.¹⁶

Another UK example involves the word mark VIRUNDHU, which is Tamil for “feast” and was the mark of the senior user for restaurant and catering services. The senior user was able to prevent the registration of the mark ROYAL VIRUNDHU for a range of food and related services. Rather than being treated as a descriptive term, the word “VIRUNDHU” was seen as highly distinctive, and so the word “ROYAL,” considered less distinctive, was insufficient to differentiate the two marks.¹⁷ The HO acknowledged that there would be a small number of consumers who might not be confused because they would recognize the descriptive meaning of the term but concluded “the majority is more important in my assessment.”¹⁸

It is not just the failure to recognize a descriptive term in a senior mark that spotlights problems. One decision involved a senior mark including the term “LAV.” The junior application was for the word “LAVASH” combined with a device for restaurants and associated services, where “lavash” is a form of Armenian flatbread. However, this fact was not taken into consideration because “most consumers” in the UK would be unfamiliar with the word’s meaning.¹⁹ Ultimately the marks were too different to lead to likelihood of confusion, but taken to its logical conclusion, failure to recognize the descriptive meaning of the word “LAVASH” in the junior mark would mean the descriptive use defense²⁰ would not be

¹⁵ *Id.* at ¶ [41].

¹⁶ Although the junior mark was also descriptive, as the term “KIAP” means “crispy,” the marks were PORK versus CRISPY PORK. *Id.* at ¶ [16].

¹⁷ O/673/18, *Virundhu Restaurant Limited v. Virundhu Ltd.* [2018], ¶ [65] (UKIPO).

¹⁸ *Id.* at [66].

¹⁹ O/509/21, *Gürok Turizm Ve Madencilik Anonim Sirketi v. Ozkahraman* [2021], at ¶ [36]. See also O/112/21, *Yasar Dondurma Ve Gida Maddeleri Anonim Sirketi v. Gulener* [2021] (UKIPO) (concerning the mark 46 MARAS DONDURMAYI ADIYLA ISTEYIN for ice cream where the words in the mark meant “mastic ice cream from Maras” in Turkish, with Maras being a town in Turkey).

²⁰ See TMA § 11(2)(b) (“A registered trade mark is not infringed by— . . . the use of indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services. . . .”)

available if the term were used by a third party where there might otherwise be infringement.

Finally, one of the measures of whether two marks are similar enough to lead to a likelihood of confusion is their conceptual similarity. An unwillingness to recognize the meaning of foreign terms means that conceptual similarity may be overlooked, thus increasing the risk that two marks that minority consumers (who do understand the terms) would find confusingly similar would be registered. For example, where the earlier mark was SALAM (to use the terminology of the HO, an Islamic greeting) and the later mark was SALAAM (which would be understood by Arabic, Urdu, and Farsi speakers in the same way),²¹ the HO found that while those marks would be meaningful to the minority groups, they would not be so understood by the average consumer.²² Thus, there was no “conceptual hook” as the HO put it, meaning that no conceptual comparison was possible.²³ Consequently, minority language terms may be stripped of their meaning, as in so doing, on the measures of similarity of marks, making it more difficult to demonstrate likelihood of confusion in respect of those marks. This unfortunate outcome is particularly prominent in relation to non-Roman character words where, as discussed below, the marks are presumed meaningless because the average consumer cannot read Chinese, Cyrillic, Arabic, Hebrew, etc.

It should be noted that many of these decisions relate to applications filed by members of the minority group to whom the mark has a meaning. This does not diminish the competition concerns.²⁴ Whatever the background of the applicant, the lack of availability of what amounts to a descriptive term in the minority language remains the same and, by bringing the dispute before the Registry, the member(s) of the minority group have caused the Registry to become involved.

B. Recognition and Wider Societal Concerns

We have seen that failure to recognize the meaning of foreign terms, particularly descriptive terms, can significantly impact the availability of terms to other traders. This can limit competitors’ ability to provide and reference competing goods to minority consumers, and indeed the market more generally. It can also lead to confusion among minority consumers. However, the effect of failing to recognize minority languages in trademark law is more profound. Indeed, in some instances, failure to recognize the

²¹ O/311/19, *Flying Trade Ltd. v. Salam Foods Ltd.* [2019] (UKIPO) (*SALAM FOODS*).

²² *Id.* at ¶ [62].

²³ *Id.* at ¶ [50].

²⁴ Although this fact might counter concerns of cultural appropriation by those outside the minority group.

meaning of a minority language does not directly affect the scope of protection, but rather the problem is the mere failure to acknowledge that the term has a meaning to minorities.²⁵

When looking at trademark law, it might be asked why speakers of minority languages should be given special rights. On one level, there is no equality problem, in the sense that all languages, and even non-verbal cues such as sounds, shapes, colors, etc. are treated the same: if the “average consumer” reads a meaning into the object or word in question, this will be recognized. If such an average consumer does not, then it will not. This, though, is a superficial approach. True equality is not achieved by treating everybody and everything the same. We need to look also to the outcome.²⁶ If minority consumers cannot benefit from protection against confusion, and if words that are descriptive in their languages can fall into the hands of a single undertaking, then it is difficult to say that trademark law provides them with the same protection as that afforded to solely English-speaking consumers. However, the normative argument for language recognition in trademark law goes beyond equality of outcome and into the realm of recognizing human dignity.

From a normative perspective, it is helpful to think briefly about how our society is structured. As Parekh²⁷ identifies, any society made up of two or more cultural communities must choose how to respond to this “cultural diversity.” Some societies take a “monocultural” approach, expecting minorities to assimilate into the mainstream culture. However, other societies have adopted “multiculturalism,” whereby they seek to “welcome and cherish” cultural diversity.²⁸ It is argued in this article that the multiculturalism approach better recognizes the needs of minority language groups.

²⁵ For example, where one sign but not the other has a non-descriptive conceptual element, such as a foreign language name and this is treated as meaningless as part of the conceptual comparison conducted in comparing marks for the purpose of judging likelihood of confusion.

²⁶ See Sandra Fredman, *Discrimination Law* 16 (3d ed. 2022) (“[T]he equality principle goes beyond a demand for consistent treatment of likes and requires, instead, that the results be equal. The strength of this notion of equality lies in its recognition that apparently identical treatment can in practice reinforce inequality because of past or ongoing discrimination.”).

²⁷ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* 5-7 (2d ed. 2017).

²⁸ More recently, an additional theory, interculturalism, has been put forward, involving increased emphasis on building links between multiculturalism’s diverse groups (see, e.g., Ricard Zapata-Barrero, *Interculturalism in the post-multiculturalism debate: A defence*, 5 (14) *Comparative Migration Studies* 1 (2017)). At the heart of this theory, though, remains the recognition and protection for the diverse cultural groups that engage in such a dialogue (see, e.g., Christian Joppke, *War of words: interculturalism v. multiculturalism*, 6 (1) *Comparative Migration Studies* 1, 3 (2018)).

What is needed for a society to be multicultural is contested. However, the building blocks of any multicultural society are, according to Song,²⁹ religion, ethnicity, language, nationality, and race as aspects of culture to be considered in this context. Thus, a key question in this area is the degree to which minority languages should be recognized. The leading theorist on the interplay between language rights and multiculturalism is Will Kymlicka, who writes against the background of the ongoing debate over the recognition of French language rights for the Quebecois in his native Canada.

1. Collective Rights for National and Ethnic Minorities

Kymlicka³⁰ argues for “group collective rights” to be shared by members of minority groups. He identifies two categories³¹ of minorities.³² National minorities include indigenous people and national groups such as the Quebecois in Canada or Puerto Ricans in the United States.³³ These groups are, according to Kymlicka, entitled to broader rights because their role in society arises from conquest and colonization, or from federation. On the other hand, migrants are entitled to lesser rights. He labels this category of people as benefitting from “polyethnic” rights.³⁴ Although such people require differentiated rights to maintain their cultures, their presence in the dominant nation is a matter of choice³⁵ and indeed the ultimate aim of migrants (says Kymlicka) is to integrate into the host nation.³⁶

This difference in justification for minority rights leads to lesser rights for polyethnic groups than national minorities. According to Kymlicka, only national minorities are entitled to political “special group representation rights” and self-government. However,

²⁹ Sarah Song, *The Subject of Multiculturalism: Culture, Religion, Language, Ethnicity, Nationality, and Race?*, in *New Waves in Political Philosophy* 183 (Boudewijn de Bruin & Christopher Zurn, eds. 2009), 177.

³⁰ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1996).

³¹ These categories are not uncontroversial. For example, Kymlicka himself acknowledges that he cannot fit those whom he calls “African-Americans” into his schema. This is because (according to his categorization) many did not come to the United States voluntarily, they were prevented from integrating, and they have no “homeland” in the United States and no common historical language. See Kymlicka, *supra* note 30, at 24; see also Adrian Favell, *Applied Political Philosophy at the Rubicon: Will Kymlicka’s Multicultural Citizenship*, 1 *Ethical Theory & Moral Prac.* 255, 266-267 (1998).

³² Kymlicka focuses solely on national and ethnic minorities, though he notes that some of his arguments may apply to other “marginalized groups,” giving the examples of “women, gays and lesbians, and the disabled.” Kymlicka, *supra* note 30, at 18-19.

³³ *Id.* at 29.

³⁴ *Id.* at 30, 37-38.

³⁵ *Id.* at 63.

³⁶ *Id.* at 79. Controversially, he applies the same logic to refugees, even though it is difficult to argue that their choice of location is “voluntary.” For our purposes, this is unimportant because Kymlicka advocates for language rights for both groups. See *id.*

“polyethnic rights” protect specific religious and cultural practices that would otherwise be unprotected³⁷ and are afforded to immigrant, ethnic, and religious groups. It is these rights that will most frequently apply in the trademark context.

We might question the importance of protecting language rights in particular. Kymlicka explains that group collective rights, including language rights, promote equality. He notes that “freedom of choice is dependent on social practices, cultural meanings and a shared language.”³⁸ Further, he argues “Some groups are unfairly disadvantaged in the cultural marketplace and political recognition and support rectify this disadvantage.”³⁹ He dismisses the alternative approach to multiculturalism, which he labels “benign neglect,” where minorities are not afforded special rights. Benign neglect, he argues, is not neutral, because in the case of a language, to ignore that language “is almost inevitably condemning that language to ever-increasing marginalization.”⁴⁰ In most, if not all, cases involving trademarks, the language rights we might argue for are likely to fall within Kymlicka’s “polyethnic rights.” Accepting the logic of Kymlicka’s argument would mean that it is socially important to recognize the meaning of minority languages.

2. Why Language Rights?

In a world plagued by social, economic, religious, gender, and numerous other forms of inequality, we might question why language is so important to Kymlicka and other liberal thinkers. Kymlicka⁴¹ highlights the role of language in establishing identity. In making this argument, Kymlicka draws heavily on the work of the importance of recognition. Indeed, in *Multicultural Citizenship*, Kymlicka highlights the importance of cultural identity, of which language is part, noting “people’s self-respect is bound up with the esteem in which their national group is held. If a culture is not generally respected, then the dignity and self-respect of its members will also be threatened.”⁴² Thus, it is necessary to examine the role that language plays in that recognition.

³⁷ *Id.* at 37-38.

³⁸ *Id.* at 126.

³⁹ *Id.* at 108-109.

⁴⁰ *Id.* at 111.

⁴¹ Alan Patten & Will Kymlicka, *Introduction: Language Rights and Political Theory: Context, Issues, and Approaches*, in *Language Rights and Political Theory* 14-15; 44-46 (Alan Patten & Will Kymlicka, eds. 2023). Kymlicka also stresses the importance of minorities maintaining their identity. *Supra* note 30, at 89-90 (citing Charles Taylor, *The Politics of Recognition*, in *Multiculturalism: Examining the Politics of Recognition* (Amy Gutmann, ed. 1994)).

⁴² Kymlicka, *supra* note 30, at 89.

3. Language and Recognition

Many states have an agreed “official” language or perhaps a number of such languages, in which official business is conducted. This privileges certain languages over others. Both Kymlicka and Song argue that this results in unfair treatment of the speakers of minority languages if their languages are not also recognized. Song argues that this conflicts with recognition of people’s dignity and self-respect. Thus, Song identifies recognition of minority languages as having an important symbolic dimension, stating:

Justice demands linguistic accommodations not simply in virtue of their effects on the distribution of minorities and opportunities, but also because the symbolic recognitions of minority languages is integral to treating linguistic minorities with equal dignity.⁴³

In reaching this conclusion, Song draws on the work of Taylor, who describes recognitions as “not just a courtesy we owe people” but rather as a “vital human need.”⁴⁴ Recognition, Taylor argues, shapes a person’s identity, and so its absence can “inflict harm, can be a form of oppression, impressing someone in a false, distorted, and reduced mode of being.”⁴⁵

Taylor traces the origins of the importance of recognition to the development at the end of the 18th century of individualized identity, with “being in touch with our feelings” acting as a moral compass, telling us the right thing to do. This inner moral voice can be lost through pressure to outward conformity or false views of the self.⁴⁶ This, though, tells only part of the story, as human life is not purely monological and inward looking. Instead, it is dialogical. Taylor argues “We become full human agents, capable of understanding ourselves, and hence of defining our identity, through our acquisition of rich human languages of expression.” Taylor takes “language” here in a wide sense, to include art, love, etc., but we might pause to reflect that language in the narrow sense of the term, as well as the concepts it represents, must play a vital role in such dialogue and in particular in intra-cultural interactions that shape who we are. Thus, the key role of recognition is “universally acknowledged” on the “social” as well as the intimate plane, on which the repercussions of legal decisions, including trademark law, would be felt.⁴⁷ Indeed, Taylor argues:

Equal recognition is not just the appropriate mode for a healthy democratic society. Its refusal can inflict damage on those who

⁴³ Song, *supra* note 29, at 183.

⁴⁴ Taylor, *supra* note 41, at 26.

⁴⁵ *Id.* at 25.

⁴⁶ *Id.* at 30-31.

⁴⁷ *Id.* at 36.

are denied it. . . . The projection of an inferior or demeaning image on another can actually distort and oppress, to the extent that the image is internalised.⁴⁸

4. Implications of Recognition for Trademarks: Language Protects Culture

Thus, failure to acknowledge the meaning of trademarks in minority languages is not only an inconvenience for members of those minorities but also has a crucial symbolic value in recognizing the dignity and needs of the members of those minorities. To fail to recognize that meaning, even if it is not one that would be understood by those who do not speak those languages, plays a role in denying minority group members their identity on an individual level, and as full members of society. This is true even for “run-of-the-mill” terms, but how much more so must this be for terms of cultural significance. And yet we will see that there are examples of the Registry discounting the meaning⁴⁹ of cultural artifacts such as personal names,⁵⁰ place names,⁵¹ names of cuisine,⁵² and even religious practices⁵³ because they would not be known to the “average consumer” in the UK.

