

THE CULTURAL AND PSYCHOLOGICAL CHARACTERISTICS OF CHINESE CONSUMERS AND THEIR INFLUENCE ON THE TRADEMARK LAW IN CHINA

Trademarks are designed to be an efficient means for sellers to inform likely buyers about desirable qualities and characteristics of their goods. The scope of protection under trademark law afforded to the trademark holder depends on the psychology and behavior of an "ordinary" consumer "under the normally prevalent conditions of the market and giving the attention such purchasers usually give in buying that class of goods."

In this article, the author explored how Chinese cultural values and modern economic reforms affect the psychology and behavior of Chinese consumers. In this context, seven factors have been discussed as to their influence on the Chinese consumers' decision making process, including education, age, buyers with social motivation (guanxi), face saving, group orientation and collectivism, limited opportunity, and self-esteem in the rapid economic growth of the last two decades. By affecting consumers' motivation and ability to exercise consumer care, all seven factors have a substantial impact on determining the sophistication of the consumer.

By providing a Chinese perspective on the inquiry of confusion in trademark cases, the goal of this comment was to determine the potential factors that the Chinese courts may utilize in analyzing the likelihood of confusion between consumers. The application of the Lee-Christen-DeRosia model in the context of Chinese consumers provided unique insight into how various Chinese cultural values affect the motivation and ability of consumers to exercise care.

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I. INTRODUCTION

Trademarks are considered one of the most valuable assets for a business entity.¹ Each individual trademark is designed to be an efficient means for a particular seller to inform potential buyers about desirable qualities and characteristics of a product.² Thus, to be effective, a mark must ensure that consumers will associate characteristics carried by the mark with the right product.³ However, when consumers fail to differentiate between various trademarks, this fundamental purpose of a trademark as a distinguishing and informative tool is severely compromised.

A general rule to sustain a claim of trademark infringement is that an ordinary “relevant person acting with ordinary carelessness must be likely to be confused, mistaken, or deceived.”⁴ As a result, the scope of protection under the trademark law turns on the psychology and behavior of an “ordinary” consumer “under the normally prevalent conditions of the market and giving the attention such purchaser usually give in buying that class of goods.”⁵ In other words, the trademark infringement is determined based on “whether there is a likelihood of confusion in the mind of an appreciable number of ‘reasonably prudent’ buyers.”⁶ The U.S. courts have used “the sophistication of the buyers” as one of the circumstantial factors to determine the likelihood of confusion by consumers.⁷ Notably,

1. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1687-88 (1999) (discussing that economists view trademarks as valuable aids to efficient markets and moreover, an increasing trend that trademarks are considered as property rights).

2. Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1240 (2008).

3. *Id.* (explaining one brand name can serve as a repository for “a complex constellation of associations and images that comprises a consumer’s knowledge of the brand and his attitudes towards it.”) (citing John F. Coverdale, *Comment, Trademarks and Generic Words: An Effect-On-Competition Test*, 51 U. CHI. L. REV. 868, 875 (1984)).

4. LOUIS ALTMAN & MALLA POLLACK, 3A CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 21:10 (4th ed. 2013). Courts have different definitions with regard to “an ordinary consumer”. *Id.* Some of the classic judicial descriptions consider the ordinary consumer as “ignorant,” “unthinking,” and “credulous.” See *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910).

5. Thomas R. Lee et al., *Trademarks, Consumer Psychology, and the Sophisticated Consumer*, 57 EMORY L.J. 575, 575 (2008) (citing *W.W.W. Pharmaceutical Co. v. Gillette Co.*, 984 F.2d 567, 575 (2d Cir. 1993)).

6. 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:91 (4th ed. 2007) (referring to *Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr.*, 103 F.3d 196, 201, (1st Cir. 1996)).

7. *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (listing eight factors in analyzing the prior owner’s chance of success: (1) the strength of his make, (2) the degree of similarity between the two marks, (3) the proximity of the products, (4)

an accurate analysis in trademark infringement cases demands deep and correct understanding of consumer psychology in a target group.⁸

In order to meet this goal, a consumer behavior model of sophistication has been developed by Professors Lee, Christensen, and DeRosia.⁹ The model introduces two general antecedents to the exercise of consumer care: motivation for care and an ability to be careful.¹⁰ According to this model, a sophisticated consumer must be sufficiently motivated and possess an adequate ability to exert cognitive effort to perform a judgment.¹¹

This article will examine how specific cultural and psychological characteristics of Chinese consumers will impose effects on analyzing the likelihood of confusion, in the context of the consumer behavior model. First, the author will narrate an overview of Chinese culture and specific psychological characteristics of Chinese consumers. Second, the article will analyze how such characteristics will affect the analysis of likelihood of confusion. Lastly, the article concludes what obstacles Chinese courts may encounter when using the likelihood of confusion in deciding trademark infringement cases.

II. TRADITIONAL CHINESE CULTURAL VALUES STILL HAVE IMPACT ON THE BEHAVIOR OF MODERN CHINESE

China is one of the earliest civilizations in the world, having a recorded history of approximately 5,000 years.¹² Before 1911, China was ruled by Chinese emperors, with the last Dynasty as the Qing.¹³ This period was marked with a feudal monarchical system with a self-sufficient economic model, under the strong

the likelihood that the prior owner will bridge the gap, (5) actual confusion, (6) the reciprocal of defendant's good faith in adopting its own mark, (7) the quality of defendant's product, and (8) the sophistication of the buyers).

8. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) (explaining that "[t]he protection of trade-marks is the law's recognition of the psychological function of symbols.").

9. *Lee*, *supra* note 5, at 577.

10. *Id.*

11. *Id.* at 585 (identifying three steps for a consumer to avoid source confusion, including (1) the consumer must gather relevant product information, (2) comprehend the information and determine its meaning, and (3) integrate the implications to form source-identification judgment).

12. RONGXING GUO, UNDERSTANDING THE CHINESE ECONOMIES 1 (2012), available at <http://dx.doi.org/10.1016/B978-0-12-397826-4.00001-9>.

13. Anne M. Wall, *Intellectual Property Protection In China: Enforcing Trademark Rights*, 17 MARQ. SPORTS L. REV. 341, 346 (2006) (offering a summary of the major economic and political periods in Chinese history).

influence of Confucianism.¹⁴ Confucianism refers to a systematical teaching of a Chinese philosopher, Kong Fu Zi (551 B.C.).¹⁵ The Confucians believed that an individual can be improved by understanding the complicated relationship with his or her family members, the government, and nature as a whole.¹⁶ The doctrine of Confucianism focuses on five cardinal relationships in a society. These five relationships are sovereign and minister, father and son, old and young, husband and wife, and between friends.¹⁷ All five relationships are based on unequal but mutual obligations. For example, the young owes the senior respect and obedience, and in return the senior owes the junior protection and consideration.¹⁸ It originated from the concept that societal stability is based on a mutual, sound, and unequal relationship between people.¹⁹

Under Confucianism, family serves as the basic unit of society.²⁰ In a traditional Chinese society, relationships began with the immediate family and then radiated to the extended family and local community.²¹ Thus, a strong collectivism was dispersed within Chinese society, reflected through respect for elders, obligations toward friends and relatives, a need for harmony and the concept of face.²²

Following the rapid and dramatic fall of the Qing, many intellectuals blamed traditional cultural values for preventing China from matching the industrial development of her counterparts in other parts of the world.²³ The trend of anti-

14. *Id.*; see also GUO, *supra* note 12, at 7 (noting that other ancient philosophies may influence the Chinese society as well such as Taoism).

15. GUO, *supra* note 12, at 7-8.

16. *Id.* at 8 (suggesting that the Confucianism was a human response to control the frequent flood of Yangtze River).

17. Lei Tang, *Chapter 12 - Chinese Culture and Chinese Consumer Behavior*, in GLOBAL CONSUMER BEHAVIOR, INTERNATIONAL SCIENTIFIC AND TECHNICAL ENCYCLOPEDIA (Chantal Ammi ed., 2007).

18. Nguyen Phuong-Mai et al., *Cooperative Learning vs Confucian Heritage Culture's Collectivism: Confrontation to Reveal Some Cultural Conflicts and Mismatch*, SPRINGER-VERLAG 404 (October 18, 2005), http://download.springer.com/static/pdf/238/art%253A10.1007%252Fs10308-005-0008-4.pdf?auth66=1412739483_5e4f6520e2f7d29ad874f7098758b55c&ext=.pdf.

19. *Id.*

20. Tang, *supra* note 17.

21. Edward Yui-tim. Wong, *The Chinese at Work: Collectivism or Individualism?*, LINGNAN U. 4 (Feb. 2001), <http://commons.ln.edu.hk/cgi/viewcontent.cgi?article=1030&context=hkibswp>.

22. *Id.*

23. *Before and After the May Fourth Movement*, COLUMBIA.EDU, http://afe.easia.columbia.edu/special/china_1750_mayfourth.htm (last visited Sept. 30, 2014).

Confucianism continued throughout the 20th century, reaching its peak during the Cultural Revolution.²⁴ During this turbulent time, all formal Chinese education was completely stalled.²⁵ Not until recently has Confucianism started to regain its role as the “core cultural value.”²⁶

III. MODERN CHINESE CONSUMERS POSSESS SOME DISTINCT CHARACTERISTICS

Through these historical events and periods, Chinese consumers as a group have developed some unique characteristics. Since understanding the ordinary consumer’s mindset is central to analyze trademark infringement cases, those unique characteristics pose certain impacts on trademark infringement analysis. Under the consumer behavior model, the complexity involved in determining the likelihood of confusion in Chinese consumers quickly becomes evident.

The consumer behavior model identifies two general antecedents to the exercise of ordinary care by a sophisticated consumer. These antecedents consist of “a sufficient level of ‘motivation’ for care, and an adequate ‘ability’ to be careful.”²⁷ Any negative or positive impacts on these two antecedents will be likely to affect the efficiency of source identification in consumers’ mental process.

A. Education

The consumer behavior model characterizes education, along with intelligence, and age, as the “hardware” aspect of cognition, which is directly related to a person’s capacity to exercise consumer care.²⁸ Like computer hardware, education can serve

24. May Fourth Movement’s Snowball Effect Towards The Demise of Confucianism, THE ILLUSTRATED ENCYCLOPEDIA OF CONFUCIANISM, <https://sites.google.com/a/stonybrook.edu/group23mmp/confucianism-s-place-in-modern-china/may-fourth-movement> (last visited Sept. 30, 2014).

25. John Giles et al., *The Great Proletarian Cultural Revolution, Disruptions to Education, and Returns to Schooling in Urban China 2* (The World Bank, Working Paper No. 4729), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4729>.

