

Thomas R. Lee*, Glenn L. Christensen** and Eric D. DeRosia***
"Trademarks, Consumer Psychology, and the Sophisticated Consumer"
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* Professor of Law, Brigham Young University.

** Assistant Professor, Marriott School of Management, Brigham Young University.

*** Assistant Professor, Marriott School of Management, Brigham Young University. Thanks to Gregory Phillips, Scott Ryther, Rebecca Tushnet, Barton Beebe, Graeme Dinwoodie, Mark Lemley, Craig Dallon, James Rasband, and Brett Scharffs for their comments on an earlier draft, and to Kelley Marsden, Joseph Benson, and Scott Cowley for their research assistance. The authors also gratefully acknowledge the generous support of research grants from the Marriott School of Business at Brigham Young University.

Trademark law rests on an amorphous foundation. The scope of protection afforded to the trademark holder turns on the psychology and behavior of the "ordinary" consumer "under the normally prevalent conditions of the market and giving the attention such purchasers usually give in buying that class of goods." n1 In trademark law, "everything hinges upon whether there is a likelihood of confusion in the mind of an appreciable number of "reasonably prudent" buyers." n2 Where the ordinary consumer is deemed sufficiently "sophisticated" to discern differences between two competing marks, the law forecloses protection for the senior trademark. n3

Although the ordinary consumer's mindset is central to trademark law and policy, neither courts nor commentators have made any serious attempt to develop a framework for understanding the conditions that may affect the attention that can be expected to be given to a particular purchase. Some of the classic judicial descriptions cast the ordinary consumer as "ignorant ... unthinking and ... credulous" n4 or "hasty, heedless and easily deceived." n5 In other cases, the courts have bristled at the "claimed asininity" of the buying public, n6 suggesting instead that the average buyer is "neither savant nor dolt," [*576] but is one who "lacks special competency with reference to the matter at hand but has and exercises a normal measure of the layman's common sense and judgment." n7 For the most part, however, the debate is a vacuous war of words, uninformed by any careful theoretical modeling of consumer psychology or empirical study of consumer behavior.

The academic literature is marked by a similarly empty rift. On one hand, so-called "apologist" trademark commentary paints a picture of the consumer as the "fool" - one highly susceptible to even the slightest suggestion of a connection between two trademarks. n8 So-called "restrictionist" commentary quarrels with the "conception of a consumerate of "presumptive idiots" who are "apparently befuddled by nearly everything." n9 Scholars on the restrictionist side of the divide see the consumer as an informed "sovereign" who is "actually habituated to ambiguity," such that "the degree of confusion [she is] actually likely to suffer is less than might otherwise be thought." n10

This fundamental disagreement is at the heart of a core theoretical divide in the trademark commentary. As Barton Beebe has noted,

The commentator proceeds from an initial assumption about the degree to which consumers act or are acted upon, about the degree to which they are creative subjects or the created objects of the trademark system The apologist commentator traditionally assumes that consumers act, the restrictionist, that consumers are [*577] acted upon. From these premises follow calls for more or less or at least different kinds of paternalism. n11

Although scholars offer strikingly different portrayals of the reasonably prudent purchaser, neither camp has attempted a comprehensive examination of the theoretical or empirical bases for their positions. Even Beebe, who makes a significant contribution in identifying some internal conflicts in each side's positions, openly declines to "take sides in this debate," n12 while acknowledging that "trademark law lacks a well-developed theory of the consumer, and, specifically, of consumer sophistication." n13

This Article attempts to fill that void. We take seriously the oft-repeated - but seldom heeded - view that the fields of "cognitive and consumer psychology" have "much to offer those interested in trademark law." n14 Borrowing from scholarly literature in marketing and consumer psychology, we develop an extensive model of consumer sophistication.

In the sections below, we first present a general summary of the relevant case law and then introduce the consumer behavior model that will serve as the core of our analysis. The model identifies two general antecedents to the exercise of consumer care (or "cognition," as it is phrased in the literature) by a sophisticated consumer: a sufficient level of "motivation" for care and an adequate "ability" to be careful. n15

After developing the motivation and ability elements in some detail, we employ the model to analyze a strand of case law that is at the heart of the [*578] broader debate about the consumer mindset - cases that identify circumstances where the consumer is expected to be more, or less, "sophisticated." The informed, rigorous view of the consumer that emerges is much more nuanced and complex than that of either fool or sovereign. We offer a positive framework for understanding the basic strands of the judicial conceptions of consumer sophistication and interject normative criticism in cases where we find fault with the jurisprudence. Lastly, we employ the model to take a broader look at the relevance (and relative significance) of consumer sophistication in trademark infringement cases.

