Chapter 3

CONSUMER BEHAVIOUR AND BRAND IMITATION
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Understanding human needs is half the job of meeting them.
- Adlai Stevenson

Speech, Columbus, Ohio,
October 3, 1952.

UNDERSTANDING THE CONSUMER

Consumer Shopping Behaviour

The behaviour of consumers is very important in determining their perception of any brand imitation. The consumer choice behaviour is one factor, which can’t be overlooked.

According to Judge Cattanch, in a case involving brand names and pet food with respect to consumer shopping behaviour—“The ordinary person buying groceries and other wares off the shelf does not look beyond the brand on the label in distinguishing the origin of the wares he or she is contemplating buying. There is neither the time nor the inclination, during the course of a shopping excursion, to stop and peruse the fine print on the labels, much less appreciate the fine distinctions of meaning that might be taken therefrom” (Bonus foods Ltd. v. Essex packers limited, 1946:20).

Consumer Decision-Making

How consumers make or do not make decisions about the goods and services they purchase or reject in the market place is a major field of study in business schools all over the world. It is called the study of consumer behaviour or buyer behaviour. In other words, the study
tells us the how, when, where, why and from whom etc. of the buyer related to purchasing i.e. why a consumer is motivated to purchase a particular brand? What is there in his mind? And how he selects brands? Thus, consumer behaviour is the behaviour that the consumer display in, searching for, purchasing, using, evaluating and disposing of products or services, which they expect, can satisfy their needs (Schiffman and Kanuk). Consumer behaviour, as a discipline, evolved when psychologists joined the business faculties of major universities in the 1960s and subsequently the first academic textbooks were written wholly devoted to the subject. Over time, consumer behaviour theorists have kept up-to-date in studying how decisions are made in the marketplace. It appears that the consumer is a very adaptive decision-maker, changing his or her behaviour to meet the demands of the environment. This adaptation is largely as a result of the change in lifestyles and in the marketplace.

The Economist’s View

According to this view, purchasing decisions are thought to be the result of largely rational and conscious economic calculations. The early models of consumer behaviour were based on economic theory. Consumers are not only assumed to be aware of all available alternatives in the marketplace, but they are also assumed to be able to rationally rank order the available alternatives by preferences. Thus this is the case of perfect information in the marketplace and unlimited ability of the consumer.

There are several problems in applying these assumptions to actual consumer consumption. First, consumers do not have perfect information in the marketplace. Neither do they have the same information about the existing alternatives and/or the attributes of known alternatives. Each consumer has fragmented knowledge of his or her own set of known alternatives and, as result, consumer cannot always rank order a set of alternatives available to them. In addition, preferences often violate utility theory. Different people prefer different styles, have different tastes and hence make choices built on preferences of style or image rather than objective information such as price.

The early economic models are not helpful in understanding the purchase behaviour of the consumer. Over time the marketplace has become more diversified and the increasing competition and multiplicity of brands has make the purchasing and thus the decision-making more complex.
The consumer As a Problem solver

The consumer now is given a more elevated status and we have act like consumer protection Act (1987) (Discussed in Chapter 4) as a social contract between the business and the society. As consumer has a right to be informed, labels are to be put on all products listing the ingredients, name of manufactures etc. The advertising can’t be misleading. Thus, consumer is getting all the information.

As a result of this environment, consumer is seen as a “Cognitive man.” They are receptive to products or services that met their needs. They are thought to search actively for information about the products and services they bought and striving to make the best possible decisions.

However, consumer researches have found that, even though consumers are given information, they often failed to use that information to make decisions. In one choice and evaluation experiment by Scammon 1975, consumers were given objective product information on several brands available in the marketplace. The result of the study showed that consumers recall of product attributes decreased with increasing information and that consumers felt better about their brand selections with more information but actually made poorer choices. Consumers were limited by the extent of their knowledge about the marketplace and their capacity to store information about the marketplace in short-term memory.

The finding of the study coincided with other research study about the consumer ability to use information. In general, humans are able to store a limited amount of information in their short-term memory. This imposes limitations on the amount of information that the individual is able to process and remember in the long run. According to G.A. Miller’s seven (plus or minus two) pieces of information were the optimum amount for individual decision-making.

The consumer as a simplifier of information

The consumer’s skills, habits, reflexes, values and goals shape the way they search for and use information to make their decisions. Although the consumer’s skills are limited, the number of choices available to them increases every day. Thus, they are unable or unwilling to engage in extensive decision-making activities and settle for “satisfactory” decision.
Generally, people do not spend their discretionary time shopping or making consumer decisions. In a change environment i.e. both husband and wife working, the wife’s are still mainly in charge of regular family shopping and the shopping is now squeezed into minutes between returning home after work and meal preparation. Most consumers simply do not take the time to look carefully at the items they buy because they simply do not have the time or the inclination to do so.

Consumer develops rules of thumb or heuristics to simplify purchase behaviour. In an in-store study it was found that consumers go through almost no brand price comparison behaviour (Hoyer 1984). Decision heuristics such as “buy the cheapest”, “buy name brands,” or “buy what my friend bought” give the consumer a satisfactory choice in the marketplace that supplants an optimal choice. The market provides over-choice to today’s consumer and the decision-making effort must be simplified.

Level of Involvement

When consumer decisions with concurrent decisions about one’s spouse or significant others, children, career and health is compared the consumer decisions seem very simple. Furthermore, everyday hassles of travelling on crowded streets or subways causes one to focus on expediting way home rather than lingering in a supermarket. It is this perspective that must be kept in mind when examining the importance and effort put into purchase decisions. As per Kassarjian (1977) - “The average consumer, who blithely purchases, consumes and discards the product, most likely could not be careless. Consumer makes the purchase, switch brands, ignore commercials and worry about the important decisions in their lives and not the purchase of toilet paper”.

However, when a brand comes before the courts in an issue of trademark infringement, all those party to the case become very involved. Lawyers, judges, manufacturers, marketers, and advertisers are aware of every detail that identifies the brand. They are keenly aware of any differences that exist between the plaintiffs and the defendant’s product. It is this close scrutiny that highlights the behaviour of being involved.

The concept of involvement means that the person is motivated to think about the object in question. When one is highly involved, more importance is attached to the object and
more evaluation takes place. Also, one sees more differences among brands, whether the
differences are real or imagined. When one has little involvement, little or no arousal exists to
motivate the consumer to evaluate the object. Alternatives seem very similar and price becomes
a primary differentiating factor (Zaichkowsky 1989). Therefore consumer behaviour theorists
speak of low-involved consumers, low-involving products, low-involving advertisement and low-
involving decisions. These are usual and frequent conditions of consumers in the market place.
The implication is that decision making is minimal and the most common form of purchase decision
is just pure and simple recognition of the product. The legal system must not lose sight of the
concept of the low-involved purchaser. Marketers know it well.

It is this difference between the low-and high-involved purchaser that leads to the
differences in views of the object. That is why one gets such varied views on the perception of
similarity or differences among the objects in question. Consumers who are highly involved with
the object under investigation may not be confused at any time, while those who are low involved
may be easily confused at any time.

**Emotional High Involvement**

To delineate further the concept of involvement, marketing researchers and practitioners
have examined a second dimension of thinking or feeling. This second dimension allows for the
explanation of why consumers may be highly motivated toward products, yet secure so little hard
information about them. It departs from the original model, which implies that high-involvement
products require a thinking or cognitive orientation first, whereas low-involvement products are
more suited to an affective or non-informational appeal. The expansion of involvement along an
orthogonal continuum from thinking to feeling allows for a more complex approach that takes
into account the excitement that accompanies certain purchases.