Here we should pause to note that recognition that a term has a meaning should not automatically result in refusal of the registration. A prominent example, for which the Registry received media criticism, was in relation to the registration of CARIAD for

⁴⁸ *Id.*

⁴⁹ Generally, in the sense of treating the terms as invented words for the purposes of the comparison as part of the likelihood of confusion assessment under Section 5(2) of the TMA. As previously stated, there are few publicly accessible examination reports raising descriptiveness or lack of distinctiveness objections, under Sections 3(1)(b) or (c) of the TMA, to applications for foreign descriptive terms. However, the Registry’s “Alphabetical List of Examination Practice” in the Manual of Trade Marks Practice states that “[t]here are no grounds for refusing registration of trade marks on the basis that they are descriptive or non-distinctive in a language which is unlikely to be understood by the relevant trade in the UK or by the relevant average UK consumer of the goods/services in question.” UKIPO, Manual of Trade Marks Practice, The Examination Guide, pt. B (Jan. 2021 ed.), <https://www.gov.uk/guidance/trade-marks-manual/the-examination-guide> [hereinafter The Examination Guide].

⁵⁰ O/500/21, *Animaccord Ltd. v. Popova* [2021] (UKIPO) (discussing the name “Masha”); O/484/21, *Mebarak v. Tayub* [2021] (UKIPO) (discussing the names “Shakera” and “Shakira”).

⁵¹ *See, e.g.*, O/704/18, *Gima (UK) Ltd. v. Disa Foods Ltd.* [2018] (UKIPO) (discussing the Turkish town Didim); O/112/21, *Yasar Dondurma Ve Gida Maddeleri Anonim Sirketi v. Gulener* [2021] (UKIPO) (discussing the Turkish town Maras).

⁵² *See, e.g.*, O/619/20, *Famous Food Ltd. v. Rahman, Madbar, & Matin* [2020] (UKIPO) (discussing the rice dish biryani).

⁵³ *See, e.g.*, O/195/15, *Pooja Sweets Ltd. v. Pooja Sweets & Savouries Ltd.* [2015] (UKIPO) (*Pooja Sweets*) (discussing “pooja” foods used in Hindu ceremonies).

candles.⁵⁴ Recognition means acknowledging that the term is not an invented word but that it means “love” in Welsh, even though most UK consumers would be unfamiliar with the word. However, normal trademark principles should then apply. Thus, because the word “LOVE” is not descriptive of candles, the mark should proceed to registration, as this mark did. (Indeed, there is a registration for a mark for candles containing the English word “LOVE” on the UK Register.⁵⁵) There is no need to prevent the registration of every meaningful or even allusive foreign term, and indeed to do so runs the risk of chilling the development of markets aimed at minority consumers wherein traders might want to use allusive terms to communicate with consumers. To impose such a rule also misunderstands the scope of trademark law, whereby registration does not prevent the use of a meaningful term in language—just in relation to the goods or services for which it is registered. However, the meaning of the term in question should be acknowledged.

5. Parallel Developments

What can be seen in the political philosophical writing reflects wider trends in the law’s treatment of minorities. Taylor’s vision of recognition as a vital human need shaped by identity finds a parallel in Fredman’s vision of equality. In her monograph, *Discrimination Law*, she argues that equality is a “multidimensional principle,” not limited to “treating likes alike.”⁵⁶ One of those dimensions is equality as dignity.⁵⁷ This focusses on “[t]he value attached to individuals simply by virtue of their humanity.”⁵⁸ It might therefore be argued that, if Taylor views recognition of language rights of minorities as essential to living as a human, failure to recognize such language rights would amount to inequality in a legal sense by failing to acknowledge the dignity of the users of minority languages.

Moreover, the logical endpoint of viewing language recognition as a component of humanity is for language rights to be treated as

⁵⁴ See *Cariad: Welsh word for love trademarked, sparking anger*, BBC (June 29, 2022), <https://www.bbc.co.uk/news/uk-wales-61973267>, although the applicant ultimately surrendered the mark, see *Cariad: Company drops plan to trademark Welsh word*, BBC (August 12, 2022), <https://www.bbc.co.uk/news/uk-wales-62518455>.

⁵⁵ UK Trademark No. 00914525992, although technically this is a figurative mark, including some not particularly distinctive design elements.

⁵⁶ Fredman, *supra* note 26, at 29. The parallel with Kymlicka’s argument that group collective rights must, in the interests of equality, trump universalism is obvious.

⁵⁷ *Id.* at 23.

⁵⁸ *Id.* at 24.

a human right.⁵⁹ De Varennes argues that such rights do exist.⁶⁰ However, these are generally at the declaratory level, and do not yet translate into individual enforceable rights. Moreover, language rights as human rights exist at a high level of abstraction, and as Kymlicka notes, may often lack the detail to be successfully applied.⁶¹ Even where specific rights are given, they focus on delivery of public services and judicial decisions, rather than content. Thus, the presence of such rights would seem to have little to say on how language should be treated as part of the substantive reasoning of a decision.⁶² Therefore the legal instruments do not give a specific right on which recognition of minority languages in trademark law can be based. At the same time though, the existence of a (albeit outline) framework of protection for minority languages enhances the argument that language, and the ability to have one's use and understanding of one's language matters. Were concrete, detailed human rights in the use of language ever to be codified, this would raise the prospect of the ability of individuals to enforce their own personal right to have their language use and understanding recognized, which contrasts with a collective rights approach that might be particularly persuasive at the policy level.⁶³

III. THE ROOT OF THE PROBLEM: UNDERSTANDING THE AVERAGE CONSUMER

The previous section examined the importance of not treating everyone the same and the legal and social importance of recognizing minority rights. It also identified how this serves as the basis for recognizing minority language rights in particular for both practical and normative reasons. Following from this is the need to acknowledge the meaning that foreign language terms have to members of minority groups, including in the decisions made by

⁵⁹ For the benefit of clarity, such positive rights to use one's own language and have that use recognized officially must be distinguished from the right to free speech, which is neutral to the content or medium of the speech, save where it is harmful.

⁶⁰ Fernand de Varennes, *Language Rights as an Integral Part of Human Rights*, 3 Int'l J. Multicultural Societies 1 (2001). He has written in greater depth on this in *Language, Minorities and Human Rights* (1996).

⁶¹ It is worth noting that in Kymlicka, *supra* note 30, at 2-5, Kymlicka dismisses this approach because, in their universalism, human rights lack the detail to answer difficult questions pertaining to the application of minority rights. For example, free speech does not tell us what language that speech should take place in, and the right to vote does not tell us how to draw up boundaries that might ultimately determine self-government rights. Thus, in his view, human rights can only provide answers in association with a theory of minority rights. He notes further that while there have been attempts to create minority rights through international law, these are often vague and influenced by external factors.

⁶² Although in O/631/20, *In re MacKenzie* [2020] (UKIPO), at ¶ [29], the HO relied on The European Charter for Regional and Minority Languages.

⁶³ de Varennes, *supra* note 60, at 16.

legal bodies, such as the Registry. This both enables minority group members access to those terms and to recognize the members' dignity as participants in society.

This section will consider the range of approaches applied by the courts as to who counts as the “average consumer” for the purposes of trademark law, and in particular whether a member of a minority can be viewed as a relevant consumer. If not, trademark law seems unable to take into account minority understandings of language, which would not protect the group minority rights that Kymlicka has advocated for. The definition of the average consumer has evolved in recent years, but elements of each of those approaches can be identified in the body of Registry decisions. It will be argued that the law has shifted, from treating everyone the same in the guise of a numerical or hypothetical average consumer, to a more nuanced approach that identifies multiple different groups of consumers whose perceptions are relevant provided those groups are “significant.” However, this shift has not been linear and has not always been implemented in Registry decisions. Where it has, significance has been defined at a level that excludes almost all ethnocultural minority groups.

The difficulty is that trademark law works on averages. Almost every aspect of trademark law is calibrated through the eyes of the “average consumer.” Averages tend to lead to generalizations and generalizations gloss over individual distinctions, which makes considerations of the needs of minorities difficult. Even though trademark law at the appellate level seems to have (mostly) rejected the need for numerical average, i.e., a majority of consumers, this has not always filtered through before the Registry. Moreover, looking for a “significant” number of consumers—the measure that stands in its place—is in a state of development. In particular, the fact that empirical evidence of consumer perception is not required in trademark cases has meant that the substitute measures also frequently draw on assumptions and generalizations. Even in cases where courts and tribunals have recognized that account can be taken of the perceptions of a minority of consumers *if* the number of such consumers is significant, there are no clear rules on what percentage or absolute number is “significant,” and the CJEU, in particular, has been unwilling to give any specific figures. Finally, it is argued that percentages can be misleading in the absence of information about how large a population one is looking at. For example, 1% of the UK population might not sound like so much, but for an estimated population of around 68.0 million people,⁶⁴ this

⁶⁴ Off. for Nat'l Stat., United Kingdom population mid-year population estimate (Oct. 8, 2024), <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries/ukpop/pop>.

equates to some 680,000 consumers⁶⁵ who might be confused, or blocked from using or receiving information about what to them is a descriptive term. In this section we will examine the judicial definition of who the average consumer is, and who is not.

A. *The Statistically Average Consumer*

The term “average” might suggest some form of statistical or empirical examination—perhaps gathering survey evidence and looking whether the majority of consumers in the sample are, for example, confused or view a mark as indicative of trade origin. This approach, though, has been rejected for a number of reasons.⁶⁶ For one thing, the CJEU has shown a repeated reluctance to set any percentage level in relation to the average consumer.⁶⁷ Obtaining such data would anyway be challenging: courts in the UK in particular have been skeptical of survey evidence⁶⁸ Moreover, when it comes to registration, marks can be registered without use, meaning that there is no evidence available regarding consumer perceptions of those marks, unless perhaps somewhat artificial surveys are conducted.

From the point of view of minority language rights, the rejection of defining the average consumer by reference to a numerical

⁶⁵ Although not all members of the population, e.g., small children, will engage with trademarks, it is still a large number.

⁶⁶ See *Hearst Holdings Inc. v. A.V.E.L.A. Inc.* [2014] EWHC 439 (Ch), ¶ [60] (Justice Birss) (writing, “The word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”); see also Jennifer Davis, *Revisiting the average consumer: an uncertain presence in European trade mark law*, *Intell. Prop. Q.* 15, 18 (2015); *London Taxi Corp Ltd. v. Frazer-Nash Rsch. Ltd.* [2017] EWCA Civ 1729 (*London Taxi*), ¶ [20] (“[T]he average consumer is not some form of mathematical average. Rather, the average consumer was “a notional person whose presumed expectations are to be taken into account by the national court in assessing the particular question it is called upon to decide.”) (citing *Interflora Inc. v. Marks & Spencer plc* [2014] EWCA Civ 1403, ¶ [128]). Graeme Dinwoodie & Dev Gangjee, *The Image of the Consumer in European Trade Mark Law*, in *The Image(s) of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Dorota Leczykiewicz & Stephen Weatherill, eds., 2016), at 362 (citing James Mellor et al., *Kerly’s Law of Trade Mark and Trade Names*, ¶ 20-02-h (15th ed. Supp. 2014) (suggesting the problem here is “linguistic” and that a better choice of language might have been a “reasonable” or “ordinary” consumer) (citing *Jacob LJ in Reed Exec. Plc v. Reed Bus. Info. Ltd.* [2004] EWCA Civ 159, ¶ [82]).

⁶⁷ See, e.g., *Windsurfing Chiemsee*, *supra* note 5, at [52], where in relation to acquired distinctiveness, the CJEU held that the perception had to be held by “the relevant class of persons, or at least a significant proportion thereof,” but this could not be determined by “reference to general, abstract data such as predetermined percentages.” In making this statement, the CJEU implicitly rejected a suggestion from the defendant that the perception had to be held by more than 50% of the relevant class of consumers. Likewise, in *Case C-342/97*, the CJEU in *Lloyd Schuhfabrik Meyer & Co GmbH v. Klijsen Handel BV* [1999] E.C.R. I-03819, ¶ [24], held that no set percentage of consumers could be predetermined for enhanced distinctiveness for likelihood of confusion purposes.

⁶⁸ *Dinwoodie & Gangjee*, *supra* note 66, at 371-72; *Fhima & Gangjee*, *supra* note 11, at 186-87.

average is to be welcome. By definition, speakers of minority languages would never constitute the majority of consumers⁶⁹ and so could never satisfy such a test. A note of caution is required, though—while numerical measures may have fallen out of favor, it remains the case (discussed below) that the Registry does sometimes look for perception on the part of the “vast majority” of consumers. While the terminology used is not overtly empirical, even those with a basic grasp of math will realize that a majority is more than 50%—again, a standard that minorities will be unable to reach.

B. The Hypothetical Consumer

There has been some suggestion in UK jurisprudence that the average consumer may be hypothetical—deemed to have certain properties and constructed to fit the particular facts of the case. Davis identifies the roots of this approach in a neoclassical economic belief that inequalities of wealth and class had been eliminated. Thus, it was assumed that all consumers would act in broadly the same way.⁷⁰

In *Whirlpool*, Geoffrey Hobbs KC, sitting as a Deputy Judge, observed that because the scope of protection of a trademark is a matter of law, some EU Member States have defined the average consumer as a “synthetic person with the ‘correct’ mindset and behaviour patterns.”⁷¹ Additionally, the CJEU has spoken of confusion being judged from the point of view of the average consumer who is “deemed to be reasonably well-informed and reasonably observant and circumspect.”⁷² Likewise, Davis observes that Lewison LJ in *Interflora I* seemed close to embracing the idea of the notional consumer.⁷³ Lewison LJ speaks of the average consumer as having the “underlying concept of a legal construct”⁷⁴ and notes:

⁶⁹ Except perhaps for when the goods are specifically aimed at a minority. We will see below that the Registry has been quite unwilling to class goods as aimed at minorities.

⁷⁰ Davis, *supra* note 66; see also Jennifer Davis, *Locating the Average Consumer: His Judicial Origins, Intellectual Influences and Current Role in European Trade Mark Law*, Intell. Prop. Q. 183, 193-194 (2005). Davis goes on, though, in the remainder of the *Revisiting the average consumer* article, to review how that homogenous consumer has been put into question, and how this reflects challenges posed to neo-classical economics from behavioral economics, which focuses more on how consumers *actually* behave, rather than how the economically rational consumer would behave. Davis, *supra* note 66, at 21 onwards.

⁷¹ *Whirlpool Corp v. Kenwood Ltd.*, [2008] EWHC 1930 (Ch), ¶ [70], although this approach is ultimately rejected.

⁷² *Lloyd Schuhfabrik*, *supra* note 67, at ¶ [26].

⁷³ Davis, *supra* note 66, at 19.