Our methodology offers insights that can inform - and transform - a broad range of issues in a body of law that can no longer afford to ignore the field of consumer psychology. By moving beyond stereotypes and rhetorical flourishes about the validity vel non of the portrayal of the consumer as the "presumptive idiot," our model opens analytical doors that account for the realities of consumer behavior and helps to resolve many of the conflicts and inconsistencies in trademark law.

I. The Likelihood of Confusion and the Reasonably Prudent Consumer

The legal touchstone of trademark infringement is a showing of a likelihood of consumer confusion. n16 In evaluating the likelihood of confusion, the standard focuses on the "ordinary" or "reasonably prudent" consumer. n17 As noted above, the courts have expressed a range of different views as to the mindset of this "ordinary" or "reasonably prudent" consumer. n18 To some degree, the cases leave room for the impression that courts may simply be "adjusting their finding of whether the relevant consumer population is [*579] sophisticated or unsophisticated to conform to the result they wish to achieve." n19

Despite this cynical characterization, the courts have long evaluated the likelihood of confusion under a series of circumstantial factors. The seminal federal case under the Lanham Act is *Polaroid Corp. v. Polarad Electronics Corp.*, n20 which identified the following eight factors relevant to the likelihood of confusion:

The strength of [the plaintiff's] mark, the degree of similarity between the two marks, the [competitive] proximity of the products [or services], the likelihood that [the plaintiff] will bridge the gap [between two markets], [the existence of] actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of [the] defendant's product, and the sophistication of the buyers.
n21

Since then, federal courts have offered some variations on these themes, but courts continue to focus primarily on the areas identified by the Second Circuit. n22

The eighth factor, referred to alternatively as the "consumer's degree of care," n23 or "consumer sophistication," n24 encompasses several considerations that are thought by the courts to affect the attention consumers may pay to their purchases. Under this factor, the courts generally hold that if a consumer can be expected to exercise a high degree of care, she will be less likely to be confused by any connection between a senior and junior trademark. n25 A [*580] sophisticated consumer is expected to act not on "impulse," but on the basis of "a careful consideration of the reliability and dependability of the manufacturer and seller of the product." n26 In other words, a sophisticated consumer is one who is apt to spend more time, attention, or care in making a purchasing decision - and who is thus deemed less likely to be confused as to the source or sponsorship of the trademarked products she buys. n27 Unsophisticated consumers, by contrast, are "the ignorant, the unthinking[,] and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearance and general impressions." n28 The prototypical unsophisticated consumer is the man walking the supermarket aisle who "undergoes ... an experience not unlike that of hypnosis," n29 in which purchases are made impulsively and thoughtlessly.

A key threshold question in the case law is how to distinguish the careful and sophisticated consumer from the unthinking and credulous one. Although the courts have not attempted to articulate any comprehensive theoretical framework for assessing consumer propensities toward care, a few consistent themes have emerged in the case law. n30 The principal strands of analysis in the case law, which are elaborated and evaluated in some detail below, include the asser-

tion that consumer care or sophistication correlates positively with price, n31 length and complexity of the purchase transaction; n32 infrequency of purchase; n33 [*581] education, age, gender, and income; n34 and the notion that professional buyers, n35 avid hobbyists, n36 and (sometimes) women n37 are more sophisticated.

As explained in further detail below, the case law elaborating these considerations is based on an ad hoc, impressionistic conception of sophistication; the courts have never articulated anything approaching a rigorous, theoretical understanding of consumer care. Yet the perceived degree of sophistication can often be the factor that dictates the degree of protection afforded by law to a trademark holder. Some courts have gone so far as to suggest that a high degree of consumer sophistication in a target market may trump all other factors, virtually eliminating the likelihood of consumer confusion in the case of a professional or highly sophisticated buyer. n38 Other courts are much more measured in their assessment of the relative significance of this factor, suggesting that its "import" is "small indeed" (at least in cases where the junior and senior trademarks are "identical"). n39

In assessing the significance of consumer care or sophistication, at least one court has suggested a distinction between source confusion and confusion as to [*582] sponsorship. In *King of the Mountain Sports, Inc. v. Chrysler Corp.*, n40 the Tenth Circuit asserted that consumer care "rarely reduces the risk of sponsorship confusion," given that "the care with which consumers select a product does not impact the association they may make regarding the sponsorship of an event." n41 The Sixth Circuit has staked out a similar position, holding that consumer care is of "minimal" significance in dispelling the likelihood of confusion as to affiliation or sponsorship. n42