26. See Joy Lam, *China’s Revival of Confucianism*, U. SOUTHERN CALIFORNIA, <http://china.usc.edu/ShowArticle.aspx>

?articleID=1179&AspxAutoDetectCookieSupport=1 (last visited Nov. 8, 2014) (emphasizing that this revival is not simply a reimplementations of the Confucian traditions but a process of reinventing the meaning of Confucianism in contemporary era).

27. Lee, *supra* note 5, at 577.

28. *Id.* at 599 (explaining that “greater educational attainment is shown to advance intelligence by improving processing strategies, problem-solving skills, and the ability to parse and apprehend complex information”).

as a determining factor for ability or processing power a consumer can bring to a purchase situation.²⁹ Education level within Chinese consumers can be separated into two distinct categories, general literacy level and English language literacy level.

China has an illiterate population of 114 million people, mainly distributed in poor, remote, or minority regions.³⁰ However, the numerical rate of literacy does not fully reflect the deficiencies of the education system throughout much of the nation. Due to the lack of public educational funding in rural areas, in 2002 alone, there were 1.1 million children in those areas unable to attend primary school.³¹ Such low enrollment and quality of schooling offered in many rural areas consequently results in fewer opportunities to pursue higher education.³²

As a result, rural consumer groups have a low ability for self-protection and product recognition.³³ Many defective and counterfeit products are sold in rural areas, especially for products necessary to everyday life such as home appliances, expired food and beverages, medicine, agricultural products, and chemicals of everyday use.³⁴

One additional factor that adds to the complexity of analyzing consumer care in rural China is price differences between two products. In the consumer behavior model, price positively correlates with the level of care in the context of risk-taking.³⁵ However, as to rural Chinese consumers, the financial burden of certain genuine products may be too much to afford, leaving them no other option but to act against their better judgment.³⁶

29. *Id.*

30. *China has an illiterate population of 114 million*, PEOPLE.COM.CN, http://english.people.com.cn/200609/16/eng20060916_303457.html (last visited Oct. 1, 2014).

31. Teng Margaret Fu, *Unequal Primary Education Opportunities in Rural and Urban China*, CHINA PERSPECTIVES 60 (July-Aug. 2005), <http://chinaperspectives.revues.org/500>.

32. *Id.* (providing, for example, that the proportion of new student body from rural areas admitted by Qinghua University was 20% in 1998 and 17.6% in 2000); *see also* Cai Hanyun, *A day in the life of a teacher in rural China*, CNN.COM, <http://www.cnn.com/2013/12/17/opinion/china-education-teacher/> (last updated Dec. 17, 2013).

33. *Poor quality and fake goods a fact of life in China's countryside*, WANTCHINATIMES.COM, <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20140202000022&cid=1103> (last visited Feb. 7, 2014).

34. *Id.*

35. Lee, *supra* note 5, at 604 (reasoning that “higher prices generally are thought to heighten perceptions of financial risk for most consumers”).

36. *Poor quality and fake goods a fact of life in China's countryside*, *supra* note 33.

Another aspect, more applicable to American or other English speaking countries' companies, is the English language literacy in China. The majority of the mainland Chinese population does not understand English.³⁷ The largest group of English learners inside China is white collar individuals, utilizing English fluency as a tool to help with their career promotion.³⁸ As to the majority, English word trademarks are insignificant; rather, it is the packaging, color, and patterns of the product that has a more significant impact on consumers.³⁹

One case showing this phenomenon is *Italian Ferrero S.P.A. v. Mengtesha (Zhangjiagang) Foodstuff Co.*⁴⁰ In *Italian Ferrero*, Ferrero, an Italian Corporation, sued the Mengtesha Foodstuff Co. in the Tianjin No.2 Intermediate People's Court for unfair competition.⁴¹ In 1986, Ferrero was granted the trademark registration of "FERRERO ROCHER" for selling its chocolate in China.⁴² The package and trade dress used for the Ferrero Rocher chocolate were that each piece of ball-shaped chocolate was wrapped with a piece of golden paper with an oval label on which the mark "Ferrero Rocher" was printed.⁴³ Since that time, the Mengtesha Foodstuff Co., a Chinese corporation, has used similar packaging and trade dress as that of Ferrero with the exception that the mark "Tresor Dore" was used. Even though the Ferrero mark was phonetically different from the mark that Mengtesha used, the purchasing public was less likely to detect this difference due to the lack of English literacy.

Many multinational companies strategically translate or transliterate their English trademarks into Chinese counterparts.⁴⁴ Because the majority of Chinese consumers do not speak or recognize English, the Chinese version becomes

37. Joff Wild, *The Truth about Trademarks in China*, WORLD TRADEMARK REVIEW 54, (Jan. - Feb. 2007), <http://www.worldtrademarkreview.com/Magazine/Issue/05/Roundtable/The-truth-about-trademarks-in-China>.

38. David Kedwards, *Doing Business in China*, BBC NEWS (Nov. 4, 2012), <http://www.bbc.co.uk/news/business-20080927>.

39. See Wild, *supra* note 37; see also Wee Loon Ng-Loy, An Interdisciplinary Perspective on the Likelihood of Confusion: Consumer Psychology and Trademarks in an Asian Society, THE TRADEMARK REPORTER 98 Trademark Rep. 950, 960 (2008) (explaining similar phenomenon in Singapore).