<table>
<thead>
<tr>
<th>Thinking</th>
<th>Feeling</th>
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<tbody>
<tr>
<td>1. Informativé</td>
<td>2. Affectivé</td>
</tr>
<tr>
<td>Car, House Furnishings</td>
<td>Jewelry, Cosmetics, Fashion Apparel</td>
</tr>
<tr>
<td>New Products</td>
<td>Motorcycles</td>
</tr>
<tr>
<td>3. Habit Formation</td>
<td>4. Self satisfaction</td>
</tr>
<tr>
<td>Food Household Items</td>
<td>Cigarettes, Liquor, Candy</td>
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*Figure 3.1*
The original classification scheme for products was produced by Vaughn (1980) for the advertising firm Foote, Cone and Belding in Los Angeles. It implies that different marketing strategies, different decision making styles and different advertising copy are needed for different types of products. The scheme is depicted in figure 3.1 It proposes that, for a great number of products, the decision process is based on emotion or effect rather than thought or facts. The consumer behaviour researches of 1980s were heavily influenced by this model.

In a case on brand imitation of handguns (Sturm, Ruger & co. Inc. v Arcadia Machine & Tool Inc., 1988), this theory of emotional involvement was used to explain the likely consumer decision making process with respect to handguns:

*Gun purchasers are more interested or involved than they would be if they were buying a bar of soap, but heightened interest does not necessarily mean that more care is exercised. That only happens when more actual intelligence is brought to bear. It does not happen if the purchaser's heightened interest is more emotional than intellectual. Gun purchasers tend to be emotional. Guns often have psychological attraction for people who buy them. When various complex subliminal factors have convinced a customer to buy a particular gun, he buys it without spending much time finding and reading the objective technical literature. The average customer probably does not exercise a high degree of care in purchasing a gun.* (Fletcher 1989:823).

This testimony also brings forth the notion that involvement and knowledge is not the same thing. They may be correlated but they predict different avenues to decision-making. Someone who is highly involved with a product is not necessarily an expert on that product. Having knowledge is definitely different from being involved and leads to different types of information seeking and processing.

We have not only the low and high-involved purchaser but we have high involvement and low involvement products also i.e. customer's level of involvement in the product. Since high involvement products often demand more customer time; hence the decision process here can be schematically understood as follows (figure 3.2):
Consumer Decision-Making Process for High Involvement products

Need Recognition or Problem Identification ➔
Development of Decision Criteria ➔
Search for Alternatives ➔
Evaluation of Alternatives ➔
Decision

Figure 3.2

By their very nature low involvement products are one where the customer spends least time in searching for alternatives or for that matter in evolving decision Criteria. The decision process here, then, is as shown in figure 3.3.

Consumer Decision-Making Process for low Involvement products

Need Recognition or Problem Identification ➔
Evaluation of Alternatives ➔
Decision

Figure 3.3

Consumers Decision Making and Literacy

A great number of people may not make informed decisions because of their lack of ability. In India, most of the population cannot read or write and illiteracy is one reason for purchase of imitated brands.

Measuring literacy has always been controversial because there is no one accepted definition. In 1948, a United Nations commission proposed, “the ability to read and write a single message” as a working definition. Due to illiteracy great numbers of people may not be
able to read labels accurately. They may frequently rely on other cues besides print information to aid their decision making and choices.

**Intelligence**

Educated and intelligent people who are involved in commerce tend to have a very narrow social world and are not fully aware of the below-average abilities of many consumers. People of one social class rarely interact on a regular basis with members of another social class. Therefore, one often forgets that other people may view things differently. A Substantive question is: what intelligence level of the consumer should be used as the standard for evaluating the level of confusion in the marketplace? This question becomes relevant because consumer surveys are relied upon as evidence in determining trademark infringement.

The whole history of consumer research tells that people who choose to participate in surveys are of higher intelligence and education that those who do not participate. Since most consumer research uses convenience samples, subjects are inherently self-selected and hence the results are usually biased toward higher education than if a truly random sample were chosen.

The particular product in question has a great deal to do with the sample used in determining confusion. However most products subject to consumer confusion, whether they are frequently purchased brand goods such as salt and soft drinks or specialty products such as faucets or guns, are bought by consumers of various intelligence and educational levels. Therefore it should be kept in mind that surveys might be biased toward the conservative end of detection of confusion because, on average, those who respond are likely to be more literate, educated and intelligent than those who do not respond. Actual confusion and potential confusion are likely to play a greater role in consumer choice, due to the great number of consumers who cannot correctly read and interpret package labels.

**SHOPPING SCENARIOS**

Levy and Rook (1981) first interviewed consumers as to their experience with consumer confusion in the marketplace. In general, it was found that consumers had three different views with respect to this issue. First, consumers could blame themselves for the mistake. Those who blame themselves admit to being embarrassed that perhaps they were not careful enough in the purchasing environment. Second, some consumers expected brands to be similar from time to
time and therefore thought consumers should be aware to make adequate discrimination. Third
some consumers saw the need for legislation to protect companies and perhaps themselves from
imitators.

**Able, But Other Cues Dominate**

The majority of the population that is literate may still make mistakes in the marketplace
because other cues, such as symbols, colour and/or shape, supersede any careful decision-
making. The mistakes made are often viewed by the consumer as not being serious enough to
take any action. Purchasing is viewed by consumers in the context of all the things they must think
about during the day.

**Shopping Experiences.** The following examples will illustrate the brand confusion.
Upon shopping in a drug store, Mr. X decided to buy some vitamins. These vitamins were a
major brand heavily advertised on television. He walked to the vitamin shelf, looked and picked
up what he thought were Zevit vitamins. He had bought Zevit before and was well aware of what
the vitamins looked like. When he looked closer at the package, he noticed that it was not Zevit
but a similar like, which had a design and package colour very similar to Zevit. Instead of returning
he purchased it.

Mr. X did not returned back and buy what he intended for two reasons. First, he
thought, they were only vitamins and how different could they be? Second, he did not want it to
appear that he made a mistake. He thought other people might think he was not that bright for
making such a mistake at the point of purchase. This consumer is not alone who has been
mistaken. Even the experts when they are consumers commit such mistakes from time to time.

The other example is shopping of Head & Shoulders dandruff shampoo, also in a drug
store. Upon examining the brand on the shelf, Mr. Y noticed a similar bottle next to it, picked it
up, and examined it. He decided that he wanted to buy the real thing and picked out a bottle to
take to the cash register. When Mr. Y arrived home and unpacked his purchases, he discovered
that he had purchased the similar bottle rather than the original bottle of Head & Shoulders he
wanted. He did not take the imitator brand back to the store for an exchange. Mr. Y did not
think it was worth his time and he felt a little stupid about making such a mistake, especially since
he consciously decided not to purchase the imitation.
These types of purchase situations exist every day for most of the consumers. Consumers might take the relative cost of such mistakes more seriously if they were aware of the potential damage being done to the original brand.

**PSYCHOLOGICAL PRINCIPLES UNDERLYING BRAND IMITATION**

Understanding why a company would want to copy aspects of a successful brand requires some review of the relevant literature from psychology. Because consumer behaviour is just another aspect of human behaviour, marketers have often turned to cognitive and social psychology for an explanation and prediction of consumer behaviour in the marketplace. For the concept of brand imitation, learning theory from cognitive psychology is important. A framework for understanding how individuals learn to make choices and discriminations is based on their learning from the environment. Also from cognitive psychology, theories of perception and attention provide an understanding of how objects are perceived or noticed by the consumer.

Social psychology, specifically attitude theory is important to the understanding of why others would want to associate with owners of successful trademarks. The premise is that positive attitudes can be developed through simple association with well liked objects and these positive attitudes can lead to purchase behaviour of the associated product, as well as the original product. Most of the theories relevant to brand mutation are very simple.

**Stimulus Generalization**

The reason that imitation as a strategy exists may be partly explained by the concept of stimulus generalization. Repetition, stimulus generalization and stimulus discrimination are useful concepts in explaining how consumers learn to behave in the market place. Stimulus generalization means that the individual generalizes from one incident or stimulus object to another similar incident or stimulus object. The phenomenon is rooted in the theory of Classical Conditioning. This learning theory states that learning depends not only on repetition but also on the ability of individuals to generalize from one object to the next.

