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Procter & Gamble v. OHIM: Is the Generic “Average Consumer” Too Generic for its Own Good?

I. INTRODUCTION

Meet Jane Doe. She is a forty-something mother of three who holds a graduate degree and works in a management position for a large corporation. As far as consumers go, Mrs. Doe makes more money and is more highly educated than the “average” consumer. Mrs. Doe has a dishwasher at home that she frequently uses, and likes to buy dishwashing tablets to use in her dishwasher as opposed to dishwashing liquid, which she considers “too messy.” She can easily tell the difference between the dishwashing tablets she prefers—made by the Procter & Gamble Company (“P&G”)—by their colors and shape, from other tablets made by other competitors.

Meet Jane Average. She is a late twenty-something single woman who holds a bachelor’s degree and is working in the sales department of a mid-sized corporation. Miss Average has a dishwashing machine at home that she occasionally uses, and does not have any preference whether to use dishwashing tablets or liquid. To Miss Average, the only differences that exist are whether the dishwashing detergent is in tablet or liquid form, and she usually buys whatever is on sale. Thus, Miss Average is more representative of an “average” consumer in the mainstream marketplace than Mrs. Doe.

There is an ever-evolving and ever-increasing number of products in the marketplace today, and consumers are constantly feeling the push and pull of advertisements and promotions for these products. Trade marks¹ are meant to help consumers discern between products they see on television and in magazine

1. The European spelling of “trade mark” will be used in this Note, as opposed to the American spelling (“trademark”).

advertisements, and the value of a trade mark lies in just that—the ability to distinguish one product from another. Not all consumers are alike, and not all consumers in the general public will be consumers of a particular product, or even of that particular product niche.

When trade mark registration is challenged, the question that often arises is just how distinguishable a trade mark should be in order to qualify for legal protection. The answer is that the “average consumer” needs to see the trade mark and be able to distinguish that product from another. But who is this average consumer? Mrs. Doe and Miss Average represent different segments of the consumer market, and while Miss Average may be more demographically similar to the average consumer in the general market, Mrs. Doe could be the one who better represents the average consumer of dishwashing tablets.

P&G attempted to register its square, multi-colored dishwashing tablets with the Office for Harmonisation in the Internal Market² (“OHIM”) in 1998 for protection as a trade mark.³ The application was rejected because OHIM felt that, *inter alia*, the average consumer of these dishwashing tablets would not be able to distinguish between the brands based on color and shape.⁴ The European Court of Justice (“ECJ”) eventually affirmed this view of the average consumer with respect to dishwashing tablets.⁵

While the ECJ reviews findings of fact made by the Court of First Instance (“CFI”) on a type of “clearly erroneous” standard,⁶ this Note will argue the ECJ should not have affirmed the rejection of P&G’s trade mark application. Rather, the ECJ should have at least remanded the case back to the CFI for more refined

2. The Office for Harmonisation in the Internal Market (“OHIM”) is in charge of registering Community Trade Marks and Community Designs in the European Union. See Council Regulation 40/94, 1994 O.J. (L 11) 1 (EC); Council Regulation 6/2002 2002 O.J. (L 3) 1 (EC).

3. Case T-118/00, Procter & Gamble Co. v. Office for Harmonisation of the Internal Market (Trade Marks and Designs) (“OHIM”), 2001 E.C.R. II-2731, paras. 1-2.

4. *Id.* para. 60.

5. Case C-468/01, Procter & Gamble Co. v. OHIM, 2004 E.C.R. I-5141, para. 36.

6. Case C-104/00, DKV Deutsche Krankenversicherung AG v. OHIM, 2002 E.C.R. I-7561, para. 22 (“[T]he Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence before it has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.”).

and fact-specific findings with respect to what the relevant “market” was for P&G’s dishwashing tablets, based on actual facts and empirical evidence.⁷ Also, this Note argues that while the average consumer concept is a legal standard in Europe,⁸ the determination of this legal standard is highly dependent on context and the product in question. Consequently, had the ECJ reviewed the legal standard applied by the CFI, the ECJ would have found that the average consumer standard was improperly defined, erroneously applied, and therefore subject to review by the ECJ.⁹

The first argument advanced by P&G is the focus of this Note. In upholding the rulings of the CFI, the ECJ perfunctorily accepted several presumptions involving the characteristics of the hypothetical average consumer¹⁰ without considering the validity of those presumptions. The ECJ should not have rejected P&G’s application to register the multicolored, square-shaped dishwashing tablets on the grounds that the tablets lacked distinctiveness without making a quantitative and qualitative inquiry regarding the distinctiveness of the good.

