European trade mark law’s search for the Yeti: does the average consumer exist, and other musings?

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The average consumer and confusion

• “I think that was an idea that they were interested in playing on; the idea of comparing apples to oranges and that oranges are different from apples.”
  – Apple v Echospin (2010)
• *Gut Springenheide* judgment of the European Court of Justice [1998] ECR I-4657

– the average consumer who is reasonably well-informed and reasonably observant and circumspect.
Appropriate?

• “The average consumer test reflects the economists’ idealistic paradigm of a rational consumer in an efficient marketplace. This notion may be useful for economists’ calculations and projections, but departs from the unpredictable realities of individual human behaviour and is hardly an appropriate standard for legislative or judicial sanctions.”
Above average confusion

• According to the Court of First Instance in *IVG v OHIM* (2007), the consumer of specialised and expensive services may be more observant than the “average consumer”

• Surely this is nonsense? All that should happen in such a case is that the court in its presumptions as to the expectations of the average consumer of those services should invest that person with more perspicacity than it would for a fast moving consumer good like toothpaste or toilet paper.
Jacob LJ in *Reed v Reed*

- Of the distinction between the average consumer and “a substantial proportion of the relevant public”:
  - “The "average consumer" is a notional individual whereas the substantial proportion test involves a statistical assessment, necessarily crude. But in the end I think they come to the same thing. For if a "substantial proportion" of the relevant consumers are [sic] likely be confused, so will the notional average consumer and vice versa. Whichever approach one uses, one is essentially doing the same thing—forming an overall ("global") assessment as to whether there is likely to be significant consumer confusion. It is essentially a value judgment to be drawn from all the circumstances. Further conceptional [sic] over-elaboration is apt to obscure this and is accordingly unhelpful. It may be observed that both approaches guard against too "nanny" a view of protection—to confuse only the careless or stupid is not enough."
Lewison LJ in *Interflora I*

- “What I find difficult to accept is that they come to the same thing. If most consumers are not confused, how can it be said that the average consumer is? I do not think that this particular paragraph of Jacob LJ's judgment is part of the ratio of the case and, with the greatest of respect, despite Jacob LJ's vast experience of such cases I question it. In some cases the result will no doubt be the same however, [sic] the question is approached; but I do not think that it is inevitable.”
  – [2012] EWCA 1501 at para.34.
Perhaps

• The judge would have done better to focus his attention on the earlier words of Jacob LJ in *Reed* in the paragraph quoted by him (para.82), where Jacob LJ referred to the test as “the ordinary consumer test”, for the word “ordinary” (or perhaps “normal”, as opposed to abnormal) is one less likely to confuse than is “average”, with its connotation of around 50%.
Ordinary vs average

- It is worth observing that in subsequent cases in which German was the language of the case, the ECJ has frequently used the word “durchschnittlich” to qualify “informierten” (informed), “aufmerksam” (observant) and “verstaendigen” (circumspect) as well as using the word in the notional construct “die Durchschnittsverbraucher” (average consumer): illustrating that the same word is used in German for “average” and “reasonably”.

- See, for example, the original German-language judgments of the ECJ in *Mag Instruments*, at para.19 (... Dabei handelt es sich um die mutmaßliche Wahrnehmung eines durchschnittlich informierten, aufmerksam und verständigen Durchschnittsverbrauchers der fraglichen Waren oder Dienstleistungen) and *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* C-220/98 13 January 2000, at para.30 (Wenn auch auf den ersten Blick wenig dafür spricht, daß ein durchschnittlich informierter, aufmerksamer und verständiger Durchschnittsverbraucher erwartet, daß eine Creme, deren Bezeichnung das Wort Lifting enthält, dauerhafte Wirkung hat, so ist es doch Sache des nationalen Gerichts, unter Berücksichtigung aller maßgeblichen Gesichtspunkte zu prüfen, wie es sich im vorliegenden Fall verhält.)

- In the translations of these judgments “durchschnittlich informierten” is rendered as “reasonably well-informed” and “Durchschnittsverbraucher” as “average consumer”. In French, the equivalent of the average consumer is “le consommateur d’attention moyenne (raisonable), normalement informé et raisonnementment attentif et avisé”: there is no suggestion of average.
Schütz v Delta [2011] EWHC 1712

• The alleged infringements were cross-bottled intermediate bulk containers (IBCs) comprising the proprietor’s cage with the defendant’s bottle. The infringement issue turned on whether the Schütz mark was used in relation to either (a) just the cage or (b) the bottle and IBC as a whole. The evidence revealed two classes of people: the fillers considered that Schütz mark related only to the cage, whereas end-users of the IBCs assumed that every IBC with the Schütz name on it was an IBC manufactured as a whole by Schütz.
Briggs J at para. [98]

• “In my judgment the application of the average consumer test ... does not depend upon a vain attempt to find a notional average consumer with perceptions somewhere between those of the fillers on the one hand and the end-users on the other. The search for a statistical average is neither warranted by European jurisprudence, nor sensible in the present context. In my judgment the test requires the court to identify the relevant perception of consumers within any relevant class who are neither deficient in the requisite characteristics of being well informed, observant and circumspect, nor top performers in the demonstration of those characteristics. That is in substance what ‘average’ means.”
Interflora v Marks & Spencer [2013] EWHC 1291 at [194]-[224]

Arnold J:

• the average consumer is a “legal construct” [208];
• the average consumer provides a “benchmark” [209];
• in a case involving ordinary consumer goods and services, the Court is able to put itself into the position of the average consumer without requiring expert evidence or a consumer survey [210];
• the average consumer test is not a statistical test in the sense that if the issue is a likelihood of confusion, the court is not trying to decide whether a statistical majority of the relevant class of persons is likely to be confused [211];
• the average consumer does not embody a “single meaning rule” [213].
The average consumer and infringement: context, context, context

• Kitchin LJ
TPN 1/2014

• Use of later mark in same colour as earlier mark has been used (even though registered in back and white) is relevant factor in assessing identity/confusing similarity and whether unfair advantage has been taken.