Several courts have also called into question the significance of the consumer sophistication factor in cases involving actionable "initial interest confusion." n43 In *Kopman A.S. v. Park Structures, Inc.*, for example, the Northern District of New York acknowledged that consumers of expensive playground equipment are "relatively sophisticated," but held that such "sophistication cannot protect [a junior trademark user] against initial confusion by consumers." n44 Thus, although sophisticated consumers are less likely to be confused at the point of sale, the court concluded that sophistication does not obviate the possibility that they may "mistakenly" find a "connection" with the senior trademark holder and "develop an interest ... that [they] would not otherwise have had." n45 The District of New Jersey reached a similar conclusion in a case involving sophisticated consumers of high-end security systems: "Because actual sales to the wrong party are not necessary for a finding of a likelihood of initial interest confusion," the court [*583] concluded that "such confusion typically defeats the sophisticated purchaser defense." n46

II. A Consumer Behavior Model of "Sophistication": Motivation and Ability as Factors Influencing Cognitive Effort

The legal touchstone of trademark infringement boils down to a fundamental matter of consumer psychology. n47 As such, this legal standard should be shaped by a careful, informed analysis of consumer behavior, not by stereotypes and generalizations about the informed "sovereign" or complete "fool." Thus, a careful investigation of the literature in this field is warranted.

Firms often attempt to differentiate their products from the similar offerings of competitors. n48 For example, a firm selling gasoline to consumers may add proprietary detergents and performance enhancements to the gasoline in an attempt to differentiate it from other gasolines. Typically, a firm attempting to differentiate its product will "brand" the product with a trademark. When a consumer is faced with a variety of differentiated products in a marketplace, the consumer will try to discern which products would suit her needs better than others. If the consumer finds a familiar brand in the marketplace, the consumer can identify the source of the product and infer the product's attributes and quality much more quickly than if the consumer laboriously investigates the product to determine its attributes and quality. n49 For example, a motorist seeking gasoline need not do an in-depth analysis of the quality of a gasoline if it is sold under a brand name the consumer knows and respects.

Before the consumer can use the brand as a shortcut for judging the attributes and quality of a product encountered in the marketplace, she must first identify the product's brand. That is to say, the consumer must ascertain the identity of the source of the product (a judgment we refer to hereafter as the [*584] "source-identification judgment"). n50 The role of brands as shortcuts for evaluating quality when products are differentiated suggests that consumers will not always perform source-identification judgments. If the consumer believes competing products are undifferentiated, the brand's identity does not add useful information to the consumer's decision, so she is unlikely to perform the source-identification judgment. For example, a consumer who believes that "all ketchup is the same" is unlikely to bother making a source-identification judgment when purchasing ketchup. Furthermore, if the consumer believes that product quality can be fully and easily judged, a shortcut for product evaluation is not useful to the consumer, so she is unlikely to

perform the source-identification judgment. For example, a consumer purchasing meat may consider USDA grading to be a sufficient indicator that the meat is safe to consume and accurately labeled, making brand irrelevant.

Arguably, brand name is relevant for the vast majority of consumer purchases. Even products that were once seen as undifferentiated (e.g., gasoline, ketchup, coffee, pickles, bath soap, and water) have been differentiated and branded. n51 Furthermore, in the absence of a certification mark (e.g., USDA grading for meats, Underwriters Laboratories for portable electronic tools, U.S. Coast Guard for life jackets), consumers often find it difficult to fully evaluate product quality without thorough physical inspection, purchase, and consumption. Because brands are so often relevant to consumer purchases, consumers typically perform a source-identification judgment when they consider products. n52

[*585] This is not to suggest that consumers always perform the source-identification judgment thoroughly and vigilantly. n53 According to the theories developed in the consumer behavior literature, a consumer attempting to avoid source confusion by making a source-identification judgment must perform a series of steps. First, the consumer must gather product information that she considers of potential relevance to the source-identification judgment. n54 Such information might include the trademark itself, trade dress, and the price at which the product is being offered. Second, the consumer must comprehend the information - that is, consider the information to determine its meaning. n55 Whereas some types of information (such as brief and simple written descriptions) are easily comprehended by most consumers, others (such as numeric n56 and technical n57 data) are more difficult for most consumers to comprehend. Third, the consumer must identify the implications of the environmental information and integrate the implications to form the source-identification judgment. n58 To perform the source-identification judgment thoroughly and vigilantly, the consumer will form an initial hypothesis (i.e., an initial judgment) concerning the source of the product and then will consider further information in an attempt to validate the initial hypothesis. If the initial hypothesis is not supported by the new information, the process is repeated until the consumer forms a source-identification in which she is sufficiently confident.

Each of the three steps of the source-identification judgment is a mental or cognitive process. That is, each step takes place in the mind of the consumer. One of the main tenets of the consumer psychology literature is that such [*586] mental processes require cognitive effort. n59 Just as physical activity (e.g., climbing stairs) requires physical effort, so mental activity (e.g., searching the environment for information) requires cognitive effort.