First, the CFI took a flawed approach in determining the distinctiveness of the good, resulting in over-generalized conclusions about the market and average consumer for the good that threaten to distort the primary purpose behind trademark registration—identification of a good, namely, to provide incentive to the product proprietor, protection to the consumer, and efficiency in the marketplace.¹¹

7. Essentially, the CFI made no findings of fact before arriving at the conclusion of what constituted the market for Class 3 products and who the average consumer was in this market. It is also unclear if evidence was proffered or accepted to define average consumer or market specifications for the dishwashing tablets.

8. Jennifer Davis, *Locating the Average Consumer: His Judicial Origins, Intellectual Influences and Current Role in European Trade Mark Law*, 2 INTELL. PROP. Q. 183, 196 (2005).

9. Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-104/00, DKV Deutsche Krankenversicherung AG v. OHIM, 2002 E.C.R. I-07561, para. 59 (stating that the Court of Justice is the highest interpreter of the law with respect to Community trade marks).

10. Case C-468/01, Procter & Gamble Co. v. OHIM, 2004 E.C.R. I-5141, para. 25. This judgment actually comprises five separate cases, C-468/01 P to C-472/01 P (C-468/01 P, white and pale green; C-469/01 P, white with green speckles and pale green; C-470/01 P, white with yellow and blue speckles; C-471/01 P, white with blue speckles; C-472/01 P, white with green and blue speckles) that were joined on appeal by order of the President of the Court for purposes of oral argument and judgment.

11. See Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1176-81 (2005).

Second, to remedy distortions in determining whether a proposed trade mark actually identifies the good in question, the CFI needs to formulate a more precise and structured method to define the average consumer and the relevant market for a good, as both are fundamental components in European trade mark law and analyses.¹²

Part II of this Note will outline the facts of the *P&G* decision; Part III will discuss the origins of the average consumer standard; Part IV will discuss problematic assumptions about the average consumer; Part V will propose modifications to the concept of the average consumer; Part VI will propose modifications to the formulation of the average consumer standard; Part VII will conclude.

II. FACTS

In October 1998, P&G filed applications with the OHIM to register five different color variations of square-shaped dishwashing tablets¹³ as Class 3 community trade marks.¹⁴ For the dishwashing tablets to qualify as a trade mark under Article 4 of Council Regulation 40/94 of 20 December 1993 ("Council Regulation 40/94"), the tablets must be found to be signs "capable of distinguishing the goods or services of one undertaking from those of other undertakings."¹⁵ However, under Article 7 of Council Regulation 40/94, if the signs or marks are not capable of distinguishing the goods or services,¹⁶ are devoid of distinctive character,¹⁷ or are "customary in the current language or in the bona fide and established practices of the trade,"¹⁸ the marks or signs should not be registered.

12. See, e.g., Davis, *supra* note 8, at 201-02.

13. Case C-468/01, *Procter & Gamble Co. v. OHIM*, 2004 E.C.R. I-5141, para. 5. The five different color variations were white and pale green, white with green speckles and pale green, white with yellow and blue speckles, white with blue speckles, and white with green and blue speckles.

14. See *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*, June 15, 1957, 23 U.S.T. 1336, 550 U.N.T.S. 45. Class 3 includes products corresponding or related to "washing and bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; preparations for the washing, cleaning and care of dishes; soaps." See Case C-468/01, *Procter & Gamble Co. v. OHIM*, 2004 E.C.R. I-5141, para. 6.

15. Council Regulation 40/94, art. 4, 1994 O.J. (L11) 1 (EC).

16. *Id.* art. 7(1)(a).