⁷⁴ *Marks & Spencer plc v. Interflora Inc.* [2012] EWCA Civ 1501 (*Interflora I*), ¶ [44].

the ultimate issue [is] one for the judge, rather than the witnesses; but also that the judge can reach a conclusion in the absence of evidence from consumers. He or she is in the position of a notional juror, using his or her own common sense and experience of the world.⁷⁵

Gangjee and Dinwoodie note that, while Lewison LJ's judgment has been viewed by some as a mere firming up of the UK courts' existing prejudices against survey evidence, in fact it is possible to read the case as a move toward what these authors call a "European approach."⁷⁶

In theory, the notional or hypothetical consumer could be an opportunity for minority language rights. Like patent law's "person skilled in the art," who encounters no language barriers when it comes to understanding prior art documents⁷⁷ (even if it is to be found in an Australian library, and written in Sanskrit⁷⁸), trademark law's average consumer could be deemed to have similar all-encompassing language skills. Indeed, when it comes to assessing the registrability on grounds of distinctiveness/descriptiveness of EU trademarks, the meanings of terms in *all* EU languages are taken into account.⁷⁹ However, the CJEU has not taken the same approach to the average consumer in relation to national trademark registrations, where instead the average consumer has been imbued with the language skills of an average consumer in the Member State in question.⁸⁰ Once we revert to a more descriptive version of the average consumer who typifies the consumer base of the goods or services in question, it seems unlikely that the notional or hypothetical consumer in the UK would be deemed to have even a knowledge of EU languages, let alone non-EU minority languages.

Lewison LJ's approach in *Interflora I* has subsequently fallen out of favor. In *Interflora II*, Arnold J (as he then was) considered whether there was a "single meaning" rule in trademark law, that is, "a rule that the use of a sign in context is deemed to convey a single meaning in law even if it is in fact understood by different

⁷⁵ *Id.* at ¶ [50].

⁷⁶ See Dinwoodie & Gangjee, *supra* note 66, at 375.

⁷⁷ The Patents Act 1977, Section 3 (U.K.). This is a person who "is well acquainted with workshop technique and who has carefully read the relevant literature. He is supposed to have an unlimited capacity to assimilate the contents of what may be scores of patent specifications but to be incapable of scintilla of invention," per Lord Reid in *Technograph Printed Circuits Ltd. v. Mills & Rockley (Elecs.) Ltd.*, [1972] RPC 346, 355.

⁷⁸ Admittedly a fanciful example, as per Jacob LJ in *Green Lane Prods. Ltd. v. PMS Int'l Grp. plc* [2008] EWCA Civ 358, ¶ [26].

⁷⁹ Case T-236/12, *Airbus SAS v. OHIM (NEO)*, ECLI: EU:T:2013:343, ¶¶ [34], [57] (July 3, 2013). See Dinwoodie & Gangjee, *supra* note 66, at 375.

⁸⁰ Case C-421/04, *Matratzen Concord AG v. Hukla Germany SA*. [2006] E.C.R. I-2322, ¶¶ [22]-[26].

people in different ways.”⁸¹ Why this matters for our purposes is that a single, hypothetical consumer would be the most likely entity to embody the single meaning rule. The hypothetical consumer is presumably capable of holding only one view of whether, for example, two marks are confusingly similar, or a term is descriptive rather than distinctive of origin. As we have mentioned that hypothetical consumer is likely to typify an “average” UK member of the public, who is unlikely to be knowledgeable about foreign languages. In this sense, she is descriptive rather than normative.⁸² Although, as discussed in the next subsection, the approach seems to have been rejected in subsequent cases, including by the Supreme Court,⁸³ it will be seen below that this notional or average consumer with little knowledge of languages is alive and well in very many Registry decisions.

C. Cutting Up Consumers: The Role of “Significance”

The hypothetical consumer and his single understanding of the meaning of trademarks has found little support subsequent to *Interflora I*. When *Interflora* returned to the High Court, as a matter of precedent it was not open to Arnold J to depart from Lewison LJ’s decision. Instead, he offered various reasons why Lewison LJ’s judgment, while seeming to introduce a single meaning rule, does not do so, including consistency with the approach taken to validity and the approach taken by prior CJEU case law.

Even though Arnold J technically followed Lewison LJ’s ruling, there is a clear tension between the two visions of the average consumer. Thus, when Arnold J’s judgment in *Interflora II (HC)* was appealed, this left the Court of Appeal with a difficult task. While the Court of Appeal in *Interflora II (CoA)* seemed to have sympathy with Arnold J’s rejection of marks being understood through the single meaning that they have to a single hypothetical average consumer, the doctrine of *stare decisis* meant that the Court was bound by the *Interflora I* Court of Appeal’s decision.⁸⁴ In *Interflora II (CoA)*, the Court of Appeal resolved the issue by finding that there was no real difference between judging trademark matters through the eyes of a single, hypothetical consumer, or, if the hypothetical consumer “provides the benchmark or threshold for the purposes of identifying the population of internet users whose views are material.”⁸⁵

⁸¹ *Interflora Inc. v. Marks & Spencer plc* [2013] EWHC 273 (Ch) (*Interflora II (HC)*), ¶ [212].

⁸² Dinwoodie & Gangjee, *supra* note 66; John Gardner, *The Many Faces of the Reasonable Person*, 131 L.Q. Rev. 563 (2015).

⁸³ *In Lifestyle Equities CV v. Amazon UK Servs. Ltd.* [2024] UKSC 8.

⁸⁴ *Interflora Inc. v. Marks and Spencer plc* [2014] EWCA Civ 1403 (*Interflora II (CoA)*).

⁸⁵ *Id.* at ¶ [126].

The difficulty is that in *Interflora II*, the Court of Appeal then seems to revert to a more numerically based approach.⁸⁶ It finds there will be confusion where the junior use “is likely to cause at least a *significant section of the target public* to establish a link between the goods or services to which it refers and the trade mark owner” [emphasis added].⁸⁷ In identifying this standard, the Court highlights the many instances where the CJEU has referred to a “significant” number or proportion of consumers, including in relation to whether consumers would link marks for the purposes of establishing confusion,⁸⁸ whether they would be confused in an Internet context,⁸⁹ whether they would view a mark as descriptive,⁹⁰ or lacking distinctiveness,⁹¹ in relation to comparative advertising⁹² and consumer protection.⁹³ This raises a further question: what makes any one section of the public significant? Earlier, speaking in relation to the consumer law case⁹⁴ from which the CJEU “borrowed” the definition of the average consumer, the Court notes “absent any provision of EU law dealing with the issue, it is then for the national court to determine, in accordance with its own national law, the percentage of consumers misled by the statement that, in its view, is sufficiently significant in order to justify banning its use.”⁹⁵ In seeking a set percentage that will render a group of consumers “significant,” the Court of Appeal seems to be reverted to a *de facto* numerical approach, albeit not one that requires the majority of consumers to share the perception.

There is a lack of clarity in the Court of Appeal’s approach to which consumers are *not* average in this and subsequent cases: is it those consumers who are so few in number that they are not considered “significant” or is it those whose perceptions of a mark are not “reasonable” (presumably because they are not sufficiently knowledgeable, observant, or circumspect or have these qualities in

⁸⁶ The Court’s use of both the hypothetical consumer and a more empirical approach is identified in Davis, *supra* note 66, at 20.

⁸⁷ *Interflora II* (CoA), *supra* note 84, at [126].

⁸⁸ *Id.* Note that confusion was relevant as the means for prejudicing the essential function of the earlier mark for double identity purposes.

⁸⁹ *Id.* at ¶ [120] (citing *Lloyd Schuhfabrik*, *supra* note 67).

⁹⁰ *Id.* at ¶¶ [86]–[88] (citing Case C-278/08, *Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v. Günther Guni and trekking.at Reisen GmbH* [2010] E.C.R. I-2517).

⁹¹ *Id.* at ¶ [119] (citing *Windsurfing Chiemsee*, *supra* note 5).

⁹² *Id.* at ¶ [121] (citing Case C-299/99, *Koninklijke Philips Electronics NV v. Remington Consumer Prods. Ltd.* [2002] E.C.R. I-5475).

⁹³ *Id.* at ¶ [124] (citing Case C-356/04, *Lidl Belgium GmbH & Co. KG v. Etablissements Franz Colruyt NV* [2006] E.C.R. I-8501).

⁹⁴ *Id.* at ¶¶ [117]–[118] (citing Case C-210/96, *Gut Springenheide GmbH v. Oberkreisdirektor des Kreises Steinfurt*, [1998] E.C.R. I-4657).

⁹⁵ *Id.* at ¶ [118].

excess) and therefore do not accord with those of the average consumer? In any event, unless our hypothetical average consumer is normative in the sense of having a desirable judicially set level of knowledge etc., the two approaches merge into one because what is reasonable depends on the typical reactions of consumers in the specific market in question. This then becomes a fact-specific question in each case, meaning that what is not reasonable will be judged by likely responses of groups of consumers of that particular product, bringing us back to an approach based on percentages of groups of consumers. Indeed, we will see that even in those decisions of the Registry where the focus has been on a “significant” number of consumers, rather than a hypothetical consumer, frequently a numerical approach has been taken to what is significant.

The lack of clarity in the *Interflora II* (CoA) approach can be tracked in subsequent Court of Appeal decisions. In its summary of the characteristics of the average consumer in *GLEE*, the Court both endorsed the idea of the average consumer as “a hypothetical person or, as he has been called, a legal construct” but at the same time found that infringement should be found where “a significant proportion of the relevant public is likely to be confused.”⁹⁶ A more cautious approach was taken by the Court of Appeal in *Muzmatch*,⁹⁷ where the Court noted that consumers have a spread of characteristics, but nonetheless recognized a role for the “hypothetical consumer” to exclude those consumers with atypical characteristics such as greater or less knowledge than the norm or who would pay more or less attention than is usual.

More recently there are signs of a shift in how significance is understood. One notable example is the Supreme Court’s judgment in *Amazon v. Lifestyle*,⁹⁸ a case concerning whether the “average consumer” would consider a website based in the United States to be “targeting” UK consumers, and so to fall within the reach of UK trademark law. In their co-authored judgment Lord Briggs and Lord Kitchen find:

The adoption [in this case] of the average consumer does not require the court to attempt to identify a “single meaning” of the activity in issue—it is enough that a significant proportion of the relevant consumers (that is to say, those who are reasonably well informed and circumspect) would consider the website to be directed and targeted at them.⁹⁹

Clearly this decision adopts the “significance” approach over single meaning. Perhaps surprisingly the Supreme Court does so with

⁹⁶ *Comic Enters. Ltd v. Twentieth Century Fox Film Corp.* [2016] EWCA Civ 41 (*GLEE*), ¶ [34].

⁹⁷ *Match Group LLC v. Muzmatch Ltd.* [2023] EWCA Civ 454.

⁹⁸ *Lifestyle Equities CV v. Amazon UK Servs. Ltd.*, *supra*, note 83.

⁹⁹ *Id.* at ¶ [31].

little comment on the uncertainty in this area following the various *Interflora* cases. Moreover, it does not explain *how* it can be determined whether the mark has the argued-for impact on a significant number of consumers. Indeed, the Supreme Court details a number of facts pointing to targeting UK consumers, but these seem to be presented as objective facts,¹⁰⁰ arguably echoing the perceptions of a hypothetical consumer. No doubt the Supreme Court intended to move away from such a construct, but this decision demonstrates once again that unless there is a clear understanding of how significance can be understood it tends to default into a numerical test or even based on hypothetical groups or the majority.

Most recently, a more nuanced approach seems to be taken in *Lidl v. Tesco*.¹⁰¹ There Arnold LJ (as he now is) with whom Lewison LJ (perhaps surprisingly given his stance in *Interflora I*) agreed, rejected both numerical and hypothetical visions of the average consumer, stating:

the average consumer is neither a single hypothetical person nor some form of mathematical average, nor does assessment from the perspective of the average consumer involve a statistical test.¹⁰²

Instead “They¹⁰³ represent consumers who have a spectrum of attributes such as age, gender, ethnicity and social group.” Consequently, there may be a finding of infringement where some consumers are confused, even when the “average” consumer (who presumably typifies the numerical majority of consumers) is not confused. This decision makes clear the potential inherent in the “significance” test: it is able to take into account the perceptions of minority groups, and while Arnold LJ does not mention this specifically, there is no reason why this should not include minority language groups. It also raises the prospect of confusion among such a minority leading to a finding of infringement that would prevent the registration of the mark for all consumers. Presumably the same would be true if a minority perceived such a mark to be, for example, descriptive. What Arnold LJ does not make clear is what amounts to a “significant” proportion. As we will see, the Registry sometimes

¹⁰⁰ *Id.* at ¶¶ [71]-[73]. On the website in question, the landing page noticed delivery to the UK, a pop-up box said consumers would be shown only goods available for delivery to the UK, the “review your order” page included UK specific delivery times and prices, and the site offered the ability to pay in sterling coupled with an exchange rate.

¹⁰¹ *Lidl Great Britain Ltd v. Tesco Stores Ltd.* [2024] EWCA Civ 262. Note that the roots of this approach can be seen in *London Taxi*, *supra* note 66, at [31]-[35], where the Court of Appeal allows for the possibility of different classes of consumer, some confused and some not, based on whether they are purchasers or end users.

¹⁰² *Lidl*, *supra* note 101 at ¶ [17].

¹⁰³ From the context, it appears that this is a non-gendered reference to the legal notion of an average consumer.

rejected minority language perceptions as irrelevant on the basis that the speakers of that language do not amount to a “significant” proportion of the UK population. There is reason, though, to be hopeful that a different approach might be taken in decisions following *Lidl v. Tesco*, both because Arnold LJ rejected the idea of a statistical test, but also because of his explicit emphasis of the perceptions of minority groups. While *Lidl v. Tesco* was decided after the period of the study, and so cannot have directly influenced the decisions included, the beginnings of such an approach can be seen in certain Registry decisions that will be detailed below.

To sum up, there has been a gradual, sometimes halting, move in the case law from looking at a single hypothetical consumer to searching for a perception shared by a “significant” number of consumers. Whether the “significant proportion” measure of the average consumer promotes recognition of minority language speakers” depends very much on what amounts to a “significant” section, given that:

- (i) in numerical terms the number of foreign language speakers varies greatly, depending on the language;
- (ii) in percentage terms compared to the general population of the UK speakers of foreign languages will often be small in number, but in absolute terms, they may well amount to hundreds of thousands or even millions; and
- (iii) significance need not be understood as a numerical measure, and may instead be a measure of how we value such people and their understanding and perceptions.

As will be seen, though, in the decisions studied, significance is often treated as a numerical measure, rather than a measure of importance or value, leading to very limited recognition of minority languages.

IV. APPROACHES TO AVERAGE BEFORE THE TRADEMARK REGISTRY

The lack of clarity in the case law and the frequent implicit reliance on numerical measures has, unsurprisingly, led to inconsistency in how cases involving foreign languages that will be understood only by a minority of consumers have been treated by the Registry. This section will consider how the average consumer has been defined in practice by the Registry, focusing particularly on cases involving minority languages. To gather this information, a quantitative and qualitative analysis of the 2731 decisions of HOs and APs¹⁰⁴ made available on the Registry website over a recent six-

¹⁰⁴ Hearing Officer and Appointed Person decisions were selected as the sample because they are made publicly available at <https://www.ipo.gov.uk/t-challenge-decision-results.htm>. Ideally, I would have also examined the file histories of all applications for

year period was conducted. Of these, 203 pertained to trademarks with foreign language components.¹⁰⁵ In sum, during the period between January 1, 2018, and December 31, 2023, no less than eight different approaches were identified in the decisions to the level of understanding of foreign terms required on the part of the average consumer for that understanding to be legally cognizable. It is argued that the presence of this number of conflicting definitions of the average consumer points to a lack of clarity and consistency, not just in relation to how the meanings of foreign languages are determined, but also as to how the average consumer is understood more generally. The research also revealed different approaches were applied to cases involving the same language, and that individual HOs and APs typically adopted a number of different approaches in the cases that came before them.