Therefore, a consumer can make the source-identification judgment in a thorough and vigilant manner only by expending ample cognitive effort. If she fails to devote sufficient cognitive effort to the source-identification task, it can be expected that she will gather inadequate environmental information, will not attempt to comprehend information that is difficult to comprehend, and will perform the source-identification judgment in a haphazard and offhand way.

Presumably, if a consumer performs the source-identification judgment thoroughly and vigilantly, she is unlikely to suffer source confusion. n60 However, if she performs the judgment in a haphazard and thoughtless manner, she may not consider the differences between the junior and senior trademarks. As a result, she will be vulnerable to source confusion. n61 Therefore, one determinant of an individual consumer's likelihood of confusion is the extent to which she expends cognitive effort while making the source-identification judgment.

Fortunately, consumer psychology researchers have given a great deal of research attention to identifying the antecedents of an individual consumer's exertion of cognitive effort. The first broad category of antecedents relates to the individual's motivation to expend cognitive effort. Just as people are typically reluctant to exert physical effort (e.g., people using escalators instead of climbing stairs) but will do so if they are sufficiently motivated, so people will exert cognitive effort only if they are sufficiently motivated. In effect, consumers act as cognitive misers n62 who exert cognitive effort only when they [*587] have sufficient incentive to do so. n63 The second broad category of antecedents is the individual's ability to exert cognitive effort. n64 Just as people may be inhibited in their ability to perform a physical task (e.g., the stairs are particularly steep or the climber has an arthritic knee), so customers can be restricted in their ability to exert cognitive effort as they perform the judgment at hand. Motivation and ability are each necessary but insufficient conditions for an individual to exert cognitive effort. That is, if either motivation or ability is lacking, the individual will exert little cognitive effort while performing a judgment task.

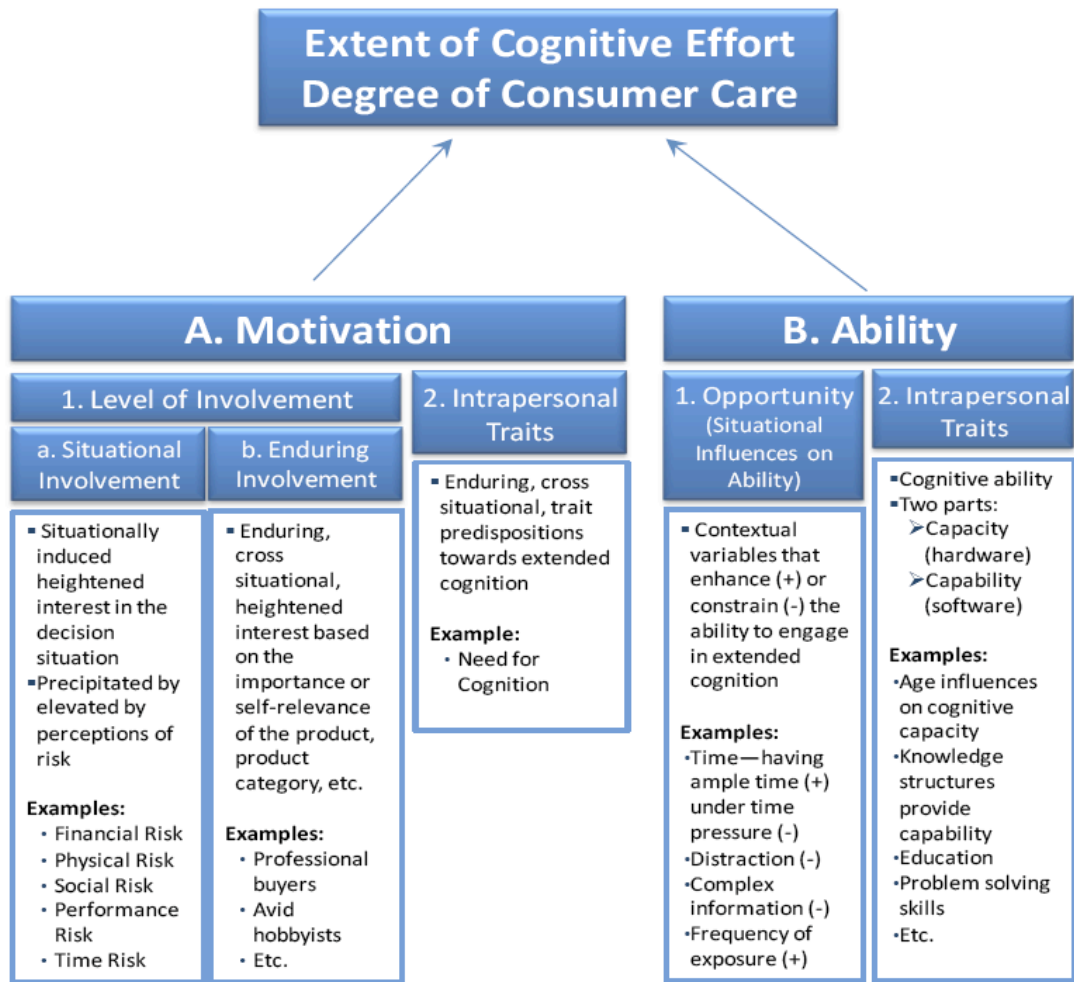
Thus, consumer behavior literature suggests that if a consumer is to perform the source-identification judgment in a meticulous and vigilant manner, she must be sufficiently motivated and able to exert the cognitive effort necessary to perform such a judgment. n65 In contrast, if an individual lacks either motivation or ability to expend cognitive effort while making the source-identification judgment, she will perform the task in a haphazard and offhand manner, resulting in an increased likelihood of confusion.