17. *Id.* art. 7(1)(b).

18. *Id.* art. 7(1)(d).

OHIM denied all five applications on the basis that all of the trade marks applied for were “devoid of distinctive character” under Article 7(1)(b).¹⁹ P&G appealed OHIM’s decision to the OHIM Board of Appeal, the CFI, and the ECJ. The OHIM Board of Appeal and the CFI agreed with OHIM’s initial assessments that the tablets lacked distinctive character, and the ECJ affirmed these findings.

P&G made five arguments in its appeal to the ECJ: (1) that the CFI took a flawed approach in determining the distinctiveness of the mark, (2) that the CFI did not properly consider the overall impression of the mark as a whole, (3) that the CFI erred in its assessment of the hypothetical average consumer’s level of attention, (4) that the CFI should not have considered the distinctiveness of the marks both at the date of filing and date of registration, and (5) that the CFI incorrectly applied the criterion in Article 7(1)(b).²⁰ All five of these arguments were rejected by the ECJ,²¹ and the first P&G argument is the focus of this Note.

III. THE CONCEPT AND ORIGINS OF THE AVERAGE CONSUMER

The idea of the average consumer originated in the *Gut Springenheide and Tusky* misleading advertising case.²² This concept has since been increasingly applied to trade mark cases by European courts²³ on issues such as the likelihood of confusion²⁴ and the distinctiveness of a mark.²⁵ As such, the concept of the average consumer has taken on a role of fundamental importance in European trade mark law,²⁶ and the hypothetical average consumer is presumed to be “reasonably well-informed and reasonably observant and circumspect.”²⁷ As the advocate general in *Merz & Krell GmbH & Co.* stated, an “essential function of

19. Case C-468/01, *Procter & Gamble Co. v. OHIM*, 2004 E.C.R. I-5141, para. 7.

20. *Id.* para. 16.

21. *Id.* paras. 41, 48, 54, 60, 64.

22. Case C-210/96, *Gut Springenheide and Tusky v. Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung*, 1998 E.C.R. I-4657, paras. 30-32; Davis, *supra* note 8, at 185.

23. Davis, *supra* note 8, at 185-86.

24. Case C-251/95, *Sabel BV v. Puma AG Rudolf Dassler Sport*, 1998 E.C.R. I-6191.

25. Case C-299/99, *Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd.*, 2002 E.C.R. I-5475, para. 34.

26. This is evidenced by the presumption and application of the concept of the average consumer in many CFI and ECJ trade mark cases since *Gut Springenheide and Tusky*.

27. Davis, *supra* note 8, at 183.

trade marks . . . is to guarantee the identity of the origin of the marked product to the consumer or ultimate user by enabling him without any possibility of confusion to distinguish that product from products which have another origin."²⁸

The ECJ has determined that a mark's distinctiveness will be "assessed by reference to, first, the goods or services in respect of which registration is sought and, second, the perception of the relevant persons, namely the consumers of the goods or services."²⁹ Thus, the characteristics and perceptions of the average consumer are essential considerations in analysis of European trade mark law.

IV. PROBLEMS WITH THE ASSUMPTIONS ABOUT THE AVERAGE CONSUMER

Assessing who the average consumer is and how the average consumer behaves is a legal inquiry made by the presiding court.³⁰ For the most part, however, European courts arrive at this legal conclusion in a non-specialized, non-technical, and essentially ad hoc fashion,³¹ largely taking for granted that there is an average consumer who is always reasonably well-informed, reasonably observant, and circumspect.³² For instance, German courts have historically been more inclined towards the use of opinion polls or survey evidence to indicate consumer perceptions in determining distinctiveness in trade mark cases.³³ By contrast, UK courts tend

28. Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-517/99, *Merz & Krell GmbH & Co. v. Deutesches Patent und Markenamt*, 2001 E.C.R. I-6959, para. 30; *see also* Case C-39/97, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.*, 1998 E.C.R. I-5507, para. 28; Ilanah Simon, *ECJ Decisions Reveal Tension over Registrability*, *MANAGING INTELL. PROP.*, May 2005, at 1 (discussing recent ECJ trade mark cases).