A. The Approaches

The eight approaches identified are:

1. Those that relied on the notion of the “average” consumer without defining the characteristics of that consumer;
2. Those that required the perception to be held by the “vast majority” of UK consumers;
- 3, those that required the meaning of the term in question to be immediately recollected by consumers;
4. Those that focused on foreign terms that would be familiar to UK consumers;
5. Those that, while relying on the notion of the average consumer, allowed for this to be viewed in terms of the perceptions of a “significant” proportion of consumers rather than the majority of consumers;
6. Those that allowed for a range of consumers with different understanding of the terms in question; and
7. Those that focused less on the understanding of consumers, and more on whether there was a competition-based need to keep certain foreign terms free for other traders to use.
8. Other approaches, including those where insufficient evidence was provided and so no conclusion could be reached

non-English language terms. However, unlike the EUIPO and USPTO, file histories are not made available to view via the Registry website, but must be requested individually; also, file histories are not available for applications that have been refused or withdrawn (perhaps because refusal is anticipated) prior to publication.

¹⁰⁵ The Registry does not identify which decisions involve foreign languages. Therefore, research assistants read all of the decisions and identified those involving foreign languages. I then read those decisions and coded them for the different approaches that I identified.

on the validity of the foreign meaning and those involving Scottish and Welsh language marks.

There did not seem to be a clear chronological progression between the approaches, with each of the approaches used at various points across the five-year period.

This inconsistency between approaches is, to an extent, unsurprising since, as discussed above, until recently there was a lack of clarity in how the average consumer is defined generally.¹⁰⁶ Consequently, decision-makers have often reverted to earlier definitions of the average consumer that have fallen out of favor with the higher courts. Even where they have focused on identifying significant numbers of consumers (where the majority may not share the perception question), a lack of clarity over when a proportion is “significant” has generally resulted in minority perceptions being rejected out of hand. However, we will also see that a more subtle approach is in evidence, which, while recognizing that minority perceptions are not the norm, takes these into account as a *minority but significant* part of a diverse group of consumers whose perceptions need to be considered in analyzing trademark questions, because they represent a relevant part of the market for the goods and services in question. This approach would seem closest to Kymlicka’s notion of recognizing minority interests in languages that is lacking in those approaches that treat the meaning of minority languages as not legally cognizable. Finally, we will see that other considerations, such as the more general need to keep marks free in the interests of *all* consumers, have also occasionally come into play. The normative basis for this approach is different from Kymlicka et al.’s because it focuses on the interests of wider society (not those of the minority), but it nonetheless has the capacity in terms of effect to limit the registration or scope of protection of minority language terms.

This section will log the prevalence of each approach and consider its implications for recognition of foreign languages in trademark law with a view to drawing wider conclusions in the final section about the nature of the average consumer.

1. Just Average

In the period studied, 36.45% (74) of the language decisions identified¹⁰⁷ considered whether the average consumer understands

¹⁰⁶ Note also that APs are not bound by each other’s decisions, which also leaves room for diverging approaches. Manual of Trade Marks Practice, Tribunal Section § 1.2 (Feb. 2003), <http://www.gov.uk/guidance/trade-marks-manual/tribunal-section>.

¹⁰⁷ See, e.g., O/839/21, *Beaupreau v. Yuk Fong Jay Lee* [2021], at ¶ [67] (UKIPO) (“I do not consider ‘méduse’ [the French word for jellyfish] to be a common word that will be understood by the average consumer in the UK.”); O/342/20, *Gehlot v. Nessa Skincare Ltd.* [2020], at ¶ [40] (UKIPO) (“I agree with the applicant that there is no evidence to support the view that the average consumer—who is a member of the UK general

the meaning of the foreign term in question, but without actually attempting to define the characteristics of that average consumer. It should be noted that while the prevalence of this approach reduced over the period of the study as the definition of the average consumer offered by the courts became clearer, it still played some role in the later years of the study.¹⁰⁸ It is difficult to comment on the precise impact this approach has on minority rights because it is unclear what is needed to satisfy it, though it often seems to be shorthand for a numerical majority that does not understand the language, which I comment on below.

2. The Vast Majority of UK Consumers

Given the repeated judicial statements that the understanding of the “average consumer” does not equate to the knowledge of the majority of consumers, it is perhaps surprising to see that in more than 10% of language decisions,¹⁰⁹ HOs have discounted the meaning of a foreign term because it is “not widely known,” nor is it known by a “vast majority of consumers” or by “most consumers.” Such decisions were split relatively evenly over the period of the study and, in fact, were more common in the final year of the study.¹¹⁰ Terms that were found to be meaningless in this way include:

- LOS AMANTES—Spanish for “the lovers” would not be known by the “vast majority” of UK consumers;¹¹¹
- GATO NEGRO—Spanish for black cat (“it cannot be assumed that a ‘majority’ of consumers are familiar with Spanish”);¹¹²
- ALMA LIBRE—UK consumers would not recognize the woman’s name ALMA, nor would the “vast majority of

public—would know this”); *Qima Coffee Ltd.*, *supra* note 8, at ¶ [40]; O/486/21, *ELORA v. Rahardjo* [2021], at ¶ [34] (UKIPO); O/620/22, *Organizacion Nacional De Ciegos Espanoles v. La Fed Mgmt. Co. Ltd.* [2022], at [51]-[52] (UKIPO); O/440/20, *Bodegas Martin Codax SA v. Carballido* [2020], at ¶ [58] (UKIPO) (“To my mind, it is more reasonable to find that the average consumer would perceive this word as an invented term.”); O/331/20, *Fabi S.p.A. v. Amazon Europe Core S.à r.l.* [2020], at ¶ [68] (“[I]n my view, it is more likely that the average consumer of the category of goods in question will see it as an invented word.”); O/679/19, *Sfera Joven, S.A. v. Krause* [2019], at ¶ [27] (UKIPO) (“It does not seem to me that knowledge of a foreign language can be assumed for the average consumer.”).

¹⁰⁸ The high point was 52.72% of language decisions in 2019, going down to 20% by 2023.

¹⁰⁹ 10.34% (21).

¹¹⁰ 2018—3.7%; 2019—10.34%; 2020—11.20%; 2021—6.82%; 2022—11.11%; 2023—17.4%.

¹¹¹ O/440/20, *supra* note 107, at ¶ [58], though ultimately this did not affect a finding of likelihood of confusion because the senior mark also consisted of the words LOS AMANTES.

¹¹² O/774/21, *Vina San Pedro Tarapaca S.A. v. Grape Passions Ltd.* [2021], ¶ [35] (UKIPO).

consumers in the UK” recognize that LIBRE means “free” in a number of European languages;¹¹³

- KOCCA and KOKKA—while (supposedly) pronounced differently in Italian would be pronounced in the same way by the vast majority of UK consumers;¹¹⁴
- LAVASH—although this is an Armenian flatbread, “most consumers” would see it as a meaningless term;¹¹⁵
- VIRUNHDHU—a Tamil term for “feast”; while this might be known to a “small group of consumers”, this was discounted because it was not known to the “vast majority of UK consumers”;¹¹⁶
- MEVLANA—the name of a Turkish saint that would have no meaning to the “majority” of UK consumers, even though it might be recognized by “some within the Turkish community.”¹¹⁷

It is difficult to disagree with the finding that most UK consumers would not recognize these terms. In many of these cases, it is also difficult to see the competitive harm that would result from the lack of recognition (though the argument based on the loss of dignity for minorities whose language is not recognized remains). For example, in relation to the LES AMANTES mark, the term “THE LOVERS” would be equally distinctive for wine and beverages whether in English or Spanish, and because the marks were identical, confusion was anyway bound to result. However, as discussed earlier, failure to recognize LAVASH and VIRHINDU means that descriptive words would potentially fall into the hands of a single undertaking, thereby blocking competitors from using these terms in a descriptive way to communicate to those communities that would understand the term.

There is also the symbolic significance of an approach that subjugates the knowledge of minority communities to the “vast” or “overwhelming” majority of UK consumers, even if that subjugation is driven solely by an (attempted) adherence to trademark law principles rather than anything more sinister or deliberate. However, this approach would seem to be incorrect even in trademark terms given the repeated statements that the “average” consumer is neither a numerical average, nor a majority, and that instead a “significant” number of consumers can be less than 50%.

¹¹³ O/254/20, FFI Global S.R.L. v. Kamara [2020], ¶ [28] (UKIPO). Interestingly there was no discussion of the meaning of this composite phrase as “free soul.”

¹¹⁴ O/904/22, KOCCA S.R.L. v. KOKKA Co., Ltd. [2022], ¶¶ [47]-[48] (UKIPO).

¹¹⁵ O/509/21, *supra* note 19, ¶ [36].

¹¹⁶ O/673/18, *supra* note 17, ¶ [65].

¹¹⁷ O/544/22, GORAN-TEE Grobhandel GmbH & Co. KG v. Mevlana Ceylon Tea (Pvt) Ltd. [2022], ¶ [56] (UKIPO).

3. Immediate Recollection

The approach of the AP in *CHEROKEE* was utilized in 6.90% (14) of decisions. The question in that decision was whether the “general public” would be aware that the word *CHEROKEE* was the name of a Native American tribe, where no evidence had been submitted on this point. The AP held that while this clearly was the meaning of the term in an objective sense, and so judicial notice could be taken of it, this did not mean that the *average consumer* was aware of this meaning.¹¹⁸ Thus, absent evidence not just as to the objective meaning of the term, but also to the average consumers’ understanding of it—unless that level of understanding was “too notorious to be the subject of serious dispute”—it had to be assumed that the average consumer would not understand the term.¹¹⁹

This presumption that consumers do not hold knowledge, unless that knowledge is “notorious” sets the bar high. In its application to foreign language cases, this has meant that when this test is applied it is almost always the case that consumers will be assumed *not* to understand the foreign language term. In fact, the *CHEROKEE* test was satisfied only once in the six-year period studied, in relation to the term “*BELLISIMO*.”¹²⁰ The *CHEROKEE* test also seems to adopt a homogenous approach to the average consumer. There is no discussion of how different consumers might have different degrees of knowledge. Instead, notoriety suggests knowledge so obvious that it would be held by all—in other words, bringing us back to the vast majority of consumers, rather than allowing for the possibility that there may be legally cognizable groups of consumers who recognize the meaning of a term, even if most consumers do not.

It is also possible to see a subset of the *CHEROKEE* test in operation in a number of the decisions. The HO’s decision in *CHEROKEE*, which was ultimately overturned by the AP (discussed above), spoke of the meaning of a potentially obscure mark being admissible where it can be “grasped immediately.”¹²¹ This too sets the bar high. Like the AP’s approach in the same case, it is rooted in an abstract view of how consumers will understand a mark, and like the AP’s approach, it would seem to demand a very high level of knowledge and obviousness for the term to be understood without thought or reflection inherent in the term “immediately.” Again, no term subject to this test satisfied it. In

¹¹⁸ O/048/08, *Cherokee Inc. v. Chorkee Ltd.* [2008], ¶¶ [37]-[38] (UKIPO).

¹¹⁹ *Id.* at [36].

¹²⁰ O/237/19, *Bellisimos Academy Ltd. v. Rigney* [2019], ¶¶ [34]-[35] (UKIPO) (*BELLISIMO STUDIO*).

¹²¹ O/251/07, *Cherokee Inc. v. Chorkee Ltd.* [2007], ¶ [35] (UKIPO).

short, both iterations of the *CHEROKEE* test make it almost impossible for minority consumers' languages to be cognized.

4. Well-Known Foreign Terms Familiar to a Significant Number of UK Consumers

There are certain foreign terms that HOs have found *would* be familiar to a significant number of UK consumers.¹²² These account for 11.33% (23) of foreign language decisions. However, the rationale for this is not based on recognition of minority groups speaking the language but rather, following *Matratzen*, that while descriptive foreign terms would not automatically be rejected, they would be if "the relevant parties in the Member State in which registration is sought are capable of identifying the meaning of the term."¹²³ In *Matratzen* this meant that "MATRATZEN," the German term for "mattresses" was considered distinctive for "mattresses" because the average Spanish consumer would not be familiar with the meaning of the word.¹²⁴

Thus, the basis for acknowledging the meaning of foreign terms in this line of decisions is that the average *English-speaking* UK consumer would be familiar with certain foreign language terms. However, UK consumers' foreign language skills are generally thought to be weak. Perhaps this is best summed up by HO Salthouse's pithy observation:

few UK consumers have any knowledge of languages other than English, and most are not overly proficient even in their mother tongue.¹²⁵

Thus, the words that English-speaking consumers have been found likely to recognize are either rather basic, similar to the same word in English, or would be familiar from wider cultural experiences and encounters with in particular foreign foodstuffs available in the UK. These include:

¹²² Similarly, the Registry Manual of trademark practice allows for the possibility that in respect of the most widely understood European languages in the UK (i.e., French, Spanish, Italian, and German), "most" UK consumers "have an appreciation of some of their more common words," see The Examination Guide, *supra* note 49, under the headings "The Most Commonly Understood European Languages," "Non-English Words which resemble English Descriptive Words," "Further Considerations which apply to Non-English Descriptive Marks for Services," and "Non-English Words which have become customary in the Current Language or in the Bona Fide and Established Practices of the Trade."

¹²³ *Matratzen*, *supra* note 80, ¶ [26].

¹²⁴ See *id.*

¹²⁵ O/418/21, Restaurant Grp. (UK) Ltd. v. Ahm Lifestyles—Creative Hospitality Co. Ltd. [2021], ¶ [26]. See also O/352/19, Felix Solis Avantis UK Ltd. v. Consorzio Priogrigio [2019], ¶ [29] (describing UK consumers as "notoriously monolingual").

- **French:** LES¹²⁶ and LA¹²⁷
- **Spanish:** AMIGOS¹²⁸; MAESTRO¹²⁹; OLIVA¹³⁰; CASTELL¹³¹
- **Italian:** CIAO¹³²
- **Mexican:** TACO¹³³
- **Greek:** GYROS¹³⁴
- **Hindu/Urdu:** CHAI and PAANI¹³⁵
- **Turkish:** BODRUM;¹³⁶ CHOCCO¹³⁷
- **Arabic:** SHAKIRA (seemingly from the pop star of the same name since confusion was found to be particularly likely in relation to entertainment services).¹³⁸

Even though this approach does lead to the recognition of some foreign language terms, it focusses not on minorities, and how they might understand language, but rather on how these terms would be understood to the majority UK population as a whole. Thus, both in terms of the very basic terms that are recognized, and the rationale behind the recognition, this cannot be seen to provide meaningful recognition of minority language rights.