40. China Patent Agent (H.K.) Ltd., *100 High-Profile Cases in China (Case Briefs)*, 148 (Wang et al eds. 2009), <http://www.cpahkltd.com/en/info.aspx?n=20100723095624583721> (last visited Oct. 1, 2014).

41. *Id.*

42. *Id.* at 149.

43. *Id.*

44. Wild, *supra* note 37, at 54 (discussing that it is a good market strategy to adopt a suitable Chinese version of a foreign trademark).

more important for brand awareness.⁴⁵ However, it may not be enough to stop Chinese infringers.

In 1997, an international beverage company, Coca-Cola Co., filed a lawsuit against a can manufacturer in Zhejiang Province for using the Chinese words “Ke Le (可口)” to market their can products in China.⁴⁶ “Ke Le (可口)” is the transliteration of “Cola” and the second element of Coca-Cola’s famous mark. Fortunately, the company was able to stop the Chinese factory from using “Ke Le” as a mark for their can products because it would mislead consumers into associating the unauthorized cans with the Coca-Cola Corporation.⁴⁷

These cases represent a common problem, derived from Chinese consumers’ insensitivity and illiteracy towards English words. Thus, both general literacy and English literacy contributed to the complexity when determining trademark infringement.

B. Age

Courts in the United States have frequently assumed a positive correlation between age and consumer care.⁴⁸ The consumer behavior model has focused on the transition and differences between children and adults.⁴⁹ Among Chinese consumers, “age” may have some unique implications beyond the two general age categories: adult and child. In the past century, China’s social and economic environment has dramatically changed and developed. Such rapid changes resulted in different characteristics of each age group in the Chinese society.⁵⁰

The Chinese economy was nearly bankrupt during the Chinese Civil War, ended in 1949.⁵¹ Subsequently, it was

45. *See id.* (discussing that foreign companies who failed to recognize the importance of the complementary Chinese trademarks of their English marks will give the opportunities for Chinese hijackers to register the Chinese trademark of their English-language Brand).

46. Jessica C. Wong, *The Challenges Multinational Corporations Face in Protecting Their Well-Known Trademarks in China*, 31 *BROOK. J. INT’L L.* 937, 952 (2006).

47. *Id.* (citing Alisa Cahan, *China’s Protection of Famous and Well-Known Marks: The Impact of China’s Latest Trademark Law Reform on Infringement and Remedies*, 12 *CARDOZO J. INT’L & COMP. L.* 219, 222 (2004)).

48. *See Lee, supra* note 5, at 633-34 (explaining that older consumers are generally thought to be sophisticated, while younger consumers are conceived as relatively careless).

49. *See id.* at 633-36 (examining some of the age cases and their sustainability under the consumer behavior model).

50. Guo, *supra* note 12, at 6 (explaining that China’s economic development has been interrupted on a number of separate occasions).

51. *Id.*

seriously damaged by both the Great Leap Forward (1958-1960) and the Cultural Revolution (1966-76) movement until the late 1970s.⁵² Since 1978, the Chinese government began the gradual transformation of its centrally planned model to market-oriented western model.⁵³ Due to the various economic and social changes in the past decades, each age group exhibits unique attitudes and values towards consumption activities.⁵⁴

Chinese consumers can be divided into nine distinct age groups.⁵⁵ From a high-level perspective, the older generation generally maintains “traditional” spending habits, and the younger generation is becoming more westernized and quality conscious.⁵⁶ For example, the longtime struggle with poverty makes the “frugal retired” (born before 1960s) more sensitive and spending conscious towards changes in consumer goods prices.⁵⁷ Under the consumer behavior model, this type of consumers may be more motivated to exercise consumer care than other age groups. However, this age group has also been deprived of education due to the abolishment of the education system during the Cultural Revolution.⁵⁸ In comparison, the “thirties” (born after 1980) save less and spend more on entertainment.⁵⁹ Unlike the “frugal retired,” most of the “thirties” are well educated and westernized.⁶⁰ Thus, they are likely to possess an adequate ability to exercise consumer care. This unique aspect of Chinese society development may have an inverse effect from that which is expected when considering consumer age. Because of fast economic development and social reform, the “age” factor presents a unique consideration during trademark infringement, which deserves special attention.

C. Social Motivation – Guanxi and Face-Saving

A consumer’s level of involvement with a product or an action is determined by the degree to which the particular

52. *Id.*

53. *Id.*

54. Yujun Qiu, *Understanding Chinese Consumers*, CHINA BUSINESS REVIEW (July 1, 2011), <http://www.chinabusinessreview.com/understanding-chinese-consumers>.

55. *Id.*

56. *Id.*

57. *See id.*

58. *See* Giles, *supra* note 25.

59. Qiu, *supra* note 53 (noting “[t]hese individuals will become the most important consumers in the next decade”).

60. *Id.*

consumer perceives that concept to be personally relevant.⁶¹ Under the consumer behavior model, highly involved consumers are very motivated to exercise consumer care during the source identification process.⁶² One type of involvement is directly related to the perceived risk of purchasing a particular product.⁶³ In other words, if a consumer perceives a social risk (i.e. buying a low-quality gift for loved ones) or physical risk (i.e. buying the wrong corrective lenses) during a purchasing activity, a higher degree of involvement will be executed.⁶⁴

As one of the determining factors for increasing motivation to exercise a higher level of consumer care, social risk relating to a purchase is very important.⁶⁵ When it comes to Chinese consumers as a whole, the social risk particularly related to gift-giving is extremely high. Throughout the history, the gift-giving custom plays an essential role in building an individual's Chinese social network.⁶⁶ This particular Chinese social network, referred to as *guanxi* (关系), largely depends on gift-giving activities.⁶⁷

Guanxi, meaning personal connections, is understood and utilized by all Chinese people.⁶⁸ These personal connections are one of the most valuable assets in both personal and business relationships.⁶⁹ The concept of *Guanxi* has been defined as "very personal interactions with other people and always involves a reciprocal obligation."⁷⁰ Often, this "reciprocal obligation" can be

61. Richard L. Celsi & Jerry C. Olson, *The Role of Involvement in Attention and Comprehension Processes*, 15 J. CONSUMER RES. 210, 211 (1988).