29. *Joined Cases C-53/01 to C-55/01, Linde AG, Winward Industries Inc., and Rado Uhren AG*, 2003 E.C.R. I-3177, para. 41.

30. *See, e.g.*, Stefan Dittmer, *Misleading Advertising: An End to the "Cursory Average Consumer"?*, 20 *EUR. INTELL. PROP. REV.* 313, 316 (1998).

31. The "average consumer" is mentioned frequently in European trade mark cases, but there is little reference to how the determination of what an average consumer is made or to empirical data that might provide support for the assumptions made. *See* Case C-210/96, *Gut Springenheide and Tusky v. Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung*, 1998 E.C.R. I-4657, para. 31; Case C-299/99, *Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd.*, 2002 E.C.R. I-5475, para. 63.

32. Case C-468/01, *Procter & Gamble Co. v. OHIM*, 2004 E.C.R. I-5141, para. 33.

33. *Davis, supra* note 8, at 189.

to take a “rather hostile attitude” to opinion and survey evidence in trade mark cases.³⁴

The latter view appears to be reflected in the methodology and approach adopted by the CFI and ECJ in assessing the distinctiveness of a mark.³⁵ The problem arising from this view is that it does not properly nor realistically account for the vastly differing categories of goods and consumers that exist in a national market. It also does not accept the possibility of subtle but significant differences between the generalized concept of an average consumer and the average consumer within a specific and specialized context.

V. PROPOSAL OF MODIFICATIONS TO THE CONCEPT OF THE AVERAGE CONSUMER

The average consumer concept, as it stands in European law, follows a “normative approach”³⁶ and presumes that the average consumer is “reasonably well informed and reasonably observant and circumspect.”³⁷ In *P&G*, the CFI did not engage in even a rudimentary analysis before making the determination that (1) an “average consumer” existed for the product in question (dishwashing tablets), and (2) that the “average consumer” for the dishwashing tablets was necessarily “reasonably well informed and reasonably observant and circumspect.”³⁸ No empirical data, statistics, expert opinions, consumer polls, or consumer surveys were considered by the *P&G* court in defining the average consumer for dishwashing tablets, nor in assessing the level of attention the average consumer pays to a particular good and its

34. *Id.*

35. Note that the “distinctiveness” of a mark is a separate (albeit related) issue to that of “acquired distinctiveness.” Some survey evidence has been accepted by the CFI and ECJ in determining the latter; this does not appear to be the case when determining the former.

36. Dittmer, *supra* note 30.

37. T-396/02, August Storck KG v. OHIM, 2004 E.C.R. II-3821, para. 34; *see also* Case C-468/01, Procter & Gamble Co. v. OHIM, 2004 E.C.R. I-5141, para. 57. Neither the court in *P&G* nor the Advocate General’s Opinion contained any empirical data nor expert opinions regarding what the “average consumer” was for dishwashing tablets.

38. Case C-468/01, Procter & Gamble Co. v. OHIM, 2004 E.C.R. I-5141, para. 57; *see also* Opinion of Advocate General Colomer, Case C-456/01 Henkel KGaA v. OHIM (Joined Cases C-456/01 P and C-457/01 P; Joined Cases C-468/01 P to C-472/01 P; and Joined Cases C-473/01 P and C-474/01 P (Procter & Gamble Co. v. OHIM)), para. 18.

mark.³⁹ As stated earlier, this approach is problematic because the average consumer takes center stage in analysis of trade mark cases involving likelihood of confusion and distinctiveness of character.⁴⁰ Different market niches will logically contain different variations of the average consumer who will have different characteristics. This problem is compounded when there are two or more substantial market niches that consume the good. By making ad hoc presumptions about the average consumer, the court undermines the foundation of its analysis, even more so if there wasn't an average consumer for a particular good.