**Classical Conditioning**

Classical conditioning gets its name from the fact that it is the kind of learning originally studied in the “Classical” experiments of Ivan P. Pavlov (1849-1936). Pavlov, a Russian psychologist, undertook experiments conditioning dogs to salivate at the sound of a bell rather than at the sight or smell of meat paste. It was the meat paste that elicited legitimate or direct
salivation from the dog. To condition the dogs, a neutral stimulus or bell acted as the conditioned stimulus. This bell was paired several times with the meat paste (Unconditioned stimulus) presented to the dog. The dog would salivate, which was an unconditioned or natural response. After a while the meat paste was taken away and only the bell was presented to the dog. As a result of the continued pairing the dog would salivate at the bell even though there was no food accompanying it. This was called a conditioned response. The process is outlined in figure 3.4.

**Pavlovian Model of Classical Conditioning**

![Diagram of the Classical Conditioning Process](image)

In Pavlov’s case the dog was conditioned to salivate at the sound of the bell when there was no meat paste present. While the possibility of applying this type of learning to humans might seem outrageous, consider the conditioning that takes place with food. Movie-goers have been
bombarded by the smell of popcorn at theaters for decades. The sight and smell thus entices them to purchase popcorn to eat during the movie. It is a learned pairing of movies and popcorn.

According to classical conditioning theorists, learning depends not only on repetition but also on the ability of individuals to generalize. Over time, Pavlov noticed, his dog would salivate not only to the sound of a bell, but to the sound of keys jangling, a buzzer or even a metronome. These were sounds that only resembled a bell. Thus the animal tended to generalize the conditioned response to stimuli that were different from the original sound of the bell, but somewhat similar to the sound to which it was specifically conditioned. It is this same response to a slightly different stimuli, or stimulus generalization, that facilitates learning or is a key aspect of learning.

**Marketing Studies of Stimulus Generalization**

Stimulus generalization provides a theory to explain why consumers react similarly to imitations that closely resemble original brands, i.e. explains why manufacturers of imitative 'me too' products succeed in the market place. It in other words, explains why manufacturers of imitated brands try to make their packaging resemble the brand leaders. They want the consumer to generalize brand images.

An academic study of brand imitation dealing with manufacturers of private brands and national brands found that the similarity in physical appearance of originals and imitators was significantly related to consumer perceptions of a common business origin between them (Loken, Ross, and Hinkle 1986). Respondents thought the look-alike brands (National vs. private) were produced at the same manufacturing plant. In addition, the researchers speculated that the physical similarities between brands, such as colour and shape, have marketing consequences independent of the product origin perceptions. The researcher felt consumers used the external package cues, such as colour, to evaluate the product attributes and to motivate purchase behaviours.

A follow-up study by ward et al. (1986) provided support for the speculation. In this study, subjects were given various brands of shampoo to evaluate. The results confirmed that different brands with similar packages were rated as similar in quality and perceived performance.
The subjects appeared to generalize from the physical appearance of the package to the contents inside the package.

A field experiment, based on the concept of stimulus generalization, provided evidence in a trademark infringement case of breath mints (Miaoulis and D'Amato 1978). The original brand, Tic Tac Mints, felt two new competitors (Mighty Mints and Dynamints) had infringed on its trade dress by copying the look of its package and mint. In the study mighty mints and Dynamints were placed for sale in retail outlets in cities where Tic Tac was an established brand, but neither Mighty Mints nor Dynamints was known. Consumers were questioned about their reasons for purchase after buying either the Mighty Mints or Dynamints, but before eating the product. The responses suggested that the consumers purchased the new competing products mainly because of the expectations raised by the physical appearance of the package and the mint. Consumers said the expectations were learned from previous experiences with Tic Tac brand mints.

Some experimental and survey evidence thus suggests that consumers generalize between look-alike brands and may form similar expectations about product attributes and performance based on the external product cues. The concept of stimulus generalization is useful in explaining why a consumer would knowingly purchase a brand imitator.

CONFIRMATION VERSUS DISCONFIRMATION OF EXPECTATIONS

If consumers use the package to generalize to the performance of the attributes inside the package, then they may have certain expectations toward the performance of the imitators based on their expectation of the original brand. Consumers form preconsumption expectancies, observe product performance, compare performance with expectation, form disconfirmation perceptions, combine these perceptions with expectation levels, form satisfaction judgements, and then re-evaluate product offerings (Oliver and De Sarbo, 1988; Oliver, 1993). Depending on the type of experience (positive or negative), the consumers may change their evaluation of the product. Implicit in this explanation is that consumers are making comparative judgements.

To conclude with first, the consumers are generalizing their experience and expectations with the imitated brand. Second, consumers have some evaluation of the original brand, based
on prior brand experience and brand image. If the brand is a category leader, it is a high positive evaluation. Third, imitators are possible brand substitutes to the original. If consumers have satisfying experiences with the imitator, then the evaluations of the original and the imitator should be assimilated. That is, since the imitator is evaluated as a good product, it may be seen as a brand substitute as the experience tells the consumer the original is not as unique as previously thought.

Conversely, if consumers have negative experiences with the imitator, then their evaluations of the original and the imitator should be contrasted. Contrasting effects should cause an increase in the evaluations of the original because negative experiences with an imitator may lead to avoidance of the imitator product. The consumer may think the original is really worth seeking out because substitutes are not good.

In the case of a new imitator, consumers who have positive expectations confirmed might decide any price premium demanded by the original is not worth it. They might be more likely to purchase the imitator in the future because it (i) meets or exceeds expectation and (ii) it is sold at a lower price. If the expectations raised by the imitator are disconfirmed through a negative product experience, then the evaluations towards the original should be reinforced. The consumer might think any price premium demanded by the original is really worth it, since they realize that they are paying for a superior-quality product. Confirming that the original is superior may actually increase the evaluations of the original due to a contrast effect from the negative consumption experience with the imitator.

Interestingly, brands might benefit from comparison to imitating brands. Does the brand become more attractive because it has more substitutes? Imitation might not only be flattering but responsible for building market share. This may lead a company to advertise that “We know we’re number one because we have more competitors wanting to be like us.” Coca-Cola started an advertising campaign in 1994 to persuade people who drink other colas that any “imposter” is inferior because “Only Coca-Cola can refresh stunning thirst.” Their strategy was to concentrate on whatever makes Coca-Cola stand out and therefore worth the premium price it commands over private-level colas. Their goal was to “do whatever is in (their) power to remind consumers there are a lot of imitators of Coke but there’s no alternative to Coke” (Elliot 1994). Advertising
is supplying the consumer a decision rule before the customer faces the purchase situation where
imitators are available.

ATTENTION AND PERCEPTION

Sometimes consumers initially select an imitator brand because they think it is the original
brand. They make a mistake or misperceive the actual differences between the original and the
imitator. This mistake may be in just the initial identification and may be discovered once the item
is in the hand of the consumer. The mistake might also go unnoticed by the consumer until the
product is about to be used. In some cases the mistake may be entirely undiscovered by the
consumer. In all of these cases, it is not stimulus generalization that is primary but perception and
attention to the object.

The initial step in understanding perception is to understand what kind of things can be
perceived at all. For the consumer to use marketing cues in decision-making, the cues first must
be perceived by the individual. For the cues to be perceived the individual must first pay attention
to them. Attention has two parts, intensity and direction, which sometimes exist in a non-conscious
environment. In other words, attention is usually immediate and effortless.

Intensity has to do with the time spent looking at the object. The longer the consumers
are exposed to a stimulus, the more likely it is to be perceived. Direction means that the individual
must have the stimulus in focus. For example, a disclaimer on an advertisement will likely not be
perceived unless the person is led to focus on it. This focusing could be aided by size colour,
contrast and position. These are all-important factors in directing attention. It is to be kept in
mind that the consumer’s main response to marketing communication might be one of disinterest
when compared with other aspects of the personal environment. Therefore, attention to marketing
communication is likely to be fleeting and superficial, having little intensity and fluttering direction.

Attention to Visual Information.