Viewed through this theoretical lens, the legal concept of the "degree of consumer care" considered by the courts is similar to the notion described in the consumer behavior literature as the level of exerted cognitive effort. The courts have generally held that if consumers exercise a low degree of care, likelihood of confusion in the marketplace will be increased. n66 Consumer psychology theory supports the same prediction: If an individual consumer [*588] exerts little cognitive effort while making the source-identification judgment, the individual is more likely to experience source confusion. n67

This analysis can be employed to refine the terminology employed in the case law. "Sophistication" and "consumer care" are used almost interchangeably by the courts, n68 but the terms are not precisely synonymous. Instead, sophistication is an antecedent of consumer care. Consumers can be said to be "sophisticated" when they have both the motivation and ability to exercise a high degree of consumer care when performing the source-identification judgment. Thus a "sophisticated" consumer emerges from the confluence of motivation and ability.

In the sub-sections below, we explain the considerations identified in the consumer behavior literature as relevant to consumer motivation and ability to process information carefully. For clarity of exposition here, the elements of the model are illustrated in Figure 1 below (with outline headings that correspond to the sub-sections that expand on these elements below).[*589]

Figure 1: A Consumer Psychology Model of Sophistication Where Both Motivation and Ability are Antecedents to the Exercise of a High Degree of Care



A. Motivation to Exercise Consumer Care

We first turn our attention to motivation for consumer care. There are both situational and intrapersonal factors that work to increase or decrease consumer motivation to exercise care. One key antecedent of motivation is a consumer's level of involvement with the purchase or consumption situation. Another component of motivation - referred to in the literature as "need for cognition" n69 - is an enduring, intrapersonal trait that can directly influence a consumer's motivation for care. We first detail the influence a consumer's [*590] level of involvement has on motivation and then turn to a careful examination of "need for cognition."

1. Involvement

In consumer research, a consumer's level of product involvement is a heavily researched construct directly related to the consumer's motivation to expend cognitive effort. n70 The perception of personal relevance or salience is the essential characteristic of involvement. n71 Consumers experience a psychological state of cognitive arousal referred to as high "felt" involvement when they perceive a connection between themselves and the product, the brand, the product category, the consumption activity, or the purchase situation. n72 Highly involved consumers are highly motivated to exercise consumer care during the source-identification judgment. In contrast, many consumers perceive little connection between themselves and a product, which can be said to constitute a low level of involvement. Routine repurchases

and impulse buys for low-cost items are prototypical examples of low-involvement situations. Low levels of felt involvement will not motivate a consumer to exercise consumer care. This does not suggest that consumers with low felt-involvement will necessarily have low motivation; other factors (as described below) can influence motivation. Thus, what can be said is that high levels of felt involvement increase motivation and low levels of felt involvement fail to increase motivation. n73

As developed in the consumer behavior literature, n74 there are two types of felt involvement: enduring involvement and situational involvement. As described below, the two types of involvement differ in terms of their antecedents and their consequences.[*591]

a. Enduring Involvement

A consumer is said to have enduring involvement in a product that she is simply "into" - whether by way of a hobby, an occupation, or some other enduring interest. n75 Such enduring involvement transcends any one specific encounter with the product (such as the purchase situation) and motivates consumers across multiple product experiences and interactions. To give one example, Harley Davidson customers often have high enduring involvement - to the extent that their fixation and interest in the product and brand is based on their trans-situational interest in the product and its associated lifestyle. For such customers, Harley Davidson is a brand closely related to their personal identity and sense of self n76 and, as such, acts as an intrinsic source of personal relevance n77 that predisposes them to the experience of felt involvement across time and in varied contexts. n78 The expected universe of products for which any given consumer has high enduring involvement is relatively small. n79

b. Situational Involvement and Perceived Risk

In contrast to enduring involvement, situational involvement is cued by the purchase situation, including those elements of the situation that are directly related to the perceived risk of purchasing and consuming the product. n80 *Ceteris paribus*, as a consumer perceives higher levels of risk in a purchase, she experiences higher levels of situational involvement n81 and is, therefore, motivated to exercise greater consumer care during the source-identification judgment.