On the issue of distinctiveness, P&G argued that the dishwashing tablets had distinctive character through the "combinations of various basic colors and various shapes" that created a perceptible difference between the usual shape of dishwashing goods and the shape of this good, "rendering it apt to confer distinctive character on the marks."⁴¹

The distinctiveness of a mark is generally assessed by considering three factors: (1) the characteristics of the mark as a whole,⁴² (2) the market sector and category to which the good belongs to,⁴³ and (3) the perceptions of the average consumer of those goods.⁴⁴ The ECJ rejected the "perceptible difference within a market segment" argument, upholding the CFI's finding that the relevant public—consisting of the average consumer—was not in the habit of making differentiations between the origins of products based on the shape of the product or its packaging.⁴⁵

39. See Case C-468/01, *Procter & Gamble Co. v. OHIM*, 2004 E.C.R. I-5141, paras. 33, 36, and 53; Case T-118/00 *Procter & Gamble Co. v. OHIM*, 2001 E.C.R. II-2731, paras. 57-58.

40. For examples of cases relying on the concept of "average consumer" in its analysis, see Case C-265/00, *Campina Melkunie BV v. Benelux-Merkenbureau*, 2004 E.C.R. I-1699, para. 30; Case T-399/02, *Eurocermex SA v. OHIM*, 2004 E.C.R. II-1391, para. 19; Case C-404/02, *Nichols plc v. Registrar of Trade Marks*, 2004 ECR I-8499, para. 20; and, Case C-299/99, *Koninklijke KPN Nederland NV v. Remington Consumer Products Ltd.*, 2002 E.C.R. I-5475, para. 63.

41. Case T-118/00, *Procter & Gamble Co. v. OHIM*, 2001 E.C.R. II-2731, paras. 22-23.

42. Case C-305/02 *Nestlé Waters France v. OHIM*, 2003 E.C.R. II-5207, para. 22.

43. Case T-163/98 *Procter & Gamble Co. v. OHIM*, 1999 E.C.R. II-2382, paras. 20-21.

44. Sebastien J. Evrard, *Trade Mark Law in the European Union: An Overview of the Case Law of the Court of Justice and the Court of First Instance*, 9 COLUM. J. EUR. L. 175, 181 (2002); see Case C-136/02, *Mag Instrument Inc. v. OHIM*, 2004 E.C.R. I-9165, para. 19.

45. See Case T-118/00, *Procter & Gamble Co. v. OHIM*, 2001 E.C.R. II-2731, paras. 58-59.

Because P&G's mark was derived from the shape of the product the mark signified, and did not depart significantly from the norms or customs of the sector, the average consumer would not be able to discern the product's origin on this basis.⁴⁶

Within the context of Mrs. Jane Doe and Miss Jane Average, the ECJ holding makes the unsubstantiated assumption that Miss Jane Average is the representative average consumer of dishwashing tablets, or of dishwashing detergent in general. However, the ECJ's conclusion that the average consumer would not be able to discern P&G's square, multi-colored tablets from other brands may not be correct if the more highly-educated and discerning Mrs. Jane Doe is actually representative of the average consumer for these dishwashing tablets.

The ECJ based its holding on two significant assumptions: (1) that the CFI properly defined the contours of the market for the dishwashing tablets; and (2) that the CFI did not err in its determination, as a matter of law, regarding what constituted the average consumer for this market. The ECJ affirmed the sparse factual findings of the CFI,⁴⁷ which relied heavily on analogy and on definitions promulgated by previous courts,⁴⁸ and declared that there was no error in the lower court's application of the legal standard.⁴⁹

The ECJ construed the definition of "market" too broadly when it did not limit the definition to dishwashing detergents, or even Class 3 goods. The ECJ considered only the perception of the public at large, neglecting the purchasers or end users of dishwashing detergents.⁵⁰ No evidence establishing whether the public at large were all purchasers or end users of these dishwashing tablets was provided nor referenced. Yet, this determination regarding the identity of the product consumer was integral to the distinctive analysis. This is disturbing, as the average consumer concept is one that should be determined, at least in part, by the market in which the consumer of a particular good belongs.

46. *Id.* paras. 60, 67.

47. *Id.* para. 62.