There are several physical properties that direct attention when considered in the context
of the visual field. For example, the size of an advertisement can account for over 25% of the
variance in readership scores (Troldahl and Jones 1975; Twedt 1952). There is an abundance
of evidence to suggest that colour increases attention to an advertisement, although many studies
of colour could be interpreted as supporting the effectiveness of colour as a contrast tool. Thus
the impact of colour depends on the surrounding information (Janiszewski 1991). The manner in
which individuals direct their attention to areas in a visual display is sensitive to the characteristics
of each piece of information relative to competing information and to the consumer’s goals
associated with the processing of the stimulus or information in question. In most cases of
product choice, the goals are to recognize and choose, rather than examine and evaluate.

The fleeting aspect of attention is detailed by Janiszewski (1991). The first look at a
stimulus (i.e., the first 200 milliseconds) is characterized by a non-fixation, indicative of a holistic
analysis of the available information. During this preattentive state, decisions are made about
where to look (fixate) first. A decision of where to look involves a comparison of potential
benefits associated with an additional fixation to the cost of being “temporarily blind” while engaged
in the movement to that area. In many cases, assessing the potential benefits associated with the
next fixation may be nothing more than assessing the density or uniqueness of information in that
area.

The resulting pattern of looking or directions are highly dependent on the viewer’s
processing goals. Greater variability can occur when an individual is asked to view a picture for
seven different purpose, as seven unique scan patterns will emerge few of them comparable to
those used by others (Janiszewski 1991). In some ways this notion of goals is related to the idea
of selective attention. The individual’s processing capacity, in the short term, is limited in some
central mechanism. This mechanism is associated with consciousness and controlled processing,
and it delimits divided attention (Johnson and Dark 1986). Selective attention therefore refers to
the differential processing of simultaneous sources of information. Research on early selective
attention show that sensory selection has consistently proved to be more accurate and less effortful
than semantic selection.

It was very simply shown by Stroop (1935) in his famous colour and word experiments.
It is easier for a person to identify the word red when it is in red lettering than in blue lettering. An
example applied to marketing would be the identification of a label. If the traditional and original
label were blue in colour with the brand name in red, the identification would be first of the colours—a
sensory cue—and then second of the printed word or semantic cue. An imitator brand using the
same colors but a different brand name might easily be misidentified as the first brand due to the
superior selection of sensory cues, such as color, over semantic cues such as brand name.
The same may be said for shape, as among the sensory cues, by which attention can be
guided, spatial cues seem to be especially effective. Stimuli outside the spatial focus of attention
undergo little or no semantic processing and stimulus processing outside the attentional spotlight
is restricted mainly to simply physical features (Johnson and Dark 1986). Therefore the individual
narrowly focuses attention and does it as simply as possible. These are some of the reasons that
consumer's mistake or confuse imitators for originals, both initially and after brand choice.

**Perception and Weber's Law**

Weber's law states that in any given kind of perceiving, equal relative (not absolute)
differences are perceptible. Weber's law is a description of the "just noticeable difference" (jnd)
or differential threshold level that can be perceived by an individual. This is the minimum difference
in a stimulus that will be noticed by the individual or the minimum differences between stimuli that
will be noticed. The quantification and expression of this ratio is shown in Box 3.1.

**Weber's Law**

\[
\frac{V_I}{I} = K
\]

Where
- \(V_I\) = the smallest increase in stimulus intensity that will be just noticeable to the person (j.n.d.)
- \(I\) = the intensity of the stimulus before the increase.
- \(K\) = the constant increase or decrease necessary for the stimulus to be noticed.

**Box 3.1**

The main point of Weber's law is that the ratios, not the absolute differences are important in
describing the least perceptible differences in sensory discrimination. The differential threshold
varies not only with the sensitivity of the receptor and the type of stimuli but also with the absolute
intensity of the stimuli being compared. The size of the least detectable change or increment in
intensity is a function of the initial intensity; that is the stronger the stimulus, the greater the differences
needs to be (Britt 1975).

The use of Weber's law in the selling of goods is important. Manufacturers and marketers
endeavour to determine the relevant just noticeable difference for their products for two reasons:
first, so that reductions in product size, increases in product price, or changes in packaging are not readily discernible to the public; and second so that product improvements are readily discernible to the public (Schiffman and Kanuk 1993). The need to update existing packaging without losing the ready recognition of consumers to the package involves a number of small changes, each carefully designed to fall below the just noticeable differences, so that consumers will not perceive the differences. For example Lux soap, Britannia Biscuits and Fair and Lovely Cream have all gone through many package changes over the years to update their image. Brand imitators may also design their package to be just below the noticeable difference level to the original so that differences are not readily noticed.

Weber’s law can also be heavily influenced by context. For example, with respect to disclaimers, contrast is particularly effective in facilitating perception. Contrasts in size, form, colour, and brightness are well known to be effective in altering Just Noticeable Difference levels (jnd). Weber’s law is also important in determining the size of warning labels or disclaimers in the context of advertisements or package sizes. The print and size of the warning or disclaimer must be proportional and relative to its context.

**Perceptions may be Biased**

The perception of the existence of brand imitation is often debated. Usually the accused of imitation denies it, while the accuser is certain of the actual intent to imitate. To understand why these differing viewpoints of the same stimulus are so rooted, following information on the interpretation of perceptions is necessary:

1. **Perceptions are Selective**

   Perceptions are best regarded as interpretations made in the light of previous experience. This interpretation occurs unconsciously and the existence of this step is apt to be denied, it instinctively places great reliance on the validity and directness of perceptions. However, a lifetime of previous experience must influence what one perceives. Our perceptions then are not always valid and they are not the direct appreciation of the environment; they are interpretations of sensory messages and this has important consequences. For instance, two people will often give different reports when they witness the same scene, not because one is a liar, unobservant or crazy but simply because past experiences of the two people are different and their interpretations
in the light of their experiences lead to different results. They genuinely have different perceptions of the scene. One need not cease to accept that “seeing is believing” (Barlow and Mollon 1982) but one comes to realize that seeing is only believing and beliefs are based on prejudice as well as fact.

In a study by Hastrof and Cantril (1954) a classic description of the biasness of selective perception is found. As per study— in a college level football game between Dartmouth and Princeton, an analysis of fans’ perceptions shows that they saw two different games between two teams sitting in the same stadium on the same afternoon. The data indicate that there is no such thing as game exist in its own right and the people merely observe. The game exists for a person and is experienced by him or her in terms of his or her purpose. Out of all the occurrences going on in the environment, people select those that have some significance for them from their own egocentric position in the total scheme of things.

Whatever is perceived is different for different people, whether the object is a football game, a presidential candidate or a package of crackers. Individuals do not simply react to some stimulus from the environment in a predetermined way. They behave according to what is brought to the occasion and what each person brings is more or less unique. Therefore perception depends a great deal on personal factors. Past experiences and social interactions may help to form certain expectations that provide categories or alternatives that individuals use in interpreting stimuli. The narrower the individual’s experience, the more limited his or her access to alternative possibilities.

II Perceptions and expectations

The interpretation of the incoming stimulus guided by selective attention is the perception, perceptual organization or perceptual interpretation of the stimulus. The typical course of perception proceeds from a real world object or event through a medium, to sensory surfaces and receptors and then to the central nervous system (Cutting 1987). Once the perception hits the central nervous system, inferences from the stimulus may be of two kinds. They may be deductively valid or inductively strong. Perception could be deductive if all premises came from stimulus information but that is hardly ever the case. Experience, familiarity or anticipation usually plays a part in passing stimulus information into perceptual objects. Therefore, most perception in inductive, with some premises coming from memory and cognition.
An example of the power of induction in attention and perception to a stimulus object is illustrated by the connection to our sense organs. Whenever our interest in an object is derived from or connected to other interests, our senses adjust to form a close connection in all our behaviour and perception. The image in the mind is the attention and when awaiting a footstep, every stir in the wood is for the hunter his game and for the fugitive it is his pursuers. (Johnson and Dark 1986)

This power of induction to consumer responses can be typified by a story. Mr. X, was driving to work with a colleague who had just bought a new house and was in the process of preparing his lawn and garden. They drove by a sign that said “Bedding sale” and the colleague said to Mr. X that he wanted to go in and buy some plants. Mr. X said, I didn’t think they sold plants at that store. Then on reaching there the colleague noticed that it was a furniture store selling mattresses. Actually he was so preoccupied with gardening that the sign “Bedding sale” for him meant a sale of bedding plants for the garden. He did not initially process the surrounding cues that indicated a furniture store but focused only on the sign that was relevant to him at the time. He was deductively weak and inductively strong in his perceptions.