62. Lee, *supra* note 5, at 590–91 (identifying two different types of involvements, enduring involvement and situational involvement).

63. *Id.* at 591.

64. *See id.* at 591-92.

65. *See id.* at 592-93.

66. *See* Sean Upton-McLaughlin, *The Art of Giving Gifts in China*, CHINA CULTURE CORNER (Oct. 30, 2013, 2:40 PM), <http://chinaculturecorner.com/2013/10/30/giving-gifts-in-china/>.

67. *See* Ruprecht Simon & Schmid Denise, *Recommendations for western managers and companies entering the Chinese market*, INSIGHT CHINA 2 (Jun., 2002). <http://www.chiricogroup.com/docs/China%20Guanxi.pdf> (explaining that gift-giving in *guanxi* relationship is more complex than simple holiday, birthday, and other personal events).

68. *See id.* at 8–9 (explaining that a fundamental distinction between Chinese and westerners is that in the Chinese culture it is people that decide and not rules is absolutely critical).

69. *See id.* at 9 (noting that "whereas in the West a successful business person is spoken of as 'wealthy', in the Chinese context he or she is described as well connected").

70. Jan-Åke Törnroos, *Nokia Mobile Phones & the Chinese Market – Managing Culturally Based Strategic Nets*, ECONBIZ (July 11, 2002), <http://www.econbiz.de/Record/nokia-mobile-phones-the-chinese-market-managing-culturally-based-strategic-nets-t%C3%B6rnroos-jan-%C3%A5ke/10001709232> (citing T.K.P. Leung et al., *A Study of*

interpreted as a requirement to exchange favors.⁷¹ For example, if Person A has provided certain assistance in building Person B's business, it is expected that B will repay a favor to A in the future or has done so in the past; though the favor might not be exactly the same in terms of kind or value.⁷²

A distinctive characteristic of *guanxi* is its individual-based relationship, limited only to a relationship between two individuals.⁷³ To strengthen and broaden *guanxi*, the custom of gift-giving in Chinese culture has become well developed.⁷⁴ This can be traced back to the imperial court.⁷⁵ Commonly, the party with a lower hierarchical rank in the *guanxi* can strengthen their position by giving gifts to the other party with higher rank.⁷⁶ Thus, consumers who are gift givers in the context of *guanxi* will be likely to conduct a higher level of consumer care while purchasing particular goods. Under the consumer behavior model, "if a consumer judges that harm will come to her social standing if the wrong product is chosen, then social risk is said to be high."⁷⁷

Guanxi as the primary social network sets a strong incentive for Chinese consumers to take a strong care in source identification. In 2012, Chinese shoppers became the largest group of luxury shoppers in the world, accounting for 25% of global revenue for luxury retailers.⁷⁸ One of the reasons for this higher percentage of share in luxury goods purchases abroad is to buy "genuine" goods.⁷⁹ Because the gift-giving in China is to

Hong Kong Businessmen's Perceptions of "Guanxi" in the People's Republic of China, 15 J. BUS. ETHICS 749, 749 (1996).

71. See Fang Yang, *The Importance of Guanxi to Multinational Companies in China*, 7 ASIAN SOCIAL SCIENCE 163, 163-64 (2011).

72. See *id.* at 164.

73. See *id.*; see also Simon, *supra* note 66, at 10-11 (introducing that the *guanxi* network can be built not only through primary connections, such as family, but also through common connections, such as friends, colleagues, neighbors).

74. Cf. Tang, *supra* note 17 (explaining that maintenance of relationships is historically the foundation of Chinese culture).

75. *Id.*

76. *Id.*

77. Lee, *supra* note 5, at 592-93.

78. 7 Reasons Why Chinese Luxury Consumers Prefer to Buy Abroad, ALBATROSS GLOBAL SOLUTIONS, <http://www.albatrossasia.com/en-7-reasons-why-chinese-luxury-consumers-prefer-to-buy-abroad/> (last visited Oct. 2, 2014).

79. *Id.* (Citing seven reasons for the increasing share of Chinese tourists in luxury shopping abroad).

advance interests and social standing, a mistaken product or a counterfeit as gift would result in a substantial social risk.⁸⁰

As with *guanxi*, another social risk serving as a motivational factor is face saving. It relates directly to the example given in the consumer behavior model article.⁸¹ For instance, if a teenage girl buys sunglasses that are long out of style, she probably perceives the purchase as harm to her social standing.⁸² A distinct characteristic in analyzing social risk is that whether the consumer's risk perceptions are objectively correct is irrelevant.⁸³

The word "face" here is a literal translation of Chinese word "面子", meaning one's dignity.⁸⁴ Maintaining one's face is fundamental to securing "harmony", a core teaching of Confucianism.⁸⁵ The face saving culture has permeated into all walks of Chinese society.⁸⁶ For instance, someone could lose face if they feel that they have given a wrong or silly answer in a meeting.⁸⁷ It also gives the answer to the difference in classroom teaching dynamics, where western students have more interaction with their teachers than their Chinese counterparts.