[*592] An important distinction must be made between perceived risk and objective risk. All that is necessary to bring about situational involvement is for the consumer to perceive risk. n82 Whether the consumer's risk perceptions are objectively correct is irrelevant. For example, if most consumers perceive little or no physical risk associated with the purchase and use of a new outdoor grill, expert testimony indicating that injuries related to outdoor grills are, in fact, commonplace would be irrelevant to situational involvement. For the same reason, commonly experienced consumer fears lead to perceptions of risk, even if those fears are irrational or objectively unfounded.

Several types of perceived risk have been identified in the literature as impacting situational involvement. n83 For example, situational involvement increases when consumers perceive a heightened physical risk (i.e., risk of bodily harm) in either the purchase or use of a product or service. n84 Additionally, perceptions of performance risk increase when there is greater uncertainty about whether a product will perform as expected. n85 Such perceptions are often related to product quality considerations. When a product is relatively expensive (a perception that depends on the relationship between the price and the customer's available funds), consumers' perceptions of financial risk increase. Thus, consumers buying an automobile typically perceive financial risk because the purchase is a large percentage of their households' disposable income. Time risk reflects the expected duration of the purchase process and the perceived length of ownership. n86 As the perceptions of the time horizon of ownership expands, so too does the perceived risk associated with the purchase situation. Thus, for most people, buying a durable good, such as a dishwasher, is situationally involving not only because it is relatively expensive, but also because consumers expect to live with the product for several years. Finally, social risk relates to the possible negative reactions of other people if the consumer purchases or consumes the product. n87 Because a gift-giver is typically trying to please another person, gift-giving inherently carries high social risk. Likewise, if a consumer judges that harm [*593] will come to her social standing if the wrong product is chosen (e.g., if she buys eyeglasses that are long out of style), then social risk is said to be high. In general, when the purchase or consumption of goods or services is interpersonally open to display, perceptions of social risk increase. n88 A high level of any of these five perceived risks causes consumers to be situationally involved and, therefore, motivated to exercise consumer care while making product judgments. In effect, the consumer carefully deliberates product judgments in the hope that the perceived risks of the buying situation will be mitigated.

2. Intrapersonal Trait Influences on Motivation

The consumer psychology literature also suggests that consumers have traits that consistently impact motivation to exert cognitive effort across a variety of situations. For example, some consumers just enjoy thinking more than others. It is part of who they are. Research has identified among such consumers a high "need for cognition." n89 Consumers with a high need for cognition enjoy thinking deeply. They derive "intrinsic enjoyment" from "engaging in effortful information processing." n90 They tend to exert cognitive effort to carefully consider consumer problems (e.g., carefully considering the attributes and benefits of a product before purchasing it). n91 On the other hand, consumers with a low need for cognition do not enjoy exerting cognitive effort and tend to avoid exerting such effort whenever possible, preferring instead to rely on their intuitions and emotions as their guides. It must be emphasized that need for cognition is a motivational variable, not an ability variable. It is not necessarily the case that consumers in high need for cognition are more intelligent n92 than their low need for cognition counterparts. n93 Consumers high [*594] in need for cognition do, however, enjoy cognition and thus are relatively more motivated to engage in extended thought.

Relating the need for cognition to the idea of cognitive misers discussed previously, n94 it can be said that individuals who are high in need for cognition are less miserly in their exertion of cognitive effort than individuals who are low in need for cognition. Need for cognition is a stable intrapersonal trait variable that has a reliable influence on a person's motivation to allocate cognitive effort.

Research suggests that as compared to consumers who are low in need for cognition, those who are high in need for cognition engage more thoroughly in information search n95 regarding potential purchases and respond differently to advertising and other persuasive campaigns. n96 Consumers high in need for cognition tend to focus on substantive message components in advertisements and ignore extraneous information, such as attractive photographs, humor, and celebrity spokespeople. n97 Thus, a consumer's need for cognition is an enduring trait predisposition that likely correlates in general terms with Barton Beebe's notion of "search" sophistication. n98 Consumers high in need for cognition search for information more extensively and process the information they find more carefully. n99

Need for cognition is of legal relevance because consumers differing in their need for cognition can be expected to have differing product interests. For example, consumers high in need for cognition may gravitate toward products and consumption experiences that provide opportunities for the exertion of cognitive effort, such as chess, strategy games, educational experiences and television shows like Jeopardy. n100 Because a high need for cognition is likely commonplace among consumers of such products, motivation for care will be relatively higher in markets of such product categories, thus reducing (ceteris paribus) the likelihood of confusion.[*595]