(i) Illusory Conjunctions

Sometimes people tell not what they saw but what they constructively have been. Experiments in cognitive psychology by Treisman and Schmidt (1982) suggest that individual features of objects are separately registered and that in the absence of focused attention, they may be wrongly combined to form illusory conjunctions. That is, people may state that they perceive something that they have not actually seen. The dimensions of colour and shape appear to be the most susceptible to separate coding and incorrect reconstruction by consumers.

The implication of these findings in illusory conjunctions suggests that if one see a small, blue triangle, only the labels “blue,” “small” and “triangle” are registered. The individual then supplies his or her conscious image with the correct quantity of blue colouring to fill the specified area, regardless of how much colour was originally presented. Moreover, the person may use the image to color the area within the specified shape, regardless of whether this matches the shape that was originally blue. The evidence of the study places conscious seeing at a greater remove from the physical stimulus than might intuitively be assumed. One may cognitively rearrange what is actually seen to coincide with what he think would most likely logically see.
GESTALT PSYCHOLOGY

The specific principles underlying perceptual organization are often referred to as Gestalt psychology. Gestalt is a German word meaning pattern, configuration, form or organization and its psychology was founded by Max Wertheimer (1880-1943) and his colleagues K. Koffka and W. Kohler. Gestalt has no direct translation in English, but is commonly defined as “the whole is more than the sum of its parts”.

The basic premise of Gestalt is that people do not experience the numerous stimuli they select from the environment as separate and discrete sensations. Rather, they tend to organize them into groups and perceive them as unified wholes. Thus, the perceived characteristics of even the simplest stimulus are viewed as a function of the whole to which the stimulus appears to belong (Schiffman and Kanuk 1991). For example, a grey piece of paper is gray only in relation to its background or to something with which it is compared. On a black background, it appears light; against a white background it appears dark. This type of perceptual organization is called figure and ground. The figure is usually perceived clearly because in comparison to its ground, it appears to be well-defined solid and in the forefront. The ground is usually perceived as hazy and in the background. The gray will be either figure or ground depending on the context. The eye does not perceive objects in isolation but rather with their surroundings.

Figure and Background

Another example of Gestalt is grouping. Individuals tend to group stimuli automatically so that they form a unified picture or impression. The point of grouping is that patterns or forms of our experience cannot be explained by compounding elements. The perception of stimuli as groups rather than as discrete bits of information facilitates their memory and recall. For example
it is easier to attend to the global features of a triangle than to broken component lines because the Gestalt property of closure makes the global figure perceptually more salient.

In the branding case, the consumer may remember the total "look" of the package but may be unable to recall individually small details such as type of lettering, exact hue of colour or the specific picture on the package.

Some other types of perceptual organizations of Gestalt that affect our interpretation of the stimulus are.

♦ **Similarity.** Similar elements are seen as belongings to each other more than to other elements equally close but less similar. What the individual perceives from the environment belongs to certain categories. For example, two packages of similar shape and color each seen separately will likely be categorized in the person’s memory in the same space. Therefore, the consumer may make a mistake in selecting one over the other because they are organized together. The two packages are too similar to be categorized separately in the consumer’s mind.

Figure 3.7, clarify the principle of similarity. Most individuals, when asked what they see in the figure 3.7, respond with two sets of four white squares and one set of four black dots. Seldom will people see two horizontal lines, each line consisting of squares and dots.

![Similarity](image)

- **Proximity.** Element that are physically close are seen as belonging to each other more than to similar elements that are farther away. Proximity can also make things look more alike than they really are.

In figure 3.8, the usual perception is four columns of five dots rather than five rows of four dots.
Proximity

Figure 3.8

• **Continuation.** Elements are seen as belonging to each other if they appear to be a continuation of the direction at previous elements.

Continuity

Figure 3.9

Figure 3.9 is usually perceived as a circle rather than a broken circle. Our need for good form is so great that we may even supply elements in order to achieve closure, to perceive a meaningful whole.

• **Common fate:** Elements that move in the same direction are seen as belonging to each other (Robertson, Zielenski and Ward 1985)

Common Fate

Figure 3.10

In figure 3.10, the usual perception is that all the arrows are moving in the forward direction although few are in the opposite direction also.

Gestalt psychology explains why objects can be detailed differently but still look the same to the observer. There are many cases of brand imitation where no one feature of the object is the same, but all features are similar. Examples of infringement cases involving Gestalt are found in toys, handguns, and greeting cards.

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**BALANCE THEORY**

Balance theory comes from social psychology and the study of attitude formation. It postulates that individuals seek information that is consistent with their needs, interests and attitudes and avoid information that is not. This theory provides a rationale for cases involving unauthorized use or association of a successful trademark. The underlying idea of Balance Theory to explain why unauthorized association with a successful brand takes place. Marketers want customers to have a very positive attitude toward the goods and services that they are selling. When consumers have a positive attitude it is likely that positive behavior in the form of purchases will follow.

Getting customers to have a positive attitude toward their product or service is a major task for marketers. While there are several complex, time-consuming and expensive ways to build positive attitudes based on the creation of good products and images, a very simple way is to associate the good with an object that consumers already have a very positive attitude toward. This implies the use of Balance Theory.

Balance Theory was developed by Fritz Heider in 1946 to explain how individuals cope with their environment. The basic premise is that people seek to balance their cognitive and affective states. In other words people want their attitude and feelings to be consistent with their objective thoughts and beliefs. This can be understood from the Figure 8. In the figure the link between the person (P) and the attitude object (O) is the attitude in question. The attitude is represented solely by its valence, either positive (+) or negative (-).

**Heider's Balance Theory**

![Heider's Balance Theory Diagram](image)

Figure 3.11
The link between O and X represents an association (+) or disassociation (-) between the attitude object and some related object, broadly construed to include people, attributes or consequences. According to Heider, the valence of the attitude between the person and the first object (P-O) can be predicated on the basis of the valences attached to the person and the second object (P-X) and the links between the two objects (O-X links). Because the individual is motivated to achieve a balanced state, the P-O valence will be determined by the algebraic multiplication of the two valences For example, if Aamir Khan, the movie and television personality, is liked by a majority of consumers, they will hold a positive attitude (+) toward him. When he endorses Pepsi communications that leads to a positive connection (+) between Aamir Khan and Pepsi. The prediction is that the consumer will like Pepsi communications (+) and hence will be motivated to purchase Pepsi. In doing so, the consumer maintains a balanced state.

Balance Theory also explains why successful companies bring lawsuits against other companies that use their property unlawfully or in bad taste. Unauthorized use of a trade-mark to associate with a lesser object or a negatively perceived object can bring harm to the original through a decrease in the consumers attitudes toward the original. The negative perception “rubs off” on the original’s image. In Girl Scouts of the United States v. Personality Posters Mfg. Co. (1969), the Girl Scouts of America tried to enjoin a company that was manufacturing and selling posters of visibly pregnant girls in Girl Scout uniform, with the headline “Be prepared”. The association of “pure Girl Scouts” (+) with unwed mother (-) would lead to an unbalanced (-) state, and perhaps harm the reputation of the Girl Scouts (Figure 3.12). This is due to the pairing of Girl scouts with unwed mothers by association. The individual has a constant (-) association to unwed mothers. To keep balanced, the previous positive sign to Girl Scouts changes to a negative sign. In this way tension is reduced because the overall state returns to positive (negative x negative = positive).
Changing Images And Attitudes

**Prior Attitude**

- Girls Scouts
- Unwed Pregnancy

*Person stores images as unrelated in their mind.*

**Pairing**

- Unwed Pregnancy
- Girls Scouts

**Result**

*Person in an unbalanced state and strives for balance.*

Thus, the unauthorized use of someone else’s trademark or trade dress is done to imply an association that should help in building a positive attitude about the infringer’s product.