Because Chinese culture greatly values "face", Chinese consumers will give additional care in source identification if purchasing wrong products may make them lose face.⁸⁸ For example, when gift-purchasing for important friends and family during Chinese New Year, consumers generally buy gifts that are of appropriate value for the receiver and pay particular attention

80. Kathrin Hamm, *Effects of Counterfeiting on the Image of Luxury Brands in China*, http://www.frankfurt-school.de/dms/ecbc/cbr/business-strategy-competition/Effects-of-counterfeiting-CBR2009_004_Hamm_Effects_counterfeiting/ (last visited Oct. 2, 2014) (explaining that the concept of reciprocity ads to the gift exchange since the favor of a gift should be returned by an even bigger gift).

81. Lee, *supra* note 5, at 592-93 (explaining that "if a consumer judges that harm will come to her social standing if the wrong product is chosen, then social risk is said to be high").

82. *Id.* at 593.

83. *Id.* at 592.

84. Geert Hofstede & Michael Harris Bond, *The Confucius Connection: From Cultural Roots to Economic Growth*, 16 ORGANIZATIONAL DYNAMICS 4, at 8 (1988) (explaining that "face" was used in various situations related to one's dignity, such as paying respect to someone else called "giving face", feeling respected call "having face").

85. *Id.*

86. INT'L HERALD TRIB., *Saving face in China*, N.Y. TIMES, (Dec. 13, 2010) http://www.nytimes.com/2010/12/14/business/global/14iht-busnav14.html?_r=0 (An excerpt from a series of iPhone application created by the international Herald Tribune to explain the culture and etiquette of major business centers.).

87. *Id.*

88. Qiu, *supra* note 54.

to product packaging.⁸⁹ Even if the consumers cannot afford a higher quality gift, they will buy the product with the nicest packaging within their price range.⁹⁰

D. *Limited Opportunities*

The high perceived risk associated with social harm is not a guarantee with a high level of consumer sophistication. Under the consumer behavior model, a highly motivated consumer may still render poor consumer care if there are significant constraints on opportunity for care.⁹¹ In *Karen J. Connelly, S.Y.K., LLC v. ValueVision Media, Inc.*, the court held that the consumer is not sophisticated based on the understanding of the “nature of home shopping, where consumers do not actually inspect items prior to purchase.”⁹²

Consumers may also have limited opportunities to compare information about the junior and senior trademarks if the local retail distribution is inhibited.⁹³ As a result, shoppers’ opportunity to exercise care is substantially reduced, when making the source identification judgment.⁹⁴

Due to the vast geographic area and complex distribution channel, it is a significant challenge to distribute the right amount of products or goods in China.⁹⁵ The physical accessibility of foreign imports is limited primarily to major urban centers of the coastal province.⁹⁶ In contrast, most suburbs in the interior and rural areas rely on local distribution centers.⁹⁷ In the case of counterfeits, the consumers who lack knowledge or opportunity to learn will not be able to distinguish

89. *Id.*

90. *Id.*

91. Lee, *supra* note 5, at 606.

92. *Id.* (citing *Karen J. Connelly, S.Y.K., LLC v. ValueVision Media, Inc.*, 2004 WL 2569494, at*7 (D. Minn. Nov.9, 2004)).

93. *Id.* at 597 (explaining that if the local retailer offers for sale only the junior trademark, shoppers are inhibited in their opportunities).

94. *Id.*

95. J.L. Zaichkowsky, *The Psychology Behind Trademark Infringement and Counterfeiting*, 229-230 (2006).

96. *Id.* at 229. *See also* Daniel C.K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U. L. QUARTERLY 1, at 17 (listing five major wholesale distribution centers, including Hanzhen Street in Wuhan City, Hubei Province, Linyi Market in Linyi, Shandong Province, Nansantiao Market in Shijiazhuang, Hebei Province, China Small Commodities City in Yiwu City, Zhejiang Province, and Wuai Market in Shenyang, Liaoning Province).

97. *Id.*

the knockoffs from the genuine products.⁹⁸ Similarly, if the retailers in those suburban and rural areas only offer for sale the junior mark, shoppers are inhibited in their opportunity to compare it with the senior mark.

In *Beijing Xiushui Street Garments Market Co., Ltd. v. French Chanel et al.*, French Chanel sued, in the Beijing No. 2 Intermediate People's Court, Huang Shanwang for infringement of its registered trademark right, alleging that the Beijing Xiushui Street Garments Market was jointly and severally liable.⁹⁹ French Chanel won the case.¹⁰⁰ Despite the optimism that ensued following this ruling, the sale of counterfeits in rural markets remains a difficult problem to tackle, particularly when fines issued are not considered substantial.¹⁰¹

E. *Luxury and Brand Shopping During the Rapid Economic Growth*

Another unique aspect associated with Chinese consumers is the significant growth of enduring involvement. Enduring involvement, proposed in the consumer behavior model, is that a consumer has a vested interest in the product itself by way of a hobby, an occupation, or some other enduring interest.¹⁰² The U.S. courts presume avid hobbyists to exercise a high degree of care in distinguishing trademarks of a given product that falls within their areas of interests.¹⁰³

The concept of enduring involvement can be adapted to the more recent phenomenon of luxury consumption due to the fast economic growth in China. Since opening up to foreign trade, capital investment, and implementing free market reforms in 1979, China's economy has been one of the fastest growing economies in the world, with an annual gross domestic product

98. *Id.* at 229-230.

