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James W. Soong

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Definite Confusion
Over Likely Confusion

by
JAMES W. SOONG*

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Introduction

Suppose that John sells pencils under the name SCRIBBLE. John obtained a federal registration for the trademark SCRIBBLE, which protects John from others using SCRIBBLE on their products. His competitor Grant later uses the name SKRIBBLER to sell pencils. Suppose further that John thinks that by using the name SKRIBBLER on Grant’s pencils, Grant will confuse consumers who intend to buy John’s SCRIBBLE pencils. Because of the similarity in appearance and sound between SCRIBBLE and SKRIBBLER, John believes that consumers will inadvertently buy SKRIBBLER pencils when they intended to buy SCRIBBLE pencils.

Based on his belief, John might file suit against Grant under the Lanham Act to prevent Grant from using SKRIBBLER on Grant’s pencils.

1. The Lanham Trademark Act, 15 U.S.C. § 1051(a) (1988). The Lanham Act sets out procedures for federal registration of a trademark in the Principal Register. Id. §§ 1051-72. An applicant’s first step may be to file a use application. Id. Alternatively, an applicant may file an intent-to-use application. Id. § 1051(b). After receipt of the application, an examiner will decide if any of the Lanham Act’s statutory bars precludes the registration. Id. § 1052. If the statute does not bar registration, then the examiner will approve of the registration in the Official Gazette. Id. § 1063(b). The Lanham Act allows thirty days after the publication in the Official Gazette for another party to file an opposition. Id. § 1063. If the registration may damage another party, that party may file an opposition. Id. § 1092. If no one files an opposition, then either a notice of registration or a notice of allowance will be issued depending on the type of application. Id. § 1063(b). A notice of registration ensures federal protection under the Lanham Act to a successful trademark applicant. Id. § 1051(a). A notice of allowance issues for an intent-to-use applicant, who has six months to use the trademark in commerce to consummate federal protections. Id. § 1051(d). The Lanham Act requires renewal every ten years. Id. § 1059(a).

The examiner may reject the application on many grounds. Id. § 1052. When an application is rejected, an applicant can attempt to rebut the examiner’s objections to registration. Id. § 1062(b). If the rebuttal does not satisfy the examiner, the applicant may appeal to the Trademark Trial and Appeal Board. Id. § 1070. Alternatively, the applicant can avoid challenge to the examiner’s findings and alter the application according to the examiner’s demands. Id. § 1062(b).

2. See id. § 1052(d) (denying registration of trademarks that are confusingly similar to federally registered trademark).

3. See id. § 1125(a)(1) (prohibiting use of certain commercial activities likely to cause confusion). Anyone who uses a word, term, name, symbol, or device which is likely to cause confusion with another’s products or commercial activities will be liable in a civil action for damages. Id. § 1125(a)(1).

4. See, e.g., Syntex Lab., Inc. v. Norwich Pharmacal Co., 437 F.2d 566, 567 (2d Cir. 1971) (upholding a preliminary injunction where the defendant’s trademark VAGESTROL infringed plaintiff’s trademark VAGITROL).
pencils. Under the Lanham Act, John could recoup losses and prevent the diversion of his profits to Grant. If John files suit under the Lanham Act, a trial court will decide whether a likelihood of confusion exists between SCRIBBLE and SKRIBBLER pencils. If the trial court finds that no likelihood of confusion exists, the court will rule for Grant. John will then assess his chances for a successful appeal.

The Lanham Act, however, fails to address the review standard for appeals in trademark infringement suits. As a result, some circuit courts consider the likelihood of confusion inquiry a question of fact.