**CASES OF IMITATION IN THE MARKET PLACE**

There are literally hundreds, if not thousands, of cases of passing off to be found in legal libraries. The number of cases seems to be growing exponentially over the years as brand imitation is seen by many to be a very effective means of competition. While infringement of competing brands is the most obvious cause of legal action, the cases of related or unrelated products that led to consumer confusion is of utmost interest to those who are thinking about the extension of their brand equity.

1 **Name Similarity**

The importance of brand name in affecting consumer evaluation or choice cannot be overstated (Dodds, Monroe and Grewal 1991). Brand name is the single most used cue, after price, in determining consumer choice and evaluation. This is probably why most of the confusion in the marketplace is brought on by competitors focusing their confusion tactics on the name they
use to label their products. The similarity of name can be between competing brands, between related product categories or even between unrelated product categories.

Cases of Imitation

<table>
<thead>
<tr>
<th>NAME SIMILARITY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Competing Brands</strong></td>
</tr>
<tr>
<td>a) Same Name</td>
</tr>
<tr>
<td>b) Similar Name</td>
</tr>
<tr>
<td>c) Partial Name</td>
</tr>
<tr>
<td><strong>Related Products</strong></td>
</tr>
<tr>
<td>a) Same Name</td>
</tr>
<tr>
<td><strong>Unrelated Products</strong></td>
</tr>
<tr>
<td>a) Same Name</td>
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</tbody>
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CONFUSION AND SIMILAR SHAPES

The Product as Shape

Consumer Packages as Shape

CONFUSION AND SYMBOLS

Tags as Symbols

COLOUR

Competing Brands

Box 3.2

(i) Competing Brands

(a) Same Name

It is seen that confusion over brand names started the history of passing-off litigation. In Thomson v. Winchester (1837), Thomson sold certain medicines of his own preparation under the name “Thomsonian Medicines”. Winchester then began to sell inferior medicines under the same name. In this early case, the court recognized that there was no exclusive right to the name if it had become generic and descriptive of a class of medicines, even though a party may be damaged by the inferiority of the medicines sold under the name. Unfortunately for Thomson, the law paid little attention to the perceptions of the consumer on this issue, or the reputation of Thomson medicines, in deciding that Winchester’s actions were not illegal. Consumers and original producers were not protected and the way was clear for copy artists to benefit from name similarity.

Another example involved the sale of lead pencils by two brothers, Faber v. Faber (1867). Originally A.W. Faber created and sold lead pencils with great success. His brother,
realizing this success, also started to produce and sell pencils with his name, John H. Faber, stenciled on the pencil. There is no information on the quality level of John Faber’s pencils in relation to those of his brother, but that did not seem to matter. The court ruled that John Faber was entitled to use his own name without fraud, despite the fact that it was his brother who created the market for Faber lead pencils.

In a case between, Levi Strauss v Delhi-based Co. (2001) the high court pointed out that the goodwill and reputation of the multinational company would suffer if goods of local companies were passed-off as those of the later. Levi-Strauss, an US-based MNC, is the registered proprietor of the trademark (TM) ‘Levi’s’ in respect to readymade garments and cloth, including footwear and headwear.

The Delhi-based Company was restrained from manufacturing and marketing footwear and related accessories bearing the trademark Levi’s.

In another similar case, S. Kumars Nationwide, formerly S.Kumars Synfabs, was forced to launch a new ready-to-wear brand, ‘Tamariind’, in the wake of a copyright infringement rights case brought against it by a little-known Bangalore-based retail store.

S. Kumars had launched its first readymade brand ‘Cinnamon’ in Sept. 2001. Subsequently, the Bangalore store took S. Kumars to court claiming it was the true owner of the Cinnamon brand.

(b) Similar Name.

The case involving similar brand names in the market is American Cyanamid Co. v. United States Rubber Co. (1966) and the sale of Cygon versus Phygon. The products were pesticides recommended for use on plants such as apple trees, azaleas and roses. Both brands were agricultural chemicals sold mainly to farmers through the same channels of distribution. Because both brands do exactly the same job, the court concluded that the similar sounding names could easily be mistaken by either the retailer or the consumer. Therefore, American Cyanamid should sell its product under a name other than Cygon.

In Cadila Laboratories Ltd. v. Dabur India Ltd. (1997, PTR 72) case, the plaintiff had coined, invented and was registered owner of the mark MEXATE for various types of cancer
medicines. The plaintiff alleged that the defendants trademark ZEXATE was deceptively similar to that of the plaintiff's mark. Both the medicines were scheduled H drugs used in the treatment of cancer. According to the plaintiff, the trademark 'MEXATE' was being extensively used by the plaintiff since, as far back as in August 1991. It was stated that the plaintiff received information around January, 1996 that the defendant has introduced, in the market, a product under the brand name 'ZEXATE' and the only difference between the plaintiffs registered trademark 'ZEXATE' was the letter 'M' replaced by the letter 'Z'. The plaintiff pleaded that the defendant had adopted 'Zexate' only to take advantage of the goodwill and reputation of the plaintiffs product 'Mexate' which had acquired a reputation in the market. The plaintiff further submitted that the defendants trademark is phonetically, visually and structurally identical to the plaintiffs registered trademark 'Mexate' and use of the same by the defendant was violation of the statutory rights which exists in favour of the plaintiffs.

The defendants contended that both the products were used for the treatment of cancer and a physician prescribed the said medicinal preparation only after careful examination of the patent and after conducting series of medical tests. The said medicine being scheduled "M" was sold by qualified dispensing chemists/ druggists on production of a prescription of a physician. Both the products of the plaintiff and defendant could not be expected to be sold over the counter, as it was a specialised drug for treatment of cancer.

The plaintiff prayed for an interim injunction. The court after considering the overall position of the plaintiff and defendant refused to grant interim injunction.

In another case (Terbuline T.M., 1990, R.P.C.21 B.O.T.), Astra pharmaceuticals applied for registration of the trademark TERBULINE in respect of pharmaceutical preparations. The registrar refused the application on the ground of conflict with registered trademarks TERBOLAN and TURBALIN for similar goods in the name of different parties.

(c) Partial Names.

It is also deemed that only partial redundancy of names is enough to establish confusion for competing brands. (Maidenform Inc.v. Bestforms Foundation Inc.1969). Maidenform originally had a line of dream bras, including DayDreams, Dream liners and Dream-Aire. Bestform
subsequently launched a brand named Teen-Dream. Discussion centered on the common word “dream”. The court held that there was likely to be confusion in the consumer’s mind.

Another example involved the case between Time Warner Entertainment Company and N.K. Das (Time Warner Entertainment Company v. N.K. Das, 1993 PTC 453). There was a joint venture agreement between the plaintiff and the defendant. Later, on the agreement failed. The defendant started cable network under the name of CBO/CABLE BOX OFFICE. The plaintiffs were running business under trade name HBO/HOME BOX OFFICE. The plaintiff sought injunction claiming that the trademark of the defendant was deceptively similar to that of the plaintiff. The plaintiff also sought punishment injunction against the defendant. The plaintiff, Time Warner Entertainment Company, instituted a suit, seeking permanent injunction against the defendants restraining them from conducting their television services under the name, mark, or logo CBO/CABLE BOX OFFICE or under any name or style which is deceptively similar to the name mark or logo of the plaintiff, called HBO/Home Box Office.

The plaintiff was the owner of a division Home Box Office for the premium Television Programming with the logo called HBO. HBO operates the world’s oldest and largest cable television channel under the trademark HBO/HOME BOX OFFICE in use since September 1972. The plaintiff pleaded that HBO/Home Box Office played a pioneering role in the cable Television business and operates in 96 countries. The plaintiff had applied for registration in the year 1994 for the trademarks HBO. The representatives of the Plaintiff Company had visited India on several occasions and discussions were held with different representatives of the trade including the defendants. Widespread publicity was given to the joint venture between them. However, the joint venture project could not take off and failed to materialise as the defendants failed to come up with any concrete business plan.