• Evidence of use of later mark in different colour is irrelevant in the Registry.
Some other recent cases in the UK

- Sky
- Initial interest
- A fraudulent application?
- Surveying surveys
- The importance of the non-use provision
- Scrambling around
- Lush
- Betty Boop
Opposition: what the court considers

• Opposition: notional and fair use
Cf. Infringement

Where the court considers:

• actual use of the mark by plaintiff (to possibly give heightened protection) and of the sign by the defendant

PLUS notional use by the plaintiff in relation to those goods/services covered by specification in respect of which the mark has not been used.

• P: file storage, management and sharing software. D: provision of broadband services, including provision of email services
The colour green in Ireland
Nevertheless ...

- ...[W]hen a motorist travelling at speed sees a green station, at a distance at which the logo cannot be made out, and starts to make preparations to turn off into the station, he is liable to continue his manoeuvre even though he may descry the logo as he nears the station and appreciate that the petrol on sale is that of the respondents and not of BP. As [counsel for BP] put it, the antidote to the bane has not been applied and that is a customer lost. We consider that there is force in this contention.

- CA Northern Ireland in *BP v John Kelly*
In the land of the blind, the one-eyed man is king
Slip-up

- Clothing, headwear and footwear in Class 25.
- Section 5(3) detriment, unfair advantage.
Surveying surveys in the English courts
Lewison LJ in \textit{Interflora I}

- "The current practice, which Arnold J understandably followed, is to allow the evidence in unless the judge can be satisfied that it will be valueless. In my judgment that is the wrong way round. I consider that, even if the evidence is technically admissible, the judge should not let it in unless (a) satisfied that it would be valuable and (b) that the likely utility of the evidence justifies the costs involved."
The questions asked

• Q. What did you think when you saw M&S when you entered the search term ‘Interflora’?

• Q. Why do you say that?

• Q. From your memory of the search results, what, if anything, do you think the results tell you about the relationship between Interflora and M&S?
Then witness statements prepared

• “The first point to make is that the witness statements paint a rather different picture to that painted by the raw answers to the questions”, at para.10 Interflora II.

• “It is plain ... many witnesses were led by [the third] question into speculating about something they had not thought about before.”
“With the benefit of hindsight, perhaps I did not make myself clear enough in *Interflora I*. Let me say it again, but more loudly. A judge should not let in evidence of this kind unless the party seeking to call that evidence satisfies him (a) that it is likely to be of **REAL** value; and (b) that the likely value of the evidence justifies the cost.” Lewison LJ [2013] FSR 26 at para.26.
Cycling uphill

BE AWARE OF FAKES AND IMITATORS

Buyers beware: if you are looking for an authentic ASSOS product do not buy from these dubious websites:

- alibaba.com
- aooboicyling.com
- german.alibaba.com
- aliexpress.com
- CoolChange
- hotsale-cyclingoutfit.com
- belkyicyling.com
- cycling-monton.com
- marketplatz.nl
- cheapcyclingjersey.com
- cyclingmonster.com
- radprofi.nl
- tweedeland.nl
- Dongguan Whitofree
- Teambikejersey.com

Please buy only ASSOS from authorized ASSOS dealers.

ASSOS grants warranty solely on original products bought from authorized dealers.

In order to ensure the authenticity, each ASSOS product is equipped with the ASSOS WarrantyCard (see photos)
ASSOS/ASOS (Madam Justice Rose)

- Importance of revocation application.
Non-use

• 1. Is there real commercial exploitation of the mark?
  – All relevant circumstances.

• 2. No *de minimis* rule.
  – Appropriate in the economic sector concerned

• 3. Burden of proof is on the proprietor
  – Solid and objective evidence.
• Ordinary consumer would take into account that Assos has chosen not to go down the same route as [Nike and Fred Perry, from sportswear into general casual clothes].
• Assos has maintained a very focused approach in specialist stores.
• Specification limited to
  – Specialist clothing for racing cyclists and casual clothing including tracksuits, t-shirts, polo shirts, caps and jackets.
If this is not confusion, what is?

• “[Evidence showed] that people have bought Assos goods, intending to buy Assos goods but have contacted ASOS by mistake to follow up a point about the garment. This does not appear to me to show that they are confused about the origin of ASOS products or that they think there is a link between ASOS goods and Assos”.
Scrambling around: [2013] EWHC
According to Peter Smith J, on the evidence

- “Scrabble” and “Scramble”:
  - Not similar and not likely to cause confusion
Cosmetic Warriors v Amazon (2014)
Hearst v Avela (2014)

- Betty Boop
- (or is it Boop oop a doop?)
Thank you very much

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