6. Id. § 1117. Registration is constructive notice of registrant's ownership of the trademark. Id. § 1072. A registrant may seek remedies for violations against the registrant's rights. Id. § 1116. Use of any trademark that copies or imitates a registered trademark when the use will likely cause confusion violates the Lanham Act. Id. § 1114; see also supra note 1 (delineating process to secure Lanham Act protection). The Lanham Act vests equitable power in courts to grant injunctive relief for an infringer's violations against a registrant's rights. 15 U.S.C. § 1114. In addition, the Lanham Act allows a plaintiff to recover defendant's profits, damages, and costs. Id. § 1117. To recover the defendant's profits, the plaintiff need only prove defendant's sales. Id. The court, in awarding damages, may give a plaintiff up to three times the actual amount of damages. Id. In exceptional cases, a court may award reasonable attorney's fees. Id.

In a typical infringement case, the plaintiff claims that the defendant's trademark illegally copies or resembles the plaintiff's federally registered trademark. See, e.g., ConAgra v. George A. Hormel, & Co., 990 F.2d 368, 375 (8th Cir. 1993) (plaintiff alleging that defendant's trademark HEALTH SELECTIONS infringed plaintiff's registered trademark HEALTHY CHOICE). To prevail in a trademark infringement suit, the plaintiff must show: (1) the plaintiff's mark is distinctive and (2) consumers may confuse the plaintiff's products with the defendant's. Two Pesos, Inc. v. Taco Cabana, Inc. 505 U.S. 763, 769 (1992).

7. See Two Pesos, 505 U.S. at 763 (analyzing possible infringement by using likelihood of confusion test). The likelihood of confusion test is whether similarity of trademarks is likely to deceive or confuse the public. Id. at 780 (citing New West Corp. v. NYM Co. of Cal., Inc., 595 F.2d 1194, 1201 (9th Cir. 1979)).
8. See, e.g., McGregor-Doniger, Inc. v. Drizzle, Inc., 599 F.2d 1126, 1130 (2d Cir. 1979) (affirming lower court decision that defendant's trademark DRIZZLE did not infringe plaintiff's trademark DRIZZLER).
10. See 15 U.S.C. §§ 1051-1127 (omitting provision that specifies review standard in infringement appeal). Judicial efforts to resolve the issue have not been successful. See McMonagle v. Northeast Women's Ctr., Inc., 493 U.S. 901, 904 (1989) (White, J., dissenting) (favoring Court review to settle whether likelihood of confusion is question of law, fact, or both).
11. See infra note 85 (identifying circuits that view likelihood of confusion as a
These courts defer to the trial court’s determination unless the trial court determination is clearly erroneous. Other courts consider the likelihood of confusion inquiry a question of law resting on underlying questions of fact. These courts disregard the trial court’s determination and decide the issue independently. By disagreeing on how to characterize the likelihood of confusion inquiry, courts have created conflicting appellate review standards.

The disagreement is notable because the current circuit split frustrates Congress’ goal to make uniform trademark law. Consequently, differing review standards lead to forum shopping by trademark litigants, a result Congress intended to avoid. Also, by using differing review standards, courts treat similarly situated litigants differently. Therefore, courts should adopt a consistent approach to trademark appeals, which would further congressional intent, eliminate forum shopping, and ensure that courts treat trademark litigants equally.

This article addresses the split in authority concerning the likelihood of confusion standard of review in trademark infringement cases. Part I discusses the Lanham Act and appellate review principles

question of fact).

12. See infra notes 85-89 and accompanying text (describing clearly erroneous review of likelihood of confusion in majority of circuits).

13. See infra note 100 (listing circuits that consider likelihood of confusion a question of law).

14. See infra notes 100-104 and accompanying text (describing de novo review of likelihood of confusion in minority of circuits).


18. See infra notes 97-104 and accompanying text (explaining differences between majority-rule circuits and minority-rule circuits concerning likelihood of confusion review).

19. See supra note 16 and accompanying text (discussing Lanham Act’s goal of uniformity in trademark law and forum shopping by trademark litigants).
under Federal Rule of Civil Procedure 52(a). Part II describes the circuit courts’ inconsistent approaches to categorizing the likelihood of confusion inquiry. Finally, Part III proposes an amendment to the Lanham Act that balances conflicting policy concerns and acknowledges the legal nature of the likelihood of confusion question.