5. A “Significant Proportion” of UK Consumers

The approach taken by both the CJEU and the Court of Appeal in *Interflora II* when considering a mark that is in a foreign language or has an obscure meaning is to ask whether a particular perception of the mark is shared by a “significant proportion of the

¹²⁶ O/887/22, Chanel Ltd v. AYA Design Grp. Ltd. [2022], ¶ [34] (*LES BOYS*) (UKIPO).

¹²⁷ O/839/21, *supra* note 107, ¶ [67] (finding that the “meduse” element in the LA MEDUSE mark was not considered to be familiar).

¹²⁸ O/335/19, Selection Diffusion Ventes v. Sepco Europe Ltd. [2019], ¶ [33] (UKIPO) (*EL AMIGOS*).

¹²⁹ O/890/22, Olive Line Int’l, S.L. v. Aceitunas y Encurtidos Artesanos de Navarra S.A. [2022], ¶ [95] (UKIPO) (*MAESTROS ACEITUNEROS DESDE 1968*).

¹³⁰ *Id.* at ¶ [96].

¹³¹ O/475/20, Faber-Castell Aktiengesellschaft v. Castelli (Diaries) Ltd. [2020], ¶ [87] (UKIPO) (*CASTELL*).

¹³² O/873/21, LMSJ Ltd. v. MCJB Enters. Ltd. [2021], ¶ [57] (UKIPO) (*CIAO BELLISIMA*).

¹³³ O/307/20, Taqueria Worldwide Ltd. v. W. A. Essex Ltd. [2020], ¶ [72] (UKIPO) (*TACORIA*). Of course, this is an example of a national cultural phenomenon and Mexican is not a language.

¹³⁴ O/1102/22, Bromhead Johnson LLP v. Rhodes EA Ltd. [2022], ¶ [18] (UKIPO) (*GYROS*).

¹³⁵ O/858/21, Chai Paani Ltd. v. Ahmed [2021], ¶ [26] (UKIPO) (*CHAYEE PAANI LOVE AT FIRST SIP*). Hindu and Urdu are the terms used by the HO to describe the origins of the word “paani.”

¹³⁶ O/704/18, *supra* note 51, ¶ [70].

¹³⁷ O/634/18, Yadex Int’l GbmH v. Şölen Çikolata Gıda Sanayi Ve Ticaret Anonim Şirketi [2018], ¶ [32] (*CHOCO DAN’S*).

¹³⁸ O/484/21, *supra* note 50, ¶ [60] (*SHAKERA*).

public.” This was the approach taken by the GC in the *KIAP MOU* case, described above, in a decision specifically involving foreign language trademarks. There it was held that there was nothing to suggest that a significant proportion of the UK public understood Thai or Laotian, and so the average UK consumer would not recognize MOU as descriptive of pork in those languages.¹³⁹

This approach is adopted in 12.32% (25) of Registry decisions. In itself, the term “significant” does not tell us much. We assume that it is less than a majority, but equally the courts have generally eschewed mathematical concepts such as statistical significance. Thus, no court-level decisions could be located specifically addressing the percentage of consumers that would be viewed as significant. Perhaps this is unsurprising, as the CJEU has repeatedly avoided setting percentages. However, it is difficult to find any indication even in broad terms of where the border between significance and insignificance lies. Instead, in every decision except *BEST MANGAL* (discussed below) the AP or HO has found that the meaning of terms is *not* known to a significant number of consumers.

Space does not permit detailed consideration of all the decisions where a foreign language-speaking minority was held not significant. Instead, this article will focus on the largest minority population to be considered by the Registry. This was in *Pooja Sweets*,¹⁴⁰ a decision that falls slightly outside the dates of the study but remains a key reference point. The dispute concerned rival claims for marks, both for foodstuffs, containing the words “pooja sweets & savouries.” It was argued that the word “pooja” was descriptive, as it referred to the food offerings made at Hindu pooja ceremonies. The AP found that even if this was the case,¹⁴¹ the Hindu¹⁴² population of the UK who were familiar with the term amounted to only 1.2% of the UK population,¹⁴³ and this was insufficient to satisfy the average consumer test.¹⁴⁴ While 1.2% may be small in percentage terms, it amounted to 558,810 people who would be unable to easily use a potentially descriptive term to describe their products or receive information about products they might wish to purchase. Yet neither the HO nor the AP made any reference to the absolute number of people in question.

¹³⁹ Case T-286/02, *supra* note 16, ¶ [41].

¹⁴⁰ *Pooja Sweets*, O/195/15, *supra* note 53.

¹⁴¹ *Id.* at ¶ [54]. The AP also doubted whether the term would have described the foodstuffs for which was sought, rather than the ceremony at which the foods were to be offered. *Id.*

¹⁴² While most of the decisions we examine are about languages, sometimes there is a cross-over with adherents to a certain religion sharing common terminology.

¹⁴³ *Pooja Sweets*, *supra* note 53, ¶ [48]. This figure appears to be derived from the 2001 census. I have drawn the number of people in absolute terms from that same census.

¹⁴⁴ *Id.* at ¶¶ [48]-[49].

As Hindus were the largest minority group considered in by the Registry, it is unsurprising therefore, that when the HOs and APs considered other smaller minority groups, these groups were found not to be significant. These include speakers of Turkish, Tamil, Arabic, Japanese, Chinese, Russian, Greek, Bulgarian, Portuguese, French, German, Italian, Catalan, Vietnamese, Danish, and Scots Gaelic. Interesting, there were no decisions involving Polish or Romanian words in the period studied, even though these languages were the third and fourth most common languages in the UK (after English and Welsh) amounting to 1.1% (612,000) and 0.8% (472,000) of the UK population, respectively.

During the period studied, only one minority group, namely the UK's Turkish community, was identified as amounting to a significant number of consumers,¹⁴⁵ despite the fact that often hundreds of thousands, or even a million consumers would potentially understand the meaning of the mark in question, and even though the Turkish-speaking minority group had been labelled as insignificant in previous decisions. This is surprising in the extreme and reflects an (institutional) acceptance that some members of minority groups will be confused and will be unable to use or receive information that is descriptive. From a recognition perspective, this is troubling not only because so many minorities are described as “not significant” but also because *no* minorities (bar Turkish speakers in only one instance) were found to be significant under this approach.

It thus seems unlikely that on this approach the minority understandings of trademarks will ever be recognized, which is at odds with the multicultural approach. It is true that there are minority groups with a greater number of individuals in the UK than the Hindu population considered insignificant in *Pooja Sweets*: in the religion question of the 2021 UK census,¹⁴⁶ 3.9 million people (6.5% of the UK population) identified as Muslim. Of course, those people come from diverse national backgrounds and will not necessarily share a common language, though they may, as was argued in *Pooja Sweets*, share terminology for religious rituals. If we look to the census data on ethnicity:

- 1,864,318 (3.1%)—Asian, Asian British, or Asian Welsh: Indian;

¹⁴⁵ In *BEST MANGAL*, the AP upholds the HO's finding in O/491/14 that the Turkish community in the UK amounted to a significant proportion of the UK population. *BEST MANGAL*, *supra* note 8, ¶ [14]. However, other decisions have found that self-same group of consumers is not significant. This would seem to be at odds with *Pooja Sweets*, where the Hindu population, which formed a larger percentage of the UK population than the Turkish, was found not be significant. *Pooja Sweets*, *supra* note 53, ¶¶ [48]-[49].

¹⁴⁶ See U.K. Off. for Nat'l Stats., Religion, England and Wales: Census 2021 (Nov. 29, 2022), available at <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/bulletins/religionenglandandwales/census2021>.

- 1,587,819 (2.7%)—Asian, Asian British, or Asian Welsh: Pakistani;
- 1,488,381 (2.5%)—Black, Black British, Black Welsh, Caribbean, or African: African.

Again, this exceeds the percentage of the UK population in *Pooja Sweets*, but there is likely to be linguistic diversity among these groups, so it is likely that not all consumers in each ethnic group will understand particular minority language terms. Moreover, there remains an open question about what percentage would count as significant: would any of the minority groups entered in the census be classed as significant? While the question is not a strictly numeric one, it would be hard to justify if, say, 2.5% was significant but the 1.2% in *Pooja Sweets* was not. Significance has the potential to take minority rights into account *if* minorities are considered *qualitatively* significant because they embody a particular language, ethnicity, or national background. Such an approach would reflect the recognition given to group collective rights by Kymlicka, Song, and Taylor described above. However, the approach to date has been to concentrate on a quantitative approach to significance, and to draw the threshold for this at a high level. Thus, without a different approach, it is argued that prospects for recognition of minority languages are bleak.

6. Variegated Consumer Groups

A further approach evident in 19.21% (39) of Registry decisions concerning issues of language acknowledged that some consumers would be confused, and some would not, to then find a likelihood of confusion on the basis of the group of consumers that would be confused. In a sense this would seem to be true of the “significant part” for the average consumer as it acknowledges that the average consumer is not a single notional person, but rather reflective on the whole body of consumers, where some will be confused, and others will not, but where each group needs to be taken into account. Indeed, AP Michaels, in *SANSKRITI GURU*, explained how this approach accords with that in *Interflora II*. She notes that in rejecting the “single meaning” rule, Arnold J allows for the possibility of different classes of consumer, and so it was correct for the HO in this case to consider the impact of the mark on *each* type of consumer.¹⁴⁷ As there was no need to limit the consideration to the majority group of consumers, it was just as legitimate to consider the understanding of those consumers who were familiar with Sanskrit as much as those who were not.¹⁴⁸ Unlike in the “significant part” cases we examined above, the AP made no attempt

¹⁴⁷ O/830/18, *In re Joshi* [2018], ¶ [10] (UKIPO) (*SANSKRITI GURU*).

¹⁴⁸ *Id.*

to quantify the size of the minority consumer group, either in absolute or percentage terms.¹⁴⁹ This pattern is also evident in subsequent decisions of HOs who have likewise tended not to assess whether each subgroup of consumers is numerically or qualitatively significant before taking their perspectives into account. In terms of minority rights, this approach is well-suited, as it allows for the perspectives of subgroups of consumers, though small in percentage terms, to be considered on equal terms to the more general body of consumers.

Indeed, it is revealing to see how this translates into different outcomes from the “significant part” approach, with minority recognition of non-straightforward words in different languages, or similar to words in different languages, French (*Entre Elles*¹⁵⁰), German (KINDI KIDS,¹⁵¹ OTO¹⁵²), Italian (BELLISIMO¹⁵³), Arabic (SALAM¹⁵⁴), Russian (Командирские (transliterated as “Komandirskie”¹⁵⁵)), Chinese (QI)¹⁵⁶ and Turkish (ZEUGMA¹⁵⁷) are all taken into account. By contrast, the meaning of words in none of these languages were taken into account under the “significant part” approach where it was held in those cases that there were insufficient numbers of consumers who would speak those languages. Thus, the *SANSKRITI GURU* approach is to be welcomed because it recognizes that the perceptions of trademarks of minority groups of consumers should be taken into account, even if the size of the group is small in numerical terms. In this way it would seem to be the approach that is most closely aligned to Kymlicka et al.’s notion of minority group collective rights in language. It also opens the door for the recognition of other groups of consumers whose perceptions may be different from that of the majority of consumers, which will be discussed further below.

¹⁴⁹ Indeed, there are no speakers of Sanskrit as a mother tongue, and it does not appear as a response in the 2021 census language question. However, it is used in religious practices.

¹⁵⁰ O/914/21, *Rousselet v. Kouloufoua* [2021], ¶ [44] (UKIPO).

¹⁵¹ O/274/20, *Kindy Project SAS v. Moose Creative Mgmt. Pty. Ltd.* [2021], ¶ [70] (UKIPO).

¹⁵² O/119/20, *Otto (GmbH & Co. Kg) v. OTO Int’l Ltd.* [2021], ¶ [75] (UKIPO).

¹⁵³ *BELLISIMO STUDIO*, O/224/16, *supra* note 120, ¶ [35]. Although this is the Spanish rather than Italian spelling of the word the HO [33] was of the opinion that the average UK consumer would miss this nuance.

¹⁵⁴ *SALAM FOODS*, O/311/19, *supra* note 21, ¶¶ [48]-[49].

¹⁵⁵ O/362/21, *Vostok Chistopolskij chasovoj zavod, ZAO v. SOLEI BG* [2019], ¶ [25] (UKIPO).

¹⁵⁶ O/587/21, *RSG Grp. GmbH v. Glycologic Ltd.* [2021] (UKIPO), ¶ [43].

¹⁵⁷ O/0421/23, *Yirtar v. Zeugma Turkish Cuisine Ltd.* [2023], ¶ [59] (UKIPO).

7. Keeping Descriptive Words Free and Downplaying the Consumer

In *BEST MANGAL*, AP Alexander looked not just at how the average consumer in the UK would perceive the mark, but also at the need to keep descriptive words free for others to use.¹⁵⁸ He noted that words that are descriptive in a language other than English but currently have no meaning to most consumers in the UK may nevertheless become descriptive in the UK over the passage of time.¹⁵⁹ Failing to acknowledge a potentially descriptive meaning from the onset of the use of those words in the UK may ultimately deprive competitors of the ability to use those terms, and so stifle the development of markets for the products those names represent.¹⁶⁰ In *BEST MANGAL*, the AP conceded that the average consumer in the UK would be unfamiliar with the term “mangal”—a form of Turkish barbeque. However, he drew an analogy to terms such as “tandoori” and “stollen” which, while once obscure, have now become a common part of the British cultural landscape.¹⁶¹ Identifying that concern for *future* descriptive uses was in accordance with the approach of the CJEU in cases such as *Windsurfing Chiemsee*, and also aligned with public policy concerns,¹⁶² he observed:

It is also worth emphasising the importance of that public interest in cases of this kind. Where a trade mark is registered for a term which is descriptive and which other traders may reasonably want to use to describe their products in the same way, that can have a chilling effect on the ability of third parties to set up rival businesses offering the same kinds of products. That is particularly so where traders are bringing to wider public attention new kinds of products and services from foreign countries or from new frontiers of technology where a term may be in common use, but which is less well known among the general public in the UK. If marks are registered for those less familiar but nonetheless descriptive terms, others are restricted in their ability to set up rival businesses (in this case restaurants offering similar food) and describe them in the appropriate way. Trade mark registration is not there to make trade harder. It is there to make it easier, for traders and consumers alike. One can imagine that the flourishing Indian restaurant scene in this country may have been adversely affected if the first restaurant in the UK to offer tandoori food

¹⁵⁸ *BEST MANGAL*, O/224/16, *supra* note 8, ¶ [8].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at ¶ [15].

had registered (and sought to enforce) the mark “Best Tandoori” for food on the basis that the restaurant was well known under that name in a neighbourhood of London and “tandoori” was not yet well known to the general public in the UK.¹⁶³

What is particularly interesting about this decision is that while the AP did find that the Turkish-speaking community was a significant part of the UK average consumer base,¹⁶⁴ his justification does not depend on how the consumers currently perceive the mark, but rather on the intrinsic need to keep certain words free so as not to impinge on the development of future product markets. Moreover, the beneficiaries of this approach are not only those that speak the language in question, but also the wider community who, it is envisaged, will one day benefit from the products that were initially aimed at a niche foreign-language-speaking market. The reasoning in this decision is particularly attractive because not only is it based on protection of minority rights, but it also shows the benefits to the community of consumers as a whole that can arise from recognizing those rights.¹⁶⁵ Given that this approach was evident in only one case, it amounted to 0.49% of the language decisions.