B. Ability to Exercise Consumer Care

As noted above, high motivation is a necessary but insufficient condition for a consumer to exercise a high degree of care when performing the source-identification judgment. The other necessary but insufficient condition is the consumer's ability to exercise consumer care. As with the motivational construct, and as presented in Figure 1, both situational and intrapersonal factors influence a consumer's ability to exercise consumer care and thereby influence the likelihood that an individual consumer will suffer from source confusion. Situational influences on ability are discussed under the rubric of "opportunity," whereas intrapersonal trait influences on ability are denominated "capacity" and "capability."

Ability is generally defined in the consumer behavior literature as the extent to which the consumer has available the cognitive resources requisite to exercise consumer care during information processing and decision making. n101 To claim that the consumer's ability is high is to assert that when making the source-identification judgment, the consumer is capable of gathering whatever information is desired, capable of comprehending and considering the information, and capable of exerting the cognitive effort necessary to systematically and thoroughly make the source-identification judgment. If the consumer's ability is low, she will be inhibited in her ability to exercise consumer care while making the source-identification judgment. n102

1. Situational Influences on Ability: Opportunity

Situational factors that constrain the ability of consumers to engage in extended cognition, and thus exercise consumer care, include distracting environments, limited information, limited opportunities for comparison, incomprehensible information, and restrictions on time. n103 Concomitantly, multiple exposures to relevant information across decision experiences can enhance consumers' opportunities to exercise consumer care while making the source-identification judgment. n104[*596]

a. Distracting Environments

Distraction is any aspect of the purchase environment that diverts cognitive resources and attention away from pertinent information. n105 Background music can act as a distraction that inhibits opportunity to engage in extended thought. n106 For example, as a consumer at a bar attempts to choose from a long list of lagers, she may be distracted by the bar's loud music. Similarly, loud noise and physical discomfort, such as illness, misbehaving children, and scents in the air, n107 can all act as distractions in a purchasing environment. Also, aggressive salespeople often distract consumers from the opportunity for thought afforded by a self-paced information search and deliberation by interrupting with questions and conversation. n108 The result of such distractions is that consumers have less opportunity to exercise consumer care during the source-identification judgment, thereby increasing the likelihood of source confusion. n109

b. Limited Information

Purchase environments may also limit the opportunity of consumers to gather information that would be relevant to the source-identification judgment, thereby reducing the opportunity to effectively perform the judgment. n110 For example, when making in-home purchases (e.g., as with e-commerce), buyers cannot physically inspect the item before purchase. Similarly, some types of retail display cases inhibit physical inspection. n111 Physical inspection is the primary way of obtaining information for products [*597] that vary in terms of material properties, such as texture and weight. n112 For example, the scent of perfume and the weight balance of running shoes are physical attributes best evaluated by the consumer's physical examination of the product. Such physical information may strongly indicate source identity, so preventing the gathering of such information can inhibit consumers from effectively making the source-identification judgment.

c. Limited Opportunity to Compare Information

Consumers may also be inhibited in their opportunity to compare information about the junior and senior trademarks. Limited retail distribution makes such inhibition commonplace. n113 If a retailer offers for sale items bearing both the junior and senior trademark, shoppers will have ample opportunity to compare the items "side by side," while making a source-identification judgment. If, however, the retailer offers for sale only the junior trademark, shoppers are inhibited in their opportunity to compare the junior and senior trademarks, thus reducing shoppers' opportunity to exercise care when making the source-identification judgment. For example, if a consumer shops at a retailer that offers for sale Converz shoes, but not Converse shoes, the consumer will be less able to compare information about the junior and the senior trademarks and will, therefore, be less able to exert consumer care (as compared to a consumer shopping at a retailer that sells both Converz and Converse shoes).

d. Incomprehensible Information

Even if product information is readily available, consumers will be inhibited in their opportunity to process the information if it is presented in a way that is difficult to comprehend. n114 For example, even if the product labeling on the junior trademark explicitly describes differences between it and [*598] the senior trademark, if the label contains obscure technical jargon (common with products such as home theater equipment), numeric data (common with products such as dietary supplements), n115 or a foreign language (common with products such as French perfumes), the consumer will have reduced opportunity to perform the source-identification judgment.