In March 1996, the Time Warner Entertainment Company came to learn that the defendant proposed to launch a cable Television Service using the name CBO and/or CABLE BOX OFFICE. The plaintiff instituted a suit and grant of temporary injunction was sought, restraining the defendants from advertising, representing or conducting their television service in relation to its proposed programming service. The court, by way of an ad interim injunction restrained the defendants from advertising and conducting television service. The court held that
the plaintiff had a prima facie case and shall suffer irreparable loss if interlocutory injunction was not granted. The injunction was confirmed later on.

(ii) Related Products

The extension of brand names to other product categories or brand extensions by licensing etc. has increased the opportunity for confusion among consumers.

(a) Same Name

In Union Carbide Corp. v. Ever-Ready Inc. (1976), the related products were batteries and light bulbs. Union Carbide produced and advertised an extensive line of electric batteries, flashlights and miniature bulbs for automobile and marine use. Since 1966, sales of these goods under the name of Eveready products have been in excess of 100 million dollars a year. In 1969 the defendant commenced importing miniature lamp bulbs having the term “Ever-Ready” stamped on their base. These bulbs were sold in blister packages displaying the name “Ever-Ready” in a four-sided logo and the package indicated use in high-density lamps. Although the products were not exactly the same, the two lines were very closely related. The court originally ruled for the defendant. However, on appeal, the judgement was reversed by a higher court. The higher court gave weight to a consumer survey that showed that 55 to 60 percent of consumers were confused about the source of the products.

(iii) Unrelated Products

The degree to which two products categories are unrelated may not be obvious, or there may not be agreement on this issue. The degree of relatedness of the two products is perhaps a matter of judgement by the courts; how widely the products are used by the public and the length of time the products are in use. The question of the consumer’s perceptions of relatedness of the product category is seldom asked in surveys for court cases; rather, the judge is left to decide this issue.

A manufacture of vitamins appropriated the name of V-8, the vegetable juice company protected the brand name of V-8, but no research was presented as to the relatedness of vitamins and juice. The reasoning of the court was that consumers might mistakenly infer a relationship between vegetable juice and vitamins. The court judged vitamins and juice to be related product categories. However, in a case where the two products were scotch whiskey and walking shoes (John Walker & Sons Ltd. v. Modern shoe co., 1954) it was held that purchasers of shoes
would not conclude that the whiskey marketer had started marketing shoes (Stern and Eovaldi, 1984). The case was that the Modern Shoe Co. had named a shoe “Johnny Walker”. The whiskey distiller felt that the Shoe Company had infringed on the name of its scotch.

(a) Same Name

The difficulty for courts in seeing the possibility for consumer confusion with unrelated product categories, despite identical distinctive names and established confusion in the minds of the consumers is well documented.

In Lego Australia Pty. Ltd. v. Paul's (Merchants) Pty. Ltd. (1982), the defendant sold irrigation equipment bearing the name “Lego” in Australia. The plaintiff had sold Lego children’s building block toys in Australia since 1978, and Lego toys had been marketed in Australia since 1962. Lego toys have been manufactured since 1934 in other countries. The Lego irrigation equipment had been manufactured in Israel since 1929 and distributed in Australia since 1974. The name Lego was adopted by Lego M. Lemelstrich Ltd. independently and apparently without any wrongful intent. It was a combination of the first letters of the names of the founders of the business. The building block name was derived in Denmark in 1934 from the Danish words “Leg Godt,” Which mean play well.

A significant factor in the case was that both Legos were made of colourful plastic. Several witnesses said they had assumed that the irrigation equipment was made by the plaintiff because of the name Lego, because it was predominantly plastic and because companies appear to diversify. Since many households with children own building blocks that are purchased by parents, the issue was that the parents would closely identify the children’s toy company with the irrigation equipment company.

A survey conducted by the plaintiff suggested that the name Lego was well known as applied to the Lego toys and was not well known as being applicable to any other products. Therefore it would be possible to find consumers who believed that any product labeled Lego was made by the toy Company. The court concluded that companies might and sometimes do expand the range of products they produce. However, that in and of itself cannot warrant a conclusion that a particular company has done so and even though consumers made unwarranted
assumptions or had misconceptions, that was the fault of the consumer, not the company. The judgement was for the defendant.

The same issue, with the same arguments, was brought to court in England (Lego System A/S v. Lego M. Lemelstrich 1983). This time the judgement was for the plaintiff despite weaker consumer evidence than found in the Australian case. This ruling shows the overwhelming influence the judge and also the culture, may have in cases of passing-off.

In Tata Sons Ltd. v. Ramadasoft (2001), the court in an ex-parte order barred the Hyderabad-based software firm, Ramadasoft, from using a series of domain names with a trademark of corporate giant, Tata Sons ltd.

The court granted permanent injunction in favour of Tata Sons Ltd. saying “…………It is now settled law that with the advent of modern technology, particularly relating to cyberspace, domain names or internet sites are entitled to protection as a trademark because they are more than a mere address.”

“The rendering of Internet services is also entitled to protection in the same way as goods and services are and trade mark law applies to the activities on Internet,” the court said.

The court further said: “By its affidavits of evidence and documents exhibited, Tata Sons Ltd. has proved the averments made by the Hyderabad –based firm, and accordingly Ramadasoft and its agents are permanently restrained from using domain names containing the word ‘Tata’ or any other mark and name identical or deceptively similar to the corporate giant’s on the internet.

“An order of permanent injunction is passed against Ramadasoft restraining it for operating any business in any goods or services under any domain names containing the word, Tata,” the court said.

Some companies take the transfer of established brand names to unrelated product categories very seriously. For example, on March 20th, 2001 an advertisement was released by Torrent Tea (India) Ltd. for appointment of C & FA/ Super stockists for packet/ loose tea. Immediately, the Torrent Pharmaceuticals Ltd., responded (29th March, 2001) with an advertisement that Torrent Tea (India) Ltd., has no connection with it. As per advertisement
Torrent Pharmaceuticals Ltd. are engaged in business of Medicinal and Pharmaceutical preparations and are not carrying on any business in Tea. Therefore, public at large should not be confused or deceived that the Torrent Tea (India) Ltd. is a member of Torrent Group of companies, Ahmedabad.

Further the manufacturers, dealers, distributors, stockists and exporters of Torrent Tea (India) Ltd. were warned that any unauthorised use of trademark ‘TORRENT’ in any manner would constitute, passing-off and render the imitators liable to civil and/or criminal proceedings in a court of law.

Protecting one’s brand name from use in unrelated product categories serves two purposes. First, if the brand name is used to label an unrelated product by another manufacturer and that product is of inferior quality, the poor image may reflect on the original product. Manufacturers do not want to risk their brand name being attached to inferior product, no matter how far removed from the original product class. Second, protecting one’s name in unrelated markets protects future options, because the manufacturer may later want to extend the name to different product categories. Perhaps the more frequently brands extend to unrelated product categories, the more likely court will grant protection of their trademark.

II Confusion and Similar Shapes

Sometimes consumers identify brands or products not by their brand name but by their shape. Shape can be found in law under the expression of “distinguishing guise”. It can be the shape of wares, their containers, their mode of wrapping or packaging wares that is used for the purpose of distinguishing wares or services from others. The shape itself may be desirable or the shape may represent to the customer the quality of the product through identification of the brand. The shape of the article may be protected by the Design Act, 1911 (Discussed in Chapter 4). The shape is meaningful to the consumer. Shape may be the initial cue to identification of the desired product. The identification by shape and design takes place in both the consumer and industrial marketplace. If a product obtains commercial success and this is seen to be related to its design, competitors are quick to copy the design of the product, usually at a lower price. When a distinctive shape is developed to identify the brand, it is important for the producer to emphasize the shape in its advertising. By doing this, the consumer will be more cognizant of the shape than the brand name.
Manufacturers are eager to seek trademark protection of product shapes or configurations because this form of product differentiation may have four significant anti-competitive effects. First, it may permit the seller to acquire a control over price that he or she could not otherwise maintain. By differentiating the appearance and protecting the distinction, consumers will buy the product even though the quality level is no higher than that of a non-differentiated product. Second, shape aids quick identification of the brand for the consumer and thus simplifies the decision-making process. Third, shape adds to the cost of production and marketing by requiring expenditures for differentiation not related to the quality or actual needs of the product. Fourth, entry into an industry is made more expensive because of higher initial losses while the consumer learns to identify the product by a new shape.