At this point, it might reasonably be asked how those foreign terms that might need to be kept free can be identified. After all, only a fraction of the very many foreign terms are likely to come to the attention of the public in the UK.¹⁶⁶ It is perhaps possible to work by analogy to geographically descriptive marks. In *Windsurfing Chiemsee*, the original case where the CJEU identified the public interest in keeping potentially descriptive marks free, the Court instructed that not every mark with a geographical connection should be treated as descriptive. Instead, only certain marks were “capable, in the mind of the relevant class of persons, of designating the origin of the category of goods in question.”¹⁶⁷ This depended on “the degree of familiarity amongst such persons with that name, with the characteristics of the place designated by the name, and with the category of goods concerned.”¹⁶⁸

¹⁶³ *Id.* at ¶ [8].

¹⁶⁴ *Id.* at ¶ [14].

¹⁶⁵ See Brauneis & Moerland, *supra* note 6, for further perspective on the competition aspects of failing to recognize foreign terms. It should be noted, though, that from a minority rights perspective, the ultimate justification for recognizing the descriptive nature of the term is similar to the well-known foreign terms in (e), based on the meaning to the average member of the UK public, albeit in the future, rather than to members of the minority.

¹⁶⁶ By analogy, the difficulty of determining which foreign languages are “modern” versus which are “dead” is at the root of much of the U.S. criticism of the doctrine of foreign equivalents.

¹⁶⁷ *Windsurfing Chiemsee*, *supra* note 5, ¶ [31].

¹⁶⁸ *Id.* at ¶ [32].

In interpreting this test, the European Intellectual Property Office (“EUIPO”) Guidelines seek a “reasonable assumption”¹⁶⁹ that the term will become descriptive in the future. Thus, it might be possible to look for those minority language terms that, it is reasonable to assume, could become descriptive in the future. The Guidelines and indeed the CJEU seek a knowledge level to establish this, looking at the fame and size of the geographical location. Working by analogy, we could look for those terms that are well known to the relevant minority group as a descriptive term, as these might be most likely to “leak” into wider consciousness. The type of goods is also identified as relevant by both the Guidelines and the CJEU. It might be speculated, again by analogy, that terms used in certain market sectors are more likely to reach awareness of the wider, non-minority public, with an obvious example being food and restaurant services, where there is an established practice of bringing new forms of cuisine to the general consumer of the UK.

8. Other Decisions

There were a small number of language decisions that did not fall into any of the categories above. These include decisions involving Scottish Gaelic and Welsh as well as decisions where there was not sufficient evidence provided to enable the HO or AP to decide on the meaning of the term in the relevant foreign language. These decisions amount to 3.49% (7) of the total number of language decisions.

B. Summary and Reflections

This part of the discussion has sought to demonstrate that there is a lack of clarity on the meaning of the average consumer with a variety of approaches in use in Registry proceedings to defining this slippery actor. In a sense this is unsurprising given that during the period of this study and immediately before, the Court of Appeal itself provided conflicting visions of the average consumer, indeed sometimes in the same case. This lack of consistency is concerning in terms of how we understand trademark law’s average consumer. It has also resulted in a situation where the meanings of minority language terms are routinely discounted.

Despite the UK courts’ rejection of a numerical average of more than 50% as the relevant measure, because many Registry decisions still look for knowledge on the part of a “vast majority” of consumers, they have effectively adopted that standard. Likewise, standards such as the *CHEROKEE* test that require immediate recollection or

¹⁶⁹ EUIPO Trade Mark Guidelines, pt. B, § 4, ch. 4, ¶ 2.6.2 (2024 ed.) (discussing assessment of geographical terms) [hereinafter Trade Mark Guidelines], available at <https://guidelines.euipo.europa.eu/2214311/2226661/trade-mark-guidelines/2-6-2-assessment-of-geographical-terms>.

notoriety also effectively marginalize perceptions of all but the majority. Even tests that would seem to give more flexibility to recognize minorities, such as requiring a “significant” number of consumers to share a perception, rather than the majority, have been construed so that minorities will not form a large enough percentage to be classed as “substantial,” even though it could be argued that substantiality should be a question of significance as much as numbers. None of these approaches sit easily with the moral imperative that has been identified, from Kymlicka et al., for minority languages to be recognized.

These approaches are likely to be driven by a desire to adhere to a view of trademark law that rests on a hypothetical average consumer and are in no way motivated by discriminatory instincts. However, as has been argued, contemporary views of equality, as well as a prominent trend in liberalist thought, rest on acknowledging differences and addressing them in a way that is designed to result in equal outcomes, even if it would seem on the surface as if “special” rights are being awarded to minority groups. Indeed, an approach that acknowledges the importance of minority perceptions of language, and indeed the benefit that this brings to society more widely, is evident in AP Michaels’ willingness in *SANSKRITI GURU* to take into account the perceptions of diverse groups of consumers in, as well as in the subsequent decisions following that approach. The *BEST MANGAL* approach, which looks to future uses of foreign language terms, may take us slightly outside the justification based on minority rights, and more toward the interests of society more generally, but nonetheless its effect is to limit the grant of exclusive rights in foreign language terms. While neither of these decisions directly address the issue of minority rights, the impact of their respective approaches is clearly to protect minority language rights in a way that aligns with thinking on multiculturalism in this area.

V. OTHER LANGUAGE ISSUES

Before concluding, it is worth considering the analogous situation of non-Roman lettering, which highlights the same trend of discounting the meaning of foreign languages. Also, it should be noted that foreign language terms, even those that would not be known to the “average” UK consumer, can in principle be considered where the use is on goods that are aimed at the minority that would be familiar with the language. Here too, the no-doubt unintentional effect of the Registry’s narrow approach to defining such minority goods has made it difficult for the meaning of foreign terms to fall into this category. Again, though, there are signs of a developing minority-friendly approach. Finally, the correspondence between the Registry’s approach to Scots Gaelic and Welsh and Kymlicka’s protection for “national minorities” is noted.

A. Non-Roman Lettering

Marks composed of non-Roman lettering are particularly badly served in terms of embracing minorities' understanding of languages and reflecting this in how trademarks are protected.¹⁷⁰ Unless the goods for which protection is sought are aimed at a minority group, the approach taken by the Registry is that the average consumer will not understand non-Roman lettering and will view it as a figurative mark or element of a mark. Marks or elements of marks in Chinese¹⁷¹ and Tamil¹⁷² were subject to this approach in the period examined for this study.¹⁷³ Again, this approach strips the mark of any meaning, and so it will be neutral in any conceptual comparison, making a finding of confusion based on a shared meaning of the two marks unlikely. It also means that the mark will not sound in any phonetic comparison because figurative marks are purely visual. Perhaps more importantly, if a mark is meaningless, it cannot be descriptive. This leaves open the possibility that a purely descriptive term rendered in foreign characters, such as the proverbial word "SOAP" for "soap," could be accepted onto the UK Register on the basis that this meaning would not be apparent to UK consumers. There is also an obvious symbolic significance in rendering such marks meaningless. It should be noted that, although the Registry Examination Guide calls for marks in non-Roman characters to be translated and refused registration if this translated meaning is descriptive or generic,¹⁷⁴ the study came across no example of this approach being applied in the hearings, though it is possible that it occurs at the examination stage. If the descriptive meaning of such terms were to be taken into account, this would seem to be more generous than how other

¹⁷⁰ For a recent empirical study of the registration on non-Roman terms in the EU and UK, see Mitchell Adams & Amanda Scardamaglia, *Non-English character trade marks in Europe and the United States*, 4-5 E.I.P.R. 565 (2023). The authors track how many of such marks are registered but they do not engage with the meaning of the terms and consequently do not comment on whether descriptive marks are being registered.

¹⁷¹ See, e.g., O/423/21, Alibaba Grp. Holding Ltd. v. Play'n Go Marks Ltd. [2021] (UKIPO) (*ALI BABA*); O/602/21, Speedo Holdings B.V. v. Beijing Hongguang Dongying Sports Training Co., Ltd. [2021] (UKIPO) (*SPEEDO*); O/429/18, Houzz, Inc. v. Uhouzz (Tianjing) Network Tech. Co., Ltd., [2018] (UKIPO) (*UHOZZ*).

¹⁷² See, e.g., O/593/18, Ramesh v. Chithambara Mathematics Challenge (CMC) Ltd. [2018] (UKIPO) (*CHITHAMBARA*).

¹⁷³ Outside the time period of this study, see also O/399/13, Omar Kassem Alesayi Mktg. Co. Ltd. v. Greene [2013] (UKIPO) (*GREEN FARM FRESH FOODS*), *aff'd*, O/374/14, where, although the senior mark was composed of two "lozenges," one containing the term "GREEN FARM" in English and the other containing words in Arabic, the Arabic words were given very little weight because they could not be understood or pronounced by the average consumer. *Id.*

¹⁷⁴ See The Examination Guide, *supra* note 49, under the heading "Characters (e.g., Chinese, Japanese, Cyrillic)."

foreign language marks are treated under *KIAP MOU*,¹⁷⁵ as described above.

Arguably the UK approach in treating non-Roman characters as figurative contrasts unfavorably with that in Australia, where marks in non-Roman letters are considered to be aimed at the minority that can actually read and understand that lettering.¹⁷⁶ In Australia, it is the nature of the sign, rather than the nature of goods (as in the UK) that dictates who the sign is aimed at. This ensures that the actual meaning of those marks is not lost and can be properly taken into account. Consequently registrations that would have negative competitive effects, albeit within a subgroup of consumers, can be stopped. In contrast, the UK approach to date does not look at the characteristics of the sign, but rather it assesses whether a mark is aimed at a minority group by examining whether the *goods* specified would be the sort purchased particularly by a minority group. The meaning of such marks is simply lost within the trademark system.

B. Marks Aimed at Minority Groups

Where a trademark is aimed at a specific minority group, the practice outlined in the Registry Examination Guide establishes an exception from the usual rule that UK consumers will be unlikely to recognize the meaning of foreign language words and so that meaning cannot be taken into account. For this type of mark, the Examination Guide states:

[when] the goods or services are aimed at a specific consumer who is far more likely to understand the language of the mark rather than the average UK consumer as a whole, this should be taken into account in determining whether the mark is objectionable under section 3(1)(c).¹⁷⁷

In other words, the meaning of foreign terms can be taken into account when the goods in question are aimed at a minority group. This approach reflects the CJEU's *LOUFTI* ruling, where the court considered the meaning of Arabic elements of the two parties' marks to assess confusing similarity, even though Arabic is not an official language of the EU, because the respective goods sold under both marks were halal foods aimed at Muslim consumers of Arab origin.¹⁷⁸

¹⁷⁵ See *supra* note 14.

¹⁷⁶ *Supra* note 10.

¹⁷⁷ See The Examination Guide, *supra* note 49, under the heading "Goods or Services aimed at Minority Groups."

¹⁷⁸ Case C-147/14, *Loutfi Management Propriété Intellectuelle SARL v. AMJ Meatproducts NV*, ECLI:EU:C:2015:420, ¶ [22] (June 25, 2015).

However, the generosity of this approach depends on when exactly goods are considered to be aimed at a minority group. The example given in the Examination Guide is the Arabic for the word “NIQAB,” which would be descriptive for niqabs in Class 25. Such goods are clearly aimed only at the minority community. However, beyond such specialty goods, Hearing Officers and APs have been strict about when goods are aimed at minority groups. Thus in *Pooja Sweets*, the AP found that while the mark was registered for Asian foods and also specific foods such as Asian sweets and confectionary, kulfi, and various types of specialty bread such as naan and poppadom, such foods were also purchased by the general public and so the mark was not specific to a minority group.¹⁷⁹ This was followed in *ORIGINAL HAJI NANNA’S BIRIYANI*¹⁸⁰ where the HO, following *Pooja Sweets*, found that just because a mark *may* be of special interest to a minority group it should be judged according to the standards of the average consumer if the class of restaurants was aimed at the public at large. Thus, while the applicant may have targeted his restaurant services to the Bengali community, he had applied for “restaurant services” more generally which were aimed at the public at large. In contrast, *UK MALAYALEE MATRIMONY* arguably adopted a more sophisticated approach that focused on the interplay between the mark and the services applied for. Thus, even though the general public might use “dating services” covered by the specification sought, the terminology of the mark made it clear that the target market was a minority group. Consequently, the meaning of the mark should be judged from the understanding of that particular group.¹⁸¹

The Registry’s approach to marks aimed at minorities would seem to reflect that of marks in minority languages. While according to the Examination Guide, marks aimed at minorities are, in principle, treated in a way that takes their specific language knowledge into account,¹⁸² in practice it appears to be quite difficult to establish that the goods in question are actually aimed at minorities, particularly where the applicant has designated a broad category of goods while perhaps intending to use it only for a subset of those goods aimed at a minority. However, like *SANSKRITI GURU*, the *UK MALAYALEE MATRIMONY* decision suggests there may be a move toward greater acknowledgment of the differing perceptions of minority groups.

¹⁷⁹ *Pooja Sweets*, *supra* note 53, ¶ [44].

¹⁸⁰ O/619/20, *supra* note 52, ¶ [46]-[47].

¹⁸¹ O/788/21, *Ukmalayalimatrimony.com Ltd. v. UK Malayalee Matrimony Ltd.* [2021], ¶¶ [24]-[29] (UKIPO).

¹⁸² See The Examination Guide, *supra* note 49, under the heading “Goods or Services aimed at Minority Groups.”

C. “National Groups”: Welsh and Scots Gaelic

As mentioned earlier in the article, Kymlicka argued in favor of affording extra rights to “national groups.” The 2021 UK census identifies 538,000 Welsh speakers resident in Wales and an additional 7,349 located in England. This is fewer in number than the minority groups identified as not “significant” above. Indeed, there are even fewer speakers of Scots Gaelic with the number at just over 700.¹⁸³ Yet, both of these languages have a special status in the UK,¹⁸⁴ and as such have been granted special recognition by the Registry. Thus, the Examination Guide states: “Where marks contain Welsh or Gaelic words they will be treated in the same way as trade marks consisting of the equivalent English words for the purposes of section 3(1).”¹⁸⁵

Despite this direction, special recognition of these languages has not been universal in the decisions of HOs. In a decision regarding the registrability of the mark INBHIR NIS for “whisky,”¹⁸⁶ the HO did ultimately find that the term was descriptive. However, to reach this conclusion he did not rely directly on the special rule in the Guidelines that “Where marks contain Welsh or Gaelic words they will be treated in the same way as trade marks consisting of the equivalent English words for the purposes of section 3(1).” If he had, “Inbhir Nis” would have been found equivalent to “Inverness,” which would have been descriptive because third parties already had whisky distilleries in that geographical area. Instead, he engages in a detailed discussion of the public policy reasons justifying why Scots Gaelic should be treated as equivalent to Welsh.¹⁸⁷ While this is a powerful justification for the sorts of minority rights discussed in this article, it is be argued that this HO is “reinventing the wheel.” While he appears to have recognized that the Registry Examination Guide affords special status to Welsh and Gaelic, he takes the Guidelines as still not requiring refusal of terms descriptive in these language *unless* they would also be understood by the average consumers.¹⁸⁸

¹⁸³ It should be noted that these figures do not strictly compare like with like: the Scots Gaelic numbers are, like the other figures pertaining to foreign languages, derived from the census figures for those for whom the language is their *first* language. However, the figures regarding Welsh speakers include all who speak Welsh whether or not it is their first language.