48. *Id.* paras. 20, 37, 56-58. It is not clear from the text of the judgment how much evidence, if any, was presented in defining either "average consumer" or "market."

49. Case C-468/01, *Procter & Gamble Co. v. OHIM*, 2004 E.C.R. I-5141, para. 38.

50. *Id.* para. 21.

In *Gut Springenheide and Tusky*, Advocate General Mischo noted that “a too pessimistic view of consumers’ capacity . . . could upset the balance which in its case-law the Court seeks to achieve between the requirements relating to the protection of consumers and the free movement of goods.”⁵¹ Similarly, an overbroad definition of an average consumer could lead to such a distortion, as a court begins making generalized assumptions about a consumer of a good that do not reflect the actual consumer’s characteristics. Further, the ECJ in *Mag Instruments Inc.* observed that even if the starting point of an assessment regarding the presumed expectations and behavior of an average consumer of a product for which registration is sought, “the possibility remains that evidence based on the actual perception of the mark by consumers may, in certain cases, provide guidance to the Office or, where a challenge is brought, the Court of First Instance.”⁵²

The *Mag Instruments Inc.* court also discussed an evidentiary requirement for purposes of assessing the average consumer,⁵³ and Advocate General Colomer noted in his *DKV Deutsche Krankenversicherung AG* opinion that in defining the class of persons targeted by a trade mark, the court must “move away from formal criteria to reflect the actual characteristics of the class of persons targeted [by the trade mark].”⁵⁴ In P&G’s case, however, no substantive evidence of any kind was considered by the CFI to make these crucial determinations, an error further entrenched by the ECJ.

VI. PROPOSAL OF MODIFICATIONS AND REFINEMENTS TO THE FORMULATION OF THE HYPOTHETICAL AVERAGE CONSUMER

European courts need to adopt a more precise, substantive, and structured method of analysis in approaching the definition of

51. Opinion of Advocate General Mischo, Case C-210/96, *Gut Springenheide and Tusky*, v. Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung, 1998 E.C.R. I-4657, para. 105. Even though this case dealt with misleading advertising, the concept of “average consumer” from this case has since been supplanted into the realm of trademark law. See *Davis*, *supra* note 8, at 185-86.

52. Case C-136/02, *Mag Instruments Inc. v. OHIM*, 2004 E.C.R. I-9165, para. 49.

53. *Id.* para. 50 (“[I]n order to contribute to the assessment of the distinctiveness of a mark for purposes of Article 7(b)(1) of Regulation No 40/94 . . . evidence must show that consumers . . . [were able to immediately] distinguish the goods or services bearing the mark from the goods or services of competing undertakings.”).

54. Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-104/00, *DKV Deutsche Krankenversicherung AG v. OHIM*, 2002 E.C.R. I-7561, para. 56.

the average consumer. Trade marks, besides being dependent on distinctiveness, may also be dependent on *the perception* of distinctiveness, which may be developed and nurtured over time. The validity of the trade mark may also depend on the context in which it is used,⁵⁵ again emphasizing the need for an accommodating, but structured, approach to analysis.

In the United States, the Lanham Act allows for registration of marks that have become distinctive through acquired use.⁵⁶ The trade mark applicant may submit evidence of acquired distinctiveness demonstrating the “extent of sales and advertising leading to buyer association, length of use, exclusivity of use . . . customer surveys, customer testimony, the use of the mark in trade journals, the size of the company, the number of sales, [and] the number of customers [of that good]” in support of their application.⁵⁷

Consumer surveys, testimony, polls, statistics, or other such empirical data provide important first-hand evidence of the composition of the market for a good as well as a sound indication of who the average consumer for a particular good may be. In *Triangle Publications, Inc. v. Rohrlich et al.*,⁵⁸ Judge Frank’s

55. For instance, “apple” is a generic word for a particular kind of fruit, so it may not be used as a trade mark by a particular proprietor of apples. However, as a reference to a particular kind of computer, the word “Apple” gains validity as a trade mark. See Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 743 (2004).