(i) The Product as shape

In Ampro Food Products v. Ashok Biscuit Works and Another, (AIR 1973 AP 17) case, the appellants and respondents manufactured biscuits. The appellant’s design was registered. The respondents biscuits also had an identical design embossed on them except that instead of letters “AP” (Which were embossed on the appellant’s biscuits) letters “AB” appeared on the respondent’s biscuits. The appellants filed a suit for injunction claiming that the respondent had committed piracy of his design. Pending disposal of the suit, temporary injunction was sought for.

It was held by the court that for an injunction based on registered design, the defence that the appellant’s design was not new or original was not open to the respondent since no step has been taken for the cancellation of the registration of design.

Temporary injunction was issued by the court restraining the respondents from using the appellant’s registered design and from selling biscuits bearing that design.

The identification of establishments by their distinctive shape or structure is quite common. Because the highways are so crowded, an instantly recognizable symbol of standards and quality can turn travellers and commuters into customers. A uniquely designed building can function as a trademark and convey relatively complex messages in a form of graphic shorthand.

The identification of the shape as a symbol of the establishment is exemplified by McDonald’s golden arches, Tower Pizza, Holiday Inn, and Howard Johnson, to name a few. Just the sight of a pair of golden arches brings pictures of hamburgers and children to mind.
Seeing a pair of golden arches that is not McDonald’s would be a jarring and confusing experience to most people.

(ii) Consumer Packages as Shape

Shampoo bottles, perfume bottles, and deodorant bottles are but a few product categories where distinctively designed package shapes lead to distinctive brand identity. Manufacturers of perfume put great effort into linking the distinctive shape of the perfume bottle to the brand name. This has been a relatively successful and ethical practice over the years.

The success is perhaps due to the fact that perfume is a relatively expensive product that conveys a strong image and meaning to the consumer. This is in contrast to a product like shampoo. Shampoo brands may develop distinctively shaped bottles, but their bottles are readily copied by competitors. For e.g. Head & Shoulders is a brand that constantly suffers from imitation of the shape of the bottle.

One of the first cases involving the shape of perfume bottles was Lucian Lelong Inc. v. George W. Button Corp. (1943). The plaintiff successfully protected its brand and shape of the bottle. Since then, the design of distinctive perfume bottles contributes to the multi-million dollar perfume business. Some consumers buy the perfume only for the bottle, which is seen as a collection piece.

In Ravlon Inc. v. Sarita Manufacturing Co. (1997 PTC 394) case, plaintiff were owner and proprietor of registered trademark ‘REVLON’, ‘CHARLIE’ and ‘INTIMATE’ relating to cosmetics, perfumery and toiletries. The plaintiff sought restraint order against defendants for infringing the plaintiff’s registered trade mark, as not only the containers and cans of the defendant look alike to that of the plaintiff’s but they were also written exactly in the same style of lettering as that of the plaintiff. As per the court, the action of the defendants, prima facie, amounted to deception of the general public so as to pass-off their products as those of the plaintiff. The court restrained the defendant from manufacturing or selling perfumes, cosmetics and toiletry, under the trademark ‘REVLON’, ‘INTIMATE’ and ‘CHARLIE’ or any other mark deceptively similar to them.
Thus the shape of the package as well as the shape of the brand are common cues used by consumers to identify brands. Changing the shape may have no impact on the concrete benefits derived from the product, but may be crucial in brand identification.

III Confusion and Symbols

Similar symbols may cause confusion in the consumer’s identification of the products in the market place. A symbol is usually something specifically associated with a name brand. The symbol may be used by the customer to differentiate between the brands. It is usually attached to the object and does not serve any purpose other than identification. In some cases the symbol is very small in relation to the object it represents.

(i) Tags as symbols

An example to this is found in the manufacturing of clothing (Levi Strauss v. Blue Bell, 1980). Since 1936, Levi-Strauss had used a small tab affixed to the exterior of its jeans at the hip pocket to identify them as Levi’s. The company has also used this tab on other products it manufactures, such as shirts or jean jackets. Wrangler jeans, which had a significantly smaller share of the market, also started to put the same size tab on its casual garments. Wranglers’ tabs were of different colours, such a red, black, brown, white, olive, yellow, pink, orange and green. Despite these different colours, in a consumer survey it was seen that Wrangler garments with the tab were identified as Levi’s. The tab was therefore being used by the customer to identify the brand as Levi’s, irrespective of its colour. It was the key evidence in the judgement for levis.

In Rupa & Co. Ltd. and another v. Dawn Mills Co. Ltd. and another, (AIR 1998 Guj.247) case, the high court held that the plaintiffs were owner of registered trademark in the form of label depicting figure of Sun at dawn with prominently displayed word ‘Dawn’ and subsidiary word hosiery beneath DAWN as well as words ‘DAWN HOSIERY’ per se since last over 40 years and were marketing their products under that name. Also the defendants were manufacturing and trading in the same field of hosiery for over 25 years, under the registered trade name RUPA. From the sample of offending hosiery products and cartons in which the same were offered to buyers by the defendant shown to the court, it was clear that on labels attached to it word ‘DON’ was shown in prominence rather than its registered trademark ‘RUPA’. 
The court held that the use of word ‘DON’ by defendant prima facie infringed plaintiff’s registered mark and the temporary injunction was granted.

IV Colour

Colour is an extremely important cue for identification. It takes less effort to identify a brand by its distinct colouring than by any other attribute. For e.g., the exclusive rights of Coca-Cola in the red and white colours did not happen overnight but rather with a hundred years of use and advertising.

Colour is now accorded trademark protection. As per the section 2(1) (Zb) of trade marks Act, 1999, “trademark” means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours (Trade Marks Act discussed in Chapter 4).

Colour in distinctive combinations or patterns can be critical to product or brand identification. There may be a problem in copyrighting certain colours but when colours are coupled with other factors like shape or name, it becomes easier to protect them. For e.g., if drugs of certain colour combinations can also be linked to a certain shape, they may be more distinctly identified.

The importance of the understanding of the role of colour by the marketing community can be explained with the following example. A Vancouver business wanted to sell tea to India, with a package similar to the leading local brand, Nabob. The name was changed from Nabob to Maharajah but all other aspects of the package were extremely similar or the same.

It was proposed by Nabob that the imitator could keep all aspects of the package same if the colour is changed from the copy-cat red to blue or green. The defendant, knowing the value of the colour initially refused but later on accepted to slightly lighten or darken the colour of the package from the original red. It clearly shows how squabbles over shade might result.

(i) Competing Brands.

In Kishore Zarda Factory & others v. J.P.Tobacco House & others (AIR 1999 Del 32) case, the tin of chewing tobacco had not only similar colour scheme, but the writing style
of the letters and selection of numerals and their selling were strikingly similar. The plaintiffs were in business since 1984 and defendants had launched their business in 1994. The tobacco-chewing purchasers are generally illiterate. The court restraining the defendants from using the tradename granted an interim injunction.

In another case between Glaxo India v. Welable Pharmaceuticals Ltd and Akay Pharma Pvt. Ltd. an exparte injunction was granted against Welable pharmaceuticals Ltd. and Akay Pharma Pvt. Ltd. by the Delhi High Court restraining them from using similar colour scheme, get-up and layout as that of Glaxo India's in respect of Tetramisole soluble powder.

Glaxo, was producing Nilverm having chemical composition of tetramisole hydrochloride. The Characteristic features of the Nilverm were that it had the base of the tin in white colour and with two horizontal green bands of equal dimension on the top. The name of the chemical composition, Tetramisole was written in green in a characteristic style. Five different animal heads were shown in circles in a green background.

The said tin container was used by the Glaxo India for a long time and it had over the years acquired tremendous reputation among the general public. Glaxo, was having an exclusive right over the designs of its container and also a copyright over the size and colour in which the directions for use were written.
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