I

Lanham Trademark Act and Federal Rule of Civil Procedure 52(a)

In 1946, Congress passed the Lanham Trademark Act\(^2\) to provide uniform protection to trademarks.\(^2\) The Lanham Act provides that a trademark owner may enforce her rights by filing suit in federal court.\(^2\) Federal courts, in turn, employ the Federal Rules of Civil Procedure, which prescribe appellate review standards.\(^2\)

A. The Lanham Trademark Act

One of the Lanham Act’s main goals is to indicate a product’s origin for the benefit of consumers.\(^2\) Trademarks accomplish this goal by helping consumers differentiate among similar products in the market, enabling consumers to choose the product they most desire.\(^2\) Furthermore, consumers can use trademarks to identify companies that produce unsatisfactory products.\(^2\) For example, if a product


\(^{21}\) See Dawn Donut Co. v. Hart’s Food Stores, Inc., 267 F.2d 358, 360 (2d Cir. 1959) (explaining that Lanham Act’s constructive notice provision afforded nationwide protection). One Lanham Act goal was to eliminate the geographical limits on trademark rights. ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY, PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL 153 (1990). In addition, the Lanham Act sought to expand registrants’ access to federal courts by not requiring diversity jurisdiction. Id.


\(^{23}\) See FED. R. CIV. P. 52(a) (assigning clearly erroneous review to all findings of fact).

\(^{24}\) See MILLER & DAVIS, supra note 21, at 150 (stating that trademark law protects purchasers).


injures a consumer, the product’s trademark indicates the product’s origin and thus identifies whom the consumer may file suit against for her injuries.\textsuperscript{27} Recognizing the value of trademarks to consumers, the Lanham Act prohibits a trademark’s use if it is likely to cause consumer confusion about a product’s source or ownership.\textsuperscript{28}

In addition, the Lanham Act protects an owner’s goodwill in her product or service.\textsuperscript{29} For example, a trademark owner may spend years developing a product under a certain name to secure a market for her product.\textsuperscript{30} The Lanham Act prevents others from using the same name on a similar product to profit from the trademark owner’s efforts.\textsuperscript{31} Thus, to be legally valid, trademarks must be sufficiently distinguishable from one another.\textsuperscript{32}

A federally registered trademark owner may bring a trademark infringement suit if she believes that another trademark will cause consumers to mistake the source of her goods.\textsuperscript{33} Whether the plaintiff will prevail turns on whether the defendant’s trademark will likely cause confusion about the source of the litigants’ goods.\textsuperscript{34} If the defendant’s trademark will likely cause confusion as to the source of

\begin{itemize}
\item \textsuperscript{27} See id. (stating that trademarks protect consumers in many ways).
\item \textsuperscript{28} 15 U.S.C. §§ 1114(1), 1125(a)(1). Sections 1114(1) and 1125(a)(1) of the Lanham Act both require a court to find likelihood of confusion before a defendant is liable for trademark infringement. Brett Thomas Reynolds, Comment, \textit{Appellate Review of Lanham Act Violations: Is Likelihood of Confusion a Question of Law or Fact?}, 38 SW. L.J. 743, 746 (1984). Section 1114(1) provides that a person may not use a trademark mark that resembles a federally registered trademark if it will cause consumer confusion. 15 U.S.C. § 1114(1). Section 1125(a)(1), codifying case law on unfair competition, provides that a person may not use a trademark that resembles another trademark if it will cause consumer confusion. Id. § 1125(a)(1).
\item \textsuperscript{29} See PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 200 (revised 3d ed. 1993) (stating that merchants have for centuries used trademarks as valuable symbols of merchants’ goodwill and skill).
\item \textsuperscript{30} See id. (stating importance of merchants’ goodwill in their products).
\item \textsuperscript{31} See supra note 3 and accompanying text (stating that Lanham Act prohibits trademarks that may confuse consumers).
\item \textsuperscript{32} See 15 U.S.C. § 1052(d) (prohibiting trademarks that will likely cause confusion with another trademark).
\item \textsuperscript{34} See 15 U.S.C. § 1052(d) (defendant liable if her trademark causes likely confusion with plaintiff’s trademark).
\end{itemize}
goods, the plaintiff could, for example, obtain an injunction to stop the defendant from using her trademark.\textsuperscript{35} If a trial court issues an injunction prohibiting the defendant from using her trademark, the defendant may appeal.\textsuperscript{36} If the defendant appeals, the appellate court will review the trial court findings according to the appellate court’s standard of review.\textsuperscript{37}