56. 15 U.S.C.A. § 1052(f) (2006). Acquired distinctiveness is a different topic from the topic of the “average consumer” but is nonetheless relevant because distinctiveness is made up of the perceptions of the average consumer, acquired or otherwise, within a specific context. As such, there seems to be little reason why the factors of analysis set forth to determine acquired distinctiveness may not be used to determine actual distinctiveness and the characteristics of the average consumer. Further, since P&G’s dual-colored, square-shaped dishwashing tablets were deemed by the European Court of Justice to be “devoid of any distinctive character” under Article 7(1)(b) of Council Regulation 40/94, P&G could have argued that registration should be allowed on the basis of acquired distinctiveness.

57. *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 292 (3d Cir. 1991); see also Amendments to Patent and Trademark Rules to Implement Trademark Law Revision Act; Miscellaneous Trademark Rule Amendments, 54 Fed. Reg. 37,562, 37,590 (Sept. 11, 1989) (to be codified at 37 C.F.R. pt. 2).

58. *Triangle Publications, Inc. v. Rohrlich*, 167 F.2d 969 (2d Cir. 1948). This case was an action for trade mark infringement and unfair competition. The plaintiff was the trade mark owner of “Seventeen,” a girls’ magazine, and the defendant made and sold girdles under the label “Miss Seventeen.” *Id.* at 970.

dissenting opinion (which has since become the majority view in the United States)⁵⁹ stated:

I think that we should not pioneer in amplifying the trade-name doctrine on the basis of the shaky kind of guess in which the trial judge indulged As neither the trial judge nor any member of this court is (or resembles) a teen-age girl or the mother or sister of such a girl, our judicial notice apparatus will not work well unless we feed it with information directly obtained from 'teen-agers' or from their female relatives accustomed to shop for them.⁶⁰

This view has since become the “classic judicial argument for why surveys are needed in Lanham Act litigation.”⁶¹ First, this view accepts the idea that a judge is not likely to be a member of the pertinent class of average consumers. Second, it underscores the societal goal in “grant[ing] the trademark owner a monopoly”⁶² to allow a consumer to more efficiently discern, by perceiving the trade mark, the source, identity, and quality of a particular good. A survey is a means, albeit an imperfect but important one,⁶³ of allowing a court to determine the likely perceptions of the average consumer of a relevant market. It takes a cross-section of the pertinent market and attempts to gauge their reactions and responses to a particular mark or good, the result of which should reflect the market-at-large. Or, where the average consumer of a particular product requires definition, as in *P&G*, a survey may be useful in defining the contours of the market and the average consumers within that market.

The use of a survey in determining who the average consumer is may be supplemented by evidence of market share in a number of identifying categories, such as “geographic location,

59. Michael Rappeport, *Litigation Surveys—Social “Science” as Evidence*, 92 TRADEMARK REP. 957, 958 n.1 (2002).

60. *Triangle Publications, Inc.*, 167 F.2d at 976 (Franks, J., dissenting). The issue in this case was the likelihood that teenage girls would be confused by “Miss Seventeen” brand girdles and the “Seventeen” magazine. *Id.* at 972. The “shaky kind of guess” Judge Frank was referring to was the trial judge’s ad hoc determinations as to what was “likely” to be confusing, but was wholly unsupported by evidence that was or was likely to be the case. Judge Frank took the position that some form of scientific or empirical data should be used in determining consumer perceptions. *Id.* at 976; MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:90 (4th ed. 2005).

61. Rappeport, *supra* note 59 at 957-58.

62. *Id.* at 958.

63. *Id.* at 957. There are several methods used to conduct surveys, but no one universally accepted or entirely accurate method.

demographics, psychographics, power, position, reputation, organizational membership, role in decision making, and behavior (latent, aware, or active).”⁶⁴ The use of these different categories of identifiers is prevalent in the realm of public relations,⁶⁵ but will also likely be useful in refining (or further refining) the judicial approaches to defining the “average consumer” or “market” in trade mark cases.

Within each of the categories of identifiers, the focus should be on determining the likelihood that a person within that category will purchase (or has purchased) the product in question. Simultaneously, the overlap between the different categories of identifiers should also be ascertained for later analysis. The reason is because some identifiers, such as gender or age, will be so broad as to encompass some, but most likely not all of a different category of identifiers, such as race or occupation.