99. CHINA PATENT AGENT (H.K.) LTD., 100 HIGH-PROFILE CASES IN CHINA (CASE BRIEFS) at 295 (Wang et al eds. 2009) (discussing Chanel jointly filed suit along with four other major luxury brand owners: Gucci, Prada, Burberry, and Chanel).

100. *Id.*

101. Tricia M. Brauer, You say, “普拉达” I say, “Counterfeit”: The Perils of Civil Litigation as a Trademark Protection Strategy in China, 12 J. MARSHALL REV. INTELL. PROP. L. 262 n. 136 (2012) (citing Erica Poon, Silk Market liability ruling expected in China, MANAGING INTELLECTUAL PROPERTY, (Mar. 22, 2011), <http://www.managingip.com/Article/2791898/Silk-Market-liability-ruling-expected-in-China.html>).

102. *Id.* at 591 (giving an example that Harley Davidson customers often have high enduring involvement and consider the brand as their personal identity of sense and self).

103. *Id.* at 622 (referring to *Sunenblick v. Harrell*, 895 F.Supp. 616 (S.D.N.Y. 1995) (Holding most music purchasers are highly sophisticated in distinguishing between two very different genres of music)).

growth at the rate of 10% through 2013.¹⁰⁴ Along with recent sweeping social and economic transformation in the Chinese economy is the rise of a new powerful, largely urban, middle class with an annual income of \$16,000 to \$34,000 USD.¹⁰⁵ The pace of growth in this group is extraordinary.¹⁰⁶ By 2012 two-thirds of urban households in China were middle class.¹⁰⁷ The population of this group is larger than the entire total population of the United States today.¹⁰⁸ The defining characteristic of the Chinese middle-class consumers is that they are willing to pay a premium for quality products, and have a high level of trust in well-known brands, especially luxury goods.¹⁰⁹ Rapid increases in wealth and changing social mores that used to sanction the display of wealth in Mao's era are the driving force for luxury and brand goods consumption.¹¹⁰ The well-known and luxury brands serve as the "*de rigueur* symbols of wealth and social status."¹¹¹ Moreover, an increasing trend toward overseas travel and first-hand experience in consuming luxury goods resulted in the substantial rise in the sophistication of luxury consumers in China.¹¹²

In addition, the "age" factor, discussed in Subsection two, also contributes to this particular phenomenon. Approximately 45% of China's luxury consumers are under 35, which is 17% higher than its west European counterpart.¹¹³ Those consumers have never lived through an economic recession and have only experienced prosperity and the consistent rise of property values throughout their adult lives.¹¹⁴ This group of Chinese consumers

104. Wayne M. Morrison, *China's Economic Rise: History, Trends, Challenges, and Implications for the U.S.*, CONGRESSIONAL RESEARCH SERVICE, (Aug. 21, 2014), <http://www.fas.org/sgp/crs/row/RL33534.pdf>.

105. Dominic Barton, *Half a Billion: China's Middle-Class Consumers*, THE DIPLOMAT (May 30, 2013), <http://thediplomat.com/2013/05/half-a-billion-chinas-middle-class-consumers/>.

106. *Id.*

107. *Id.* (predicting that at the current pace, by 2022, China's middle class should number 630 millions).

108. *Id.*

109. *Id.*

110. Yuval Atsmon et al., McKinsey Consumer and Shopping Insights, *Understanding China's Growing Love for Luxury*, at 8 (2011).

111. *Id.* at 7.

112. *Id.* at 8.

113. *Id.* at 12 (adding customer awareness as a factor in contributing the growth of luxury consumption in China, and explaining "[a]s they become more familiar with luxury goods, Chinese consumers are becoming savvier about the relationship between quality and price").

114. *Id.*

expresses a growing appreciation of authentic luxury products and considers quality as an important reason to buy goods.¹¹⁵ Thus, this group of Chinese consumer possesses heightened motivation to exercise a higher level of consumer care.

IV. THESE CHINESE CONSUMERS CHARACTERISTICS AS A REFERENCE FOR EVALUATING THE RELATIVE WEIGHT OF CONSUMER SOPHISTICATION AND CARE

Long been criticized for being lax in the realm of intellectual property law, China recently revised the Trademark law on August 30, 2013 to improve the efficiency of application process, “to provide greater protection for trademark owners, and to crack down on infringers and bad faith” actors.¹¹⁶ While the Chinese government previously considered the likelihood of confusion informally, it was not required by the 2001 Trademark law.¹¹⁷ One of the key revisions in the newly revised Chinese Trademark Law is to include a likelihood of confusion analysis in determining infringement.¹¹⁸

Whether Chinese courts’ interpretation and application of this standard may differ from American courts’ analysis remains to be seen. However, the five characteristics, identified above, will contribute to the complexity of evaluating the sophistication of Chinese consumers.

A. *Rural and Urban Discrepancy Can Contribute to the Feature of a Particular Targeted Group*

During analysis of the relative significance of each factor, courts may need to assign more weight to the location of the targeted consumer group, either rural or urban. Three of the five discussed features are related to the rural and urban discrepancy, including education, limited opportunity and increasing luxury shopping in urban consumers.