¹⁸⁴ Welsh is deemed to have equal status to English in Wales by virtue of the Welsh Language Act 1993 and Welsh Language (Wales) Measure 2011. Similarly, Gaelic is an official language of Scotland under the Gaelic Language (Scotland) Act 2005. Additionally, both languages are protected as minority languages under the European Charter for Regional or Minority Languages, together with Scots, Ulster Scots, and Irish.

¹⁸⁵ See The Examination Guide, *supra* note 49, under the heading “Non-English words.”

¹⁸⁶ *Supra* note 62.

¹⁸⁷ *Id.* at ¶¶ [29]-[42].

¹⁸⁸ *Id.* at ¶¶ [24]-[25].

This does not seem to be the natural reading of the Examination Guide (the relevant provisions of which are reproduced in the footnotes¹⁸⁹). Instead, the two paragraphs should be read in the alternative, with Gaelic and Welsh automatically translated, whereas the meaning of other foreign language terms is taken into account only if they would be familiar to the average UK consumer.

More troubling is the HO decision concerning likelihood of confusion in *GLENREIDH*. The term “REIDH” and the earlier mark AN REIDH were treated as having no meaning because “the overwhelming majority of UK consumers . . . are English-speakers with no knowledge of Gaelic.”¹⁹⁰ It is unclear whether this is inconsistent with the Examination Guide because this specifically refers to the guidance in relation to Gaelic (and Welsh) being “for the purposes of section 3(1) [the absolute grounds where there is something inherently wrong with the mark],”¹⁹¹ whereas this was a decision concerning Section 5(2) (the relative grounds where two parties’ marks conflict). Using the logic of Kymlicka, it is hard to see why national languages should be recognized in relation to the absolute grounds but not the relative grounds.

VI. LESSONS TO LEARN

This final section will consider what lessons the treatment of foreign languages might hold for trademark law policy and practice more generally.

A. The Need for More Clarity in Understanding the Nature of the Average Consumer

The first lesson is a general one. This article has highlighted an historic array of approaches to how to define who must be confused in relation to conflicting trademarks, or who must find a mark descriptive for this to be legally cognizable. The result has been a

¹⁸⁹ Non-English words: “Trade marks may consist of words in languages other than English. Where marks contain Welsh or Gaelic words they will be treated in the same way as trade marks consisting of the equivalent English words for the purposes of section 3(1). Where marks contain words from languages other than those mentioned above the following will be considered. There are no grounds for refusing registration of trade marks on the basis that they are descriptive or non-distinctive in a language which is unlikely to be understood by the relevant trade in the UK or by the relevant average UK consumer of the goods/services in question. In contrast, non-English word marks which are likely to be recognized as a description of a characteristic of the goods or services (or otherwise be descriptive of the goods/services) in the application will be objectionable.” The Examination Guide, *supra* note 49, under the heading “Non-English words.”

¹⁹⁰ O/645/19, *Chivas Holdings (IP) Ltd. v. Bagchi* [2019], ¶ [22] (UKIPO). Indeed, the HO did not give the contended meaning of the term as he found it to be unevicenced.

¹⁹¹ The Examination Guide, *supra* note 49, under the heading “Non-English words” (“Trade marks may consist of words in languages other than English. Where marks contain Welsh or Gaelic words they will be treated in the same way as trade marks consisting of the equivalent English words for the purposes of section 3(1).”).

range of outcomes ranging from those looking at only the perceptions of the overwhelming majority of consumers to analyzing every subset of the market.¹⁹² They cannot all be correct. This confusion would seem to be down to a lack of clear direction from the courts on what is ultimately the fundamental barometer of trademark law. Statements from the CJEU have been abstract and the Supreme Court's pronouncement on the average consumer in *Lifestyle v. Amazon* lacks detail.¹⁹³ Indeed, while the CJEU's case law describes a consumer who is "reasonably well informed and reasonably circumspect and observant,"¹⁹⁴ there is also an acknowledgment before the CJEU and the Court of Appeal (case detailed above) that consumer groups are varied and that the impugned perception need only be shown among a "significant" number of those consumers. But this raises the unanswered question of what does "significant" mean? While it is probably a good thing that the CJEU has eschewed the inflexible percentage-based German pre-harmonization approach, the steadfast refusal to give any idea of even a range of cognizable percentages has led to uncertainty and inconsistency both within the Registry and between the Registry and the EUIPO. While our attention has focused here on foreign language consumers, as the average consumer's perspective is so fundamental as a benchmark for registrability and infringement, if we do not understand what this really is, then much of current trademark law way beyond foreign language questions is built on shaky foundations.

A further uncertainty, and one that comes across less clearly in the decisions examined, is whether our average consumer is even the same in relation to confusion versus registrability. One can see good reasons for taking a more normative approach to which marks should be barred from registration on descriptiveness grounds,¹⁹⁵ given that underlying that provision is the normatively grounded public interest in keeping certain marks free for others to use, compared to the ultimately empirically grounded question of when consumers are confused.¹⁹⁶

B. Lessons from Other Jurisdictions: Significance and Foreign Equivalents

It has been described how the UK's quantitative approach to significance has meant that minorities have not been recognized as

¹⁹² As in *SANSKRITI GURU*, O/830/18, *supra* note 147.

¹⁹³ *Lifestyle Equities*, CV, *supra* note 83.

¹⁹⁴ *Lloyd Schuhfabrik*, *supra* note 67.

¹⁹⁵ As AP Alexander did in *BEST MANGAL*, *supra* note 8.

¹⁹⁶ For a similar debate, see Graeme B. Dinwoodie, *Trademark Law as a Normative Project*, Sing. J. L. Stud. 305-341 (2023).

“significant.” This result, though, is not inevitable, as can be seen by contrasting the UK approach with that taken in other jurisdictions. Although the UK is still¹⁹⁷ meant to apply the same test as the EUIPO and GC, there is a subtle difference. While the UK looks (positively) for a *significant* number of consumers, the EU institutions adopt a negative definition, in that a group of consumers will count provided that they are “not negligible,” with the result that a smaller percentage of consumers suffices. With this small step, the EU institutions have recognized the rights of minorities in a way that seems in better accord with Kymlicka’s approach. The most telling example is a decision involving the trademark SHAKAHARI.¹⁹⁸ The term, which means “vegetarian” in Hindi, was refused registration as an EUTM because it would be descriptive among the Hindi-speaking population of the UK and the Indian and Nepali population of the EU more generally. This sits in stark contrast with *Pooja Sweets*, where a potentially larger part of that self-same population¹⁹⁹ was not viewed as significant by the Registry. A case refusing the registration of the word mark KLÖTENKÖM on descriptiveness grounds is further evidence that the EU standard is less strict. The term was descriptive of a type of alcoholic drink in “Low German,” an “unofficial” language spoken by just 3% of Germans. Again, this small number of consumers (particularly because this was an EU trademark so the entire population of the EU could potentially be relevant) demonstrates that the non-negligible standard is more able to take minority interests into account. A further, more sizeable example is the recognition that Finns are a non-negligible minority in Sweden.²⁰⁰ Though, as this population makes up 6.7% of the Swedish population²⁰¹ and is recognized as an “official minority” in Sweden, we might hazard a guess that such a minority might be considered significant even according to the UK rules.²⁰²

¹⁹⁷ While the UK has left the European Union, UK and EU trademark law were harmonized prior to Brexit, and it remains the case that UK courts and tribunals still pay attention to European decisions in this field.

¹⁹⁸ EUTM No. 0017680521, cited in Trade Mark Guidelines, pt. § 4, ch. 4, ¶ 4.1.2.2 (2024 ed.), available at <https://guidelines.euipo.europa.eu/2214311/2226597/trade-mark-guidelines/4-1-2-2-eu-regional-languages-and-non-eu-languages>.

¹⁹⁹ The Hindu population of the UK identified in *Pooja Sweets* would include those who spoke Hindi as a first language, but also speakers of other regional languages and even those who speak only English but are familiar with Hindu concepts through religious practice.

²⁰⁰ Case T-878/16, *Karelia v. EUIPO*, ECLI:EU:T:2017:702, ¶ [28] (Oct. 6, 2017). See also Case T-432/16, *Lackmann Fleisch- und Feinkostfabrik v. EUIPO*, ECLI:EU:T:2017:527, ¶ [29] (Jul. 19, 2017); Case T-830/16, *Monolith Frost v. EUIPO*, ECLI:EU:T:2018:94, ¶ [56] (Dec. 13, 2018).

²⁰¹ There appear to be 700,000 Finns out of a total population of 10.5 million, so 6.7%.

²⁰² Sweden recognizes five groups as official minorities. The others are the Sámi, Tornedalers, Roma, and Jews. See United Nations, Sweden Finns—two cultures, two

It is also worth drawing a contrast with the U.S. doctrine of foreign equivalents. Like the Registry, the USPTO does not automatically translate all foreign terms and assess for descriptiveness, etc., on the basis of that translated meaning. Instead, the U.S. test is whether the ordinary consumer would “stop and translate” the foreign term.²⁰³ This is very similar to the *CHEROKEE* approach of asking whether the average consumer would immediately recollect the foreign term. However, it seems much easier to satisfy the U.S. test because the assumption, subject to certain contextual exceptions, is that consumers will stop and translate whenever the mark is in a common modern language,²⁰⁴ and not one that is “dead, obscure or unusual.”²⁰⁵ Gilson Lalonde, in her study of the doctrine of foreign equivalents, concludes that “vanishingly few” languages fall into this latter category.²⁰⁶ Indeed, languages that have been viewed as not understood by a significant number of consumers in the UK, including Chinese, Russian, Arabic, Greek, and Japanese, have all been taken into account in the United States.²⁰⁷ In particular, the courts have looked behind the numbers of speakers reported on the 2019 U.S. Census and have considered those with familiarity with the language even if they would not be frequent speakers and looking at the existence of cultural activities pertaining to the language.²⁰⁸ Greek is the language with the lowest number of speakers recorded in the 2019 U.S. census included in Lalonde’s list, with 264,066 speakers, amounting to 0.09%²⁰⁹ of the surveyed population. Indeed, other languages on Lalonde’s list, including Swahili and Afrikaans, are not even separately recorded in the census.²¹⁰ While U.S.

languages, <https://unric.org/en/sweden-finns-two-cultures-two-languages/> (last visited May 28, 2025).

²⁰³ TMEP § 1209.03(g); *Veuve Clicquot Ponsardin, Maison Fondée en 1772 v. Palm Bay Imps., Inc.*, 396 F.3d 1369, 1377, 73 U.S.P.Q.2d 1689, 1696 (Fed. Cir. 2005).

²⁰⁴ TMEP § 1207.01(b)(vi)(B).

²⁰⁵ *Id.*, citing *Veuve Clicquot Ponsardin Maison Fondée en 1772 v. Palm Bay Imps., Inc.*, 396 F.3d 1369, 1377, 73 U.S.P.Q.2d 1689, 1696 (Fed. Cir. 2005).

²⁰⁶ Lalonde, *supra* note 7, 773, 800-801.

²⁰⁷ On the other hand, Tamil, which the 2019 language usage question in the U.S. census (U.S. Census Bureau, *Language Use in the United States: 2019* (2022), <http://www.census.gov/content/dam/Census/library/publications/2022/acs/acs-50.pdf>, p. 3) records as having 181,698 speakers, was viewed as obscure. *See* Gilson Lalonde *id.* at 801, citing *Aachi Spices & Foods v. Raju*, 2016 TTAB LEXIS 469 (T.T.A.B. 2016).

²⁰⁸ Lalonde, *supra* note 7, 806.

²⁰⁹ The language question recorded data concerning the 308,834,688 members of the population over five years old. Interestingly, the census asks about languages spoken at home, allowing for second languages to be included. By contrast, the UK census asks only about first language, meaning that if the question had been asked as it is in the UK, the percentage of Greek speakers in the United States would have been even lower. U.S. Census Bureau, *Language Use in the United States: 2019*, *supra* note 207.

²¹⁰ Lalonde, *supra* note 7, 805-806.

commentators have criticized their “doctrine of equivalents” on the grounds that “tiny percentages of US consumers have a disproportionate influence on whether a mark is registered or enforced,”²¹¹ it is argued that, by looking beyond the percentage that speaks any particular language, the United States has made it possible for minorities to have their languages and what they mean to them recognized.

The adoption of a “doctrine of foreign equivalents” in the UK was mooted but ultimately rejected in the *SPOSE DI GIO* decision.²¹² It was argued that, in the interests of the ability of goods to flow freely between different Member States, when considering whether two marks were confusingly similar, regard should be given not only to whether the marks were similar in English but also whether the marks, or components thereof, shared a meaning in another language. This would have been wider than the formal structure of the U.S. doctrine, as it did not seem to have the “stop and translate” requirement. While the Registry supported the approach,²¹³ and AP Hobbs had sympathy for the position,²¹⁴ he ultimately held that employing a “doctrine of foreign equivalents” was not open to him because the GC had held in *KIAP MOU* that the meaning of a mark could be considered only if it was understood by a significant proportion of the consumers in the country in question.

Thus, because the AP did not believe that a significant proportion of UK consumers would understand the Italian words that made up both the junior and senior marks, he could not take the meanings of those foreign elements into account in comparing the two parties’ marks.²¹⁵ Interestingly, the AP’s motivation to support a doctrine of equivalents in principle was not a belief in the inherent need to recognize the value of foreign languages, or even based on the need to keep descriptive foreign terms open to all, but rather on a desire to maintain free movement of goods within the EU.²¹⁶ It could be argued that, post-Brexit, the UK is no longer bound to follow the approach in *KIAP MOU* (though, of course, other EU Member States would be), and there are strong, keep-free-based reasons for paying more attention to the meaning of foreign

²¹¹ *Id.* at 808. See also Serge Krimnus, *The Doctrine of Foreign Equivalents at Death’s Door*, 12 N.C. J.L. & Tech. 159 (2010).

²¹² O/253/05, GA Modelfine SA v. Di Gio’ Srl [2005] (UKIPO). The term “Spose di Gio” meaning “the brides of Gio.” Since the application was for bridalwear, it was argued that the term “spose” would not be as important as the “di Gio” element, meaning that the mark would be confusingly similar to the mark AQUA DI GIO. See *id.* at ¶ [7].

²¹³ *Id.* at ¶ [16], [33].

²¹⁴ *Id.* at ¶ [32].

²¹⁵ *Id.* at ¶¶ [35]-[41].