Further evidence or data that should be considered includes consumer testimony and circumstantial evidence of the relevant issue. Circumstantial evidence could include factors such as the amount and manner of advertising for a product, and the volume and trend of sales for that product. Distinctiveness and the perception of the average consumer may change over time or as the result of an aggressive marketing strategy by the product’s proprietor. Where the rationale behind granting the trade mark owner a monopoly on the use of that mark rests on ideas of protecting the proprietor’s goodwill and increasing consumer efficiency in identifying a product,⁶⁶ investments and subsequent changes in consumer behavior should be taken into account by the judiciary when deciding whether a trade mark application should be allowed.

The general idea is to provide means through which the judiciary may be able to consider the validity of a mark as accurately as possible through the eyes of the likely actual

64. DON W. STACKS, PRIMER OF PUBLIC RELATIONS RESEARCH 20 (2002).

65. *See id.*

66. The fundamental role of a trade mark is to provide identification, or “attribution.” *See Lastowka, supra* note 11, at 1176-81. Attribution may be seen as beneficial to society because it provides an incentive to keep producing superior products, a means of consumer protection, or a method of increasing marketplace efficiency. *Id.*; Marcelo Halpern & Ajay K. Mehrotra, *From International Treaties to Internet Norms: The Evolution of International Trademark Disputes in the Internet Age*, 21 U. PA. J. INT’L ECON. L. 523, 525-26 (2000).

consumer.⁶⁷ A more scientific and empirical approach to defining what an average consumer is should not be inflexible, but should make allowances for nuances within different and individualized contexts. The burden of providing such information, however, should rest on the party seeking either to register or challenge the registration of the trade mark. The court need merely be open to the possibility that the average consumer for one product may be different than the average consumer for another product.

VII. CONCLUSION

In rejecting P&G's arguments, the ECJ erred both as a matter of law and as a matter of policy because it affirmed the highly generic presumptions of what constituted an average consumer and average market for the product in question, the dishwashing tablets. The ECJ judges did not see how dual-colored tablets could be "distinctive" as a matter of law, and therefore rejected P&G's trade mark application.

The judges failed to consider whether the dual-colored dishwashing tablets were distinctive to the most likely, or "average," consumers of that product. The judges also failed to consider the fact that they were not in the best position to arrive at their conclusion without collateral support in the form of scientific, empirical, or even observational data. The flat and predictable approach currently in use by European courts is analyzing and drawing conclusions based on the average consumer, the relevant market, and derivative issues such as distinctiveness or likelihood of confusion. However, this approach fails to take into account the depth, breadth, sophistication, or evolutionary abilities of both the consumer and the market. Conceivably, there will be some "average" consumers for a certain product who are not going to be "well-informed" at all, like Miss Jane Average. Conversely, there will likely be some "average" consumers for a different product who are going to be extremely "well-informed," like Mrs. Jane Doe. There may also be product proprietors who seek to drive or shape the perception of the product in the relevant market by investing in substantial marketing and advertising activities. The current trend in European trade mark law unfortunately fails to

67. Case C-383/99, *Procter & Gamble Co. v. OHIM*, 2001 E.C.R. I-6251, para. 42 ("In order to assess . . . distinctiveness, it is . . . necessary to put oneself in the shoes of . . . [the] consumer.").

accommodate the former and threatens to prevent positive evolution of the latter.

Trade marks are meant to aid and protect consumers and to protect innovation and investment by product proprietors. The European approach pays only lip service to these fundamental rationales and does not account for the possibility that the more-educated Mrs. Jane Doe is the average consumer, rather than the less-educated Miss Jane Average. The courts should instead wisely recognize what a judicial body is capable and is not capable of realistically discerning. The current European approach to determining trade mark distinctiveness resembles the now-abandoned American approach criticized by Judge Franks in 1948. Consumers, it seems, are a fickle lot, and trade mark law can only serve its purpose by doing its best to keep up.

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