115. *Id.*

116. PERRY J. VISCOUNTY ET AL., *8 Key Revisions to Chinese Trademark Law: Promising Steps Toward IP Protection*, LATHAM & WATKINS, (Oct. 16, 2013) (explaining that the law goes into effect on May 1, 2014, but the practical import of the amendments will not become clear until the courts have interpreted and implemented those rules).

117. *Id.*

118. Joseph Simone, *Analysis of China’s Revised Trademark Law*, BLOOMBERG BNA (Sep. 24, 2013), <http://www.globallawwatch.com/2013/09/analysis-chinas-revised-trademark-law/>; see Shangbiao Fa (商标法)[Trademark Law of the People’s Republic of China](promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2013, effective May 1, 2014), *available at* <http://www.wipo.int/wipolex/en/details.jsp?id=13198> (last visited Oct. 5, 2014).

Because of limited rural-urban migration and largely urban-focused development, significant rural and urban economic disparity persistently exists in China, with monthly income of urban households at 6,859 RMB (\$826 USD) and its rural counterpart at 2,366 RMB (\$285 USD).¹¹⁹ Thus, compared to rural consumers, urban consumers were more sophisticated shoppers.¹²⁰ Moreover, urban consumers are more brand-conscious and less price-conscious than rural consumers.¹²¹ With limited opportunity, rural consumers are less likely to verify the credibility of the products they purchased.¹²² Thus, because of those differences between urban and rural consumers, courts should assign a greater weight in determining the target group of a particular infringing activity.

B. *Sampling of the Relevant Target Group Has a Significant Impact on the Analysis of the Likelihood of Confusion*

One type of evidence used by litigators is the consumer survey.¹²³ A consumer survey is “a scientific method of presenting evidence of mental associations of a given group of people by asking a representative sample of the relevant target group.”¹²⁴ In other words, a consumer survey can be described as a tool used to collect a large quantity of data on the beliefs and attitudes of consumers towards certain products or goods.¹²⁵ As to Chinese consumers, conducting consumer survey to a proper group is extremely important in analyzing trademark infringement cases.

119. Tao Sun & Guohua Wu, *Consumption patterns of Chinese urban and rural consumers*, 21 J. CONSUMER MARKETING 245, 246 (2004).

120. *Id.* at 247 (explaining urban consumers were more likely to shop at well-known stores and to shop at the stores with quality customer service).

121. *Id.* at 248 (explaining that “Marketers usually invest heavily in retail advertising and in-store promotions to build brand equity” and “the lack of functional alternatives for retail outlets decreases the chances for rural consumers to be exposed to these marketing promotions”).

122. *Id.*

123. Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. PA. J. BUS. L. 1013, 1016 (2012) (reviewing sources showing that “Consumer surveys provide direct evidence about consumer perceptions that expert testimony lacks and elicit multifaceted information about perceptions that mere visual comparison does not provide”).

124. Robert C. Bird, *Streamlining Consumer Survey Analysis: An Examination of the Concept of Universe in Consumer Surveys Offered in Intellectual Property Litigation*, 88 TRADEMARK REP. 269, 270 (1998).

125. Bird, 14 U. PA. J. BUS. L. at 1015-1016.

As a collectivist group, people in China are often motivated by norms and duties in their group.¹²⁶ Face saving is positively related to collectivism in Chinese society.¹²⁷ Collectivism strongly influences the process of information search among Chinese consumers, who are more willing to accept information from their relatives and acquaintances.¹²⁸ Thus, when courts evaluate the likelihood of confusion, conducting a survey of the proper and relevant target group becomes very important in determining accuracy of the analysis. Moreover, the importance of a proper sampling of Chinese consumers is further reflected through the distinct characteristics of each age group.

V. CONCLUSION

In providing a Chinese perspective on the inquiry of confusion in trademark cases, the goal of this comment is to determine the potential factors which would influence Chinese courts' finding on the likelihood of confusion. The application of social scientists' model on the question of confusion has provided unique insight into how various Chinese cultural values affect the motivation and ability of the consumer to exercise care.

However, since the likelihood of confusion is only one factor of the multi-factors test used by the western courts, the Chinese courts may initially rely on other factors to assist them in ruling on trademark infringement cases. Moreover, an accurate determination of the degree of consumer sophistication within a target group of Chinese consumers in a case can be achieved through case-by-case analysis.

Nevertheless, bad faith does play a role in most of Chinese infringement cases, and courts may adjust weight on particular factors. As shown in the revised Trademark Law (2013), the amended Trademark law extended "bad faith" into prior relationships, in order to prevent trademark hijacking by business partners such as manufacturer or distributors.¹²⁹ In all, how Chinese courts' interpretation and application of this

126. Yan Luo, *Analysis of Culture and Buyer Behavior in Chinese Market*, *Asian Culture and History*, 1 ASIAN CULTURE AND HISTORY 25, 28 (2009), available at <http://www.ccsenet.org/journal/index.php/ach/article/viewFile/361/290> (explaining collectivism prefer to be similar with others in the group and "easily impacted by consensus or public voice, and care a lot about the other people's opinion about them").

127. *Id.* at 28 (explaining that "culture influences each step of decision making process").

128. *Id.* (explaining "collectivism refers to the extent which individuals are intergraded into groups and form their judgments based on group norms").

129. LATHAM & WATKINS, *supra* note 116, at 2.

standard may differ from other countries analysis remains to be seen.

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