²¹⁶ Interestingly, the same justification lies behind the argument in favor of recognizing the doctrine of foreign equivalents in Brauneis & Moerland, *supra* note 6.

language marks, even if they are not apparent to a large number of consumers. A doctrine of foreign equivalents—whether on the U.S. model, or that outlined in *SPOSE DI GIO*—would certainly accord greater recognition to minority rights because it demonstrates a willingness to take into account the meaning of the term to the minority group in a way that even the definition of the average consumer that requires understanding by a significant proportion of consumers has not to date.

C. Should We Abandon the Average Consumer?

The average consumer has been a feature of UK and EU trademark law for two decades, but it was not always so. In a series of articles, Jennifer Davis tracks the development of the average consumer, arguing that historically courts in the UK *did* take into account the characteristics of sub-groups of consumers. Thus, courts

did not assume that all participants in the market could be equally responsible. Instead, the courts assumed the market was made up of a heterogeneous public, some of whom by reasons of, for instance, education or economic status were not equally well informed and so were not in a position to exercise equal choice in the marketplace.²¹⁷

However, post–World War II, divisions in class, affluence, and education narrowed, making recourse to a hypothetical “average” consumer, mirroring the single, utility-maximizing consumer found in economics, possible.²¹⁸ While it might be correct that socio-economic divisions between consumers have narrowed, this move toward viewing all consumers embodying the same characteristics fails to take into account non-economic characteristics that might lead to different consumers perceiving different trademarks differently. We have focused on how linguistic and ethno-religious minorities might view trademarks differently from the hypothetical average consumer. However, there are undoubtedly other minorities who may experience trademarks differently from the majority of people. For example, Eric Johnson details how certain people with disabilities experience trademarks, placing particular importance on the visual if their particular impairment means they are unable to read.²¹⁹ Even the idea that socio-economic status no longer makes a difference to how people shop is questionable with Laura Heymann²²⁰ considering factors including the impact of

²¹⁷ Davis, *supra* note 66, 199.

²¹⁸ *Id.* at 195–199.

²¹⁹ Eric E. Johnson, *Intellectual Property’s Need for a Disability Perspective*, 20(2) Geo. Mason U. C.R. L.J. 181, 191 (2010).

²²⁰ Laura Heymann, *Trademark Law and Consumer Constraints*, 64 Ariz. L. Rev. 339 (2022).

literacy levels, access to Internet shopping via mobile devices, and differing purchase priorities in the face of more limited financial resources. But, returning to issues of language, it might also be considered that certain terms or concepts may be familiar to other non-majority groups²²¹—for example, the LGBTQ+ community²²² or speakers of slang²²³—even if they are unfamiliar to the majority of consumers.

It is undoubtedly the case that we want and need to ground our trademark concepts within the perception of consumers. After all, it is consumer protection that serves as the traditional justification for our trademark system.²²⁴ The difficulty is in employing the all-encompassing concept of a single hypothetical average consumer who is reasonably well informed and reasonably circumspect and

²²¹ Kymlicka, *supra* note 30, 18, does not afford his group collective rights to non-national/ethnic minorities as he seeks to draw a distinction between “ethnocultural” groups and other forms of “culture.” However, he seems to have adopted a more expansive approach in Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (1998).

²²² There do not seem to be a large number of examples of such marks, but it is striking that in the *LES BOYS* decision, *supra* note 126, the meaning of the term was examined from the point of view of the general consumer, rather than those who might fit into that group of people—this arguably has echoes of the approach to foreign terms that understands their meaning by reference to the understanding of British people rather than the understanding of members of the minority group. As noted, AP Alexander’s approach here does not seem to be entirely on all fours with that in *BEST MANGAL*. There is likewise little scholarship on this theme, though of interest is Michael Goodyear, *Queer Trademarks*, 164 U. of Ill. L.R. 163 (2024). While this examines registration of marks including LGBTQ+ terminology from the perspective of registration of offensive marks, the arguments based on the symbolic importance of language and its relationship to identity have parallels in this work. Indeed, in later work, Kymlicka draws analogies between the treatment of the LGBTQ+ community and ethnocultural groups. See Kymlicka, *supra* note 221, ch. 6.

²²³ To date, slang terms have been treated in a similarly inconsistent way as foreign language terms. See, e.g., *LES BOYS*, *supra* note 126, where AP Alexander discounted applicant’s argument that *LES BOYS* would be understood as short for “lesbian boys.” *Id.* at ¶¶ [34]–[35]. While he noted that “some” of the UK public might view the mark in that way, AP Alexander found that the HO was not in error to find that the “majority” of consumers, and so the average consumer, would view the term “les” as the French word for “the.” *Id.* at [34]. This focus on the majority and discounting minority understanding in this context is surprising given AP Alexander’s approach in *BEST MANGAL*. See also O/864/22, *Cake v. Cake Pte. Ltd.* [2022], ¶¶ [88], [89] (UKIPO) (*CAKEDEFI*) (holding that a “large proportion of the average consumer” would be familiar with the term “DEFI” as an abbreviation for “decentralized finance,” even though some would not). In two decisions regarding the term “crep” (slang for trainers), the meaning was either accepted by both parties, or by the HO in the absence of an alternative meaning. O/396/21, *RIN Intell. Prop. Ltd v. Kensulate Holdings Ltd.* [2021] (UKIPO) (*CREPSLOCKER*); O/456/21, *RIN Intell. Prop. Ltd. v. Roulland* [2021] (UKIPO) (*CREP SELECT*). However, we can see echoes of *SANSKRITI GURU*, *supra* note 147, in O/570/19, *Cbm Creative Brands Marken GmbH v. Yolo Prods. Ltd.* [2019] (UKIPO), where it was accepted that the term YOLO might mean “you only live once” to some consumers and as a made-up word to others, but then proceeded to analyze the possibility of confusion for both. *Id.* at ¶ [42].

²²⁴ See, e.g., Graeme Dinwoodie, *Ensuring Consumers “Get What They Want”: The Role of Trademark Law*, 83(1) Cambridge L.J. 36 (2024).

observant. This drive to objectivity lends itself to efficient decision-making but does not take into account the diversity of those who are active in the market. Rather there is a need to protect the interests of all who may be impacted by the registration of trademarks. To an extent this has been recognized by the subtle shift toward looking for a “significant number” of consumers. Indeed, as detailed above, the diversity benefit of this approach is highlighted by Arnold LJ in *Lidl v. Tesco*. However, it could be argued that a better approach is to adopt that of the European institutions in looking for the impugned perception on the part of a non-negligible number of consumers. This allows for all groups of people, even those that are relatively small, to be taken into account but allows for genuine outliers²²⁵ to be discounted.²²⁶

D. Looking Out

One of the reasons minority perceptions have not been adequately recognized is that there has been, in at least some decisions, a strict adherence to trademark principles without due consideration of concerns outside trademark law. I would add my voice to those scholars calling for trademark adjudicators to pay due consideration to wider societal interests that may be impacted by the inexorable application of “trademark” thinking without considering extrinsic policy concerns such as sustainability, free competition, and free speech.²²⁷ It could be argued that the value in recognizing diversity and in avoiding unintended discrimination should trump the strict application of trademark law. The CJEU has been willing to do this before, recognizing the importance of making technology available to consumers in Google²²⁸ and of establishing a single market in the exhaustion of rights cases.²²⁹

²²⁵ One example that springs to mind is the small number of speakers of Klingon, a constructed language used in the science fiction universe of the *Star Trek* media franchise.

²²⁶ The “flip side” of this approach is the risk that competitively valuable commercial activity is blocked by measures that protect a small number of consumers. *See, e.g.*, Dinwoodie, *supra* note 228, at 44. In the case of minority rights, this seems a price worth paying given the values extrinsic to trademark law that are at stake.

²²⁷ *See, e.g.*, Anna Tischner & Katarzyna Stasiuk, *Spare Parts, Repairs, Trade Marks and Consumer Understanding*, 54 IIC 26 (2023) (arguing that sustainability, circularity and competition will need to trump strict trademark law); Dinwoodie, *supra* note 224 at 56 (arguing that values such as “free speech, valuing free competition, facilitating public health concerns, enabling artistic creativity, comparative advertising, trying to have a climate where there is certainty for innovators, avoiding the chill of abuse of rights in litigation, respecting commercial ethics” should be balanced against overly wide trademark law based on perceptions of consumer protection).

²²⁸ Case C-236/08, *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA*, ECLI:EU:C:2010:159 (Sept. 22, 2009).

²²⁹ Case C-355/96, *Silhouette Int’l Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*, ECLI:EU:C:1998:374 (July 16, 1998), whereby there was exhaustion only when the goods were put on the market first in the EEA and not where

E. Diversity and Trademark Law

More generally, it is hoped that this work demonstrates that there is room for further consideration of diversity and minority interests in trademark law.²³⁰ As noted above, trademark law, with its focus on rights for traders, might not be the most obvious place to consider issues of diversity. However, because consumers are the barometer of trademark law, and consumers are diverse, any trademark law decision potentially impacts differently on different groups of people. This stretches beyond issues we have looked at in this piece considering descriptiveness and confusion to take in issues such as whether trademarks are offensive and how to deal with trademarks that may be well known abroad, or even in the hands of a particular organization, but that have no business in the UK. This phenomenon seems prevalent, in particular, in relation to religious groups, where often rival offshoots may both seek to register the mark for the organization.²³¹ There is also further work to be done in understanding how diverse groups of consumers might experience trademarks. While there is some writing on how disability²³² and socio-economic factors might influence purchasing decisions, there is more work, potentially empirical or drawing on previous cross-disciplinary empirical studies, to be done. While there has been some discussion in the case law about how gender²³³ and age and disability²³⁴ might result in consumers having differing responses to trademarks, these cases have been characterized by

they were first put on the market outside the EEA, even though from a trademark perspective the marks communicated exactly the same information.

²³⁰ The author has made a modest contribution to this effort in her chapter *Trade Mark Law and Diversity in Research Agendas in Trade Mark Law* (Ilana Fhima & Anke Moerland, eds., forthcoming).

²³¹ In the U.S. context, see David A. Simon, *Register Trademarks and Keep the Faith: Trademarks, Religion, and Identity*, 49 IDEA 233 (2009).

²³² Substantially more attention has been given to the interplay between copyright and disability, see, e.g., in the UK context, Sabine Jacques, *The UK pathways towards an equal access to creative works*, in Int'l Perspectives on Disability Exceptions in Copyright Law and the Visual Arts Feeling Art (Ana Ramalho & Jani McCutcheon, eds. 2020), though there are many more examples including the detailed consideration of the U.S. position in Blake E. Reid, *Copyright and Disability*, 109 Calif. L. Rev. 2173 (2021).

²³³ See Case T-344/09, *Hearst Commc'ns v. OHIM*, ECLI:EU:T:2012:324, ¶¶ [31]-[32] (June 27, 2012). The applicant argued that the marks in question (the name of the well-known magazine COSMOPOLITAN or COSMO) were "female trade marks" aimed at "women of all ages who are interested in love, sexuality, men, but . . . also in beauty and life-style." The EUIPO countered that "female trade marks" might possibly apply in relation to goods such as "panty liners or tampons." *Id.* at ¶ [32]. Neither approach would seem to particularly capture the female experience.

²³⁴ See, e.g., Case T-369/10, *You-Q BV v. OHIM*, ECLI:EU:T:2012:177, ¶ [72] (Mar. 29, 2012), where the GC found that purchasers of the junior BEATLES wheelchairs would be attracted on account of their handicap but the image of "freedom, youth and mobility" of the 1960s pop group of the same name.

gross generalizations, highlighting even more strongly the need for further research in this area.

VII. CONCLUSION AND RECOMMENDATIONS

Despite current political pressures, respect for diversity, and the protection of minorities in particular, is a fundamental value in today's society. Liberal thinkers have shown how recognition of the needs of minorities plays a vital role in the cohesion of our multicultural society, and that achieving equality of outcomes sometimes means affording minority groups different rights to the majority. Trademark law has not always lived up to these goals. In adhering to a view of the average consumer that treats him or her as a single hypothetical entity, or the embodiment of the "vast majority" of UK consumers, the Registry has repeatedly discounted the language knowledge of minorities. No doubt this was motivated by a desire to respect trademark principles in the face of a definition of the average consumer that lacks clarity rather than because of any discriminatory impulse. However, it demonstrates how UK and EU trademark law is not currently equipped to deal with perceptions of marks that are shared by small but important groups of consumers whose interests we want to protect, be they speakers of foreign languages, the disabled, or any other group of consumers that is limited in numbers. Likewise, even when the goods are aimed at minorities, courts are cautious about recognizing that this is the case, often assimilating such uses to goods aimed at the "entire" public.

More recent developments, though, have shown a greater willingness to recognize diversity among consumers as well as the societal benefits of recognizing how minorities interact with trademarks. These developments should be used as a basis by the Registry for an approach that, in the interest of recognizing the needs of minorities in our multicultural society, acknowledges the meanings of trademarks, even if they are not known to the numerically average consumer. As a first step, the Registry may consider inviting applicants to indicate the meaning of any foreign terms as part of their trademark application, as is the practice in the United States and Australia.²³⁵ This would level the playing field somewhat by proactively exposing the examiner to the contended meaning of any term at an early stage in the examination process, in the same way that the examiner would be exposed to the meaning of an English term, rather than relying on the examiner to

²³⁵ Translations of foreign terms and transliterations of non-Roman lettering are required in the United States. See TMEP §§ 819.01(m), 809.01, which provides a translation and/or transliteration of any foreign language term or term in non-Roman characters. IP Australia Trade Marks Manual of Practice and Procedure, *supra* note 10, at § 10.4 (Jan. 21, 2025), <https://manuals.ipaustralia.gov.au/trademark/4.-translation-transliteration-of-non-english-words-and-non-roman-characters>.

appropriately research potential meanings.²³⁶ A more substantive option would be to adopt the EUIPO's "not negligible" standard to which groups of consumers are relevant. But perhaps even better is the *SANSKRITI GURU* approach, whereby all groups of consumers are considered without the need to engage in a determination of their quantitative or qualitative role in the overall group of consumers. There is also a strong argument, as noted in *BEST MANGAL*, for taking into account those marks that, while not widely understood now, may come to be known by the numerically average consumer. While the *BEST MANGAL* approach does not directly focus on the needs of minorities, it will provide them with de facto protection if their marks cannot be monopolized, while also benefiting society more generally. Similarly, there is greater scope for taking proper account of the meaning of marks and goods aimed at minorities by acknowledging that even when a class of goods might be of interest to the general public, the particular applicant or owner's offering may be of particular interest to a minority, who would understand its meaning. Finally, the adoption of the Australian approach to non-Roman lettering, treating goods bearing such lettering as aimed at the minorities who can understand it, rather than relying on the type of goods to ascertain who the mark is aimed at, is recommended.

²³⁶ Although it should be noted that in many of the decisions examined, the HO *was* aware of the meaning of the foreign term, as it had been argued by the parties, and sometimes even accepted but nonetheless concluded that *consumers* would not be so aware. However, including it in the form would guarantee that the meaning is available at an early stage.