e. Restrictions on Time

Harried consumers under time pressure will have limited opportunity to carefully consider product information. n116 Consumer research has shown that time-pressured consumers use shallow, heuristic processing and consider a more limited array of product information. n117 Opportunity is also limited by time when information is presented in short bursts and limited-duration windows, n118 and when consumers cannot control their own rate of exposure to information (as with ads playing on radio and television). n119

f. Frequency of Exposure

In contrast to the many situational factors that can act to inhibit opportunity, n120 one situational factor acts to increase opportunity: multiple exposures to relevant information. n121 For example, seeing an advertisement or a retail display multiple times increases the opportunity for the information to be considered while the consumer performs the source-identification judgment. Also, if there are many overt steps required to enact a purchase, the opportunity for exposure to relevant information is increased. For example, if a consumer desires to purchase a prescription drug after viewing a

direct-to-consumer advertisement sponsored by a pharmaceutical company, the [*599] consumer must consult a physician and then visit a pharmacist to have the prescription filled. Each step in the purchase process gives the consumer more opportunity to make (and refine) a source-identification judgment.

2. Intrapersonal Influences on Ability: Capacity and Capability

Beyond situational influences on consumers' ability to exercise consumer care, a customer comes to a purchase situation with traits that can either enable or inhibit her ability. This intrapersonal, enduring cognitive ability can be bifurcated in an important way: capacity and capability to exercise consumer care. To understand these distinctions more clearly, it is useful to think of capacity as a "hardware" aspect of cognition and capability as "software." n122 The "hardware" aspect, like a computer, refers to the state or capacity "of the machine" - how much processing power or ability does the consumer bring to a purchase situation? n123 Some computers simply have faster hardware than others. The "software" aspect, as the metaphor suggests, refers to the existence of past experience, knowledge structures, memories, and expertise available to the consumer when exerting cognitive effort as part of mental processes. n124 In this sense, capability as "software" refers to the memory structures the mind can use to compare, contrast, counter argue, confirm, integrate, and, in other ways, elaborate upon during the consumer decisionmaking process. n125

a. Capacity for Exercising Consumer Care: "Hardware"

Consumer behavior studies suggest that intelligence, education, and age are all directly related to a person's capacity to exercise consumer care. Higher levels of intelligence endow the consumer with greater processing capacity. n126 Further, much like an upgrade in hardware processing power, greater educational attainment is shown to advance intelligence by improving processing strategies, problem-solving skills, and the ability to parse and apprehend complex information. n127

[*600] Age has also been correlated with cognitive capacity, but in a non-monotonic way. The consumer behavior literature suggests that cognitive capacity increases from childhood to adulthood, but eventually declines due to the effects of aging. n128 Graphically, the relationship can be expressed in an "inverted U-curve" as cognitive capacity for elaborative processing is plotted against cognitive development. The cognitive abilities of young children are still developing, giving them reduced capacity to apprehend and consider market information. n129 Furthermore, elderly consumers have been shown to commonly experience diminished cognitive skills and thus a reduced capacity to process market information. n130

b. Capability for Exercising Consumer Care: "Software"

Continuing the metaphor introduced earlier, the "software" aspects of innate cognitive skill relate to a consumer's capability to exercise consumer care. "Capability refers to the knower's possession of active cognitive structures (i.e., knowledge structures available in memory) wherein the reasoning process from evidence to conclusion may be carried out." n131 Thus, having relatively more extensive knowledge of a particular product or product category (i.e., greater consumer expertise n132) provides an individual's processing-ability "hardware" something to relate to the information in the environment. n133 In fact, having previous experience with and knowledge of a product and its product category facilitates the acquisition of new information regarding that product and category, while also increasing the efficiency n134 and accuracy n135 of the information search.

[*601] Individuals develop more elaborate knowledge structures around what they experience more frequently. n136 On this point, the situational influence of repeated encounters with relevant market information (e.g., during consumer decisions that require multiple steps to complete) interacts with the development of knowledge structures to facilitate the performance of the source-identification judgment. Thus, consumers who purchase the same product frequently have greater knowledge in that category, which amounts to an increase in capability. Similarly, consumers exposed to repeated advertising are more likely to develop richer product knowledge structures that are facilitative of consumer care. n137

In sum, the consumer behavior literature suggests that if an individual lacks either motivation or ability to expend cognitive effort while making the source-identification judgment, she will perform the judgment in a haphazard and offhand manner, resulting in an increased likelihood of confusion. A consumer may be motivated to exercise a high degree of care by any one of a number of factors: enduring involvement, situational involvement (precipitated by risk perceptions), or need for cognition. A consumer's ability to exercise a high degree of care may be inhibited by distractions in the shopping environment, limited availability of information, limited opportunity to compare the junior and

senior trademarks, incomprehensible information, and restrictions on time. Conversely, a consumer's ability can be increased through multiple exposures to product information and a multiple-step purchase process. As described in the next Part, these principles allow detailed predictions regarding the circumstances in which consumers can be expected to experience source confusion.