B. Defining the Standard of Review Under Federal Rule of Civil Procedure 52(a)

An appellate court’s standard of review depends on whether the likelihood of confusion determination is factual or legal.\textsuperscript{38} The conflict among circuit courts over the appropriate scope of review in trademark infringement cases reflects an ambiguity in basic, judicial-review principles.\textsuperscript{39} To clarify appellate judicial-review principles, courts often distinguish between questions of fact and questions of law.\textsuperscript{40} Generally, trial courts find facts and appellate courts review legal issues.\textsuperscript{41} Thus, by characterizing an issue as factual or legal, a judge allocates power between trial and appellate courts.\textsuperscript{42}

Federal Rule of Civil Procedure 52(a) distributes the responsibility for particular judicial findings between trial courts and appellate courts.\textsuperscript{43} According to Rule 52(a), appellate courts cannot

\textsuperscript{35} See, e.g., Pikle-Rite Co. v. Chicago Pickle Co., 171 F. Supp. 671, 677 (N.D. Ill. 1959) (holding that an injunction was the appropriate remedy when defendant’s trademark POL-PAK infringed plaintiff’s trademark POLKA).


\textsuperscript{37} See infra notes 85-89, 100-104 and accompanying text (explaining different circuit review standards for likelihood of confusion).

\textsuperscript{38} See infra notes 44, 51 and accompanying text (describing scope of review for questions of fact and questions of law).


\textsuperscript{40} See id. (stating that no one has defined distinction between fact and law to implicate proper review standard); see also Edward H. Cooper, Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review, 63 NOTRE DAME L. REV. 645, 647-50 (1988) (summarizing history of appellate review of judicial fact findings).

\textsuperscript{41} Martin B. Louis, Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question and Procedural Discretion, 64 N.C. L. REV. 993, 994 (1986).

\textsuperscript{42} Id.

\textsuperscript{43} See FED. R. CIV. P. 52(a) (establishing clearly erroneous standard by allowing appellate reversal of trial court’s findings of fact only if those findings are obviously incorrect). Rule 52(a) does not, however, illuminate how to distinguish fact from law. Baumgartner v. United States, 322 U.S. 665, 671 (1944).
disturb a trial judge’s findings of fact unless those findings are clearly erroneous. Yet in 1950, the Second Circuit announced that Rule 52(a)’s clearly erroneous standard would not apply to cases involving only documentary evidence and no witness testimony. According to the Second Circuit, appellate courts could find facts based on documentary evidence de novo. The Second Circuit, thus, adopted broad review power, believing that appellate judges and trial judges were equally qualified to find facts from the written record. In 1985, however, Congress amended Rule 52(a) to apply in all cases including those containing only documentary evidence. Although this amendment merely reiterated accepted law in most circuits, the amendment affirmed that reviewing courts should not usurp trial judges’ power to determine facts.

44. FED. R. CIV. P. 52(a). Courts do not have a definitive definition of clearly erroneous. See Cooper, supra note 40, at 645 (asserting that clearly erroneous has no definition). Judge Learned Hand found defining clearly erroneous to be a futile task. Id. (citing Judge Hand’s remark in United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945)). The Supreme Court has attempted to define clearly erroneous. United States v. United States Gypsum Co., 333 U.S. 364, 367 (1948). The Gypsum Court explained that a judicial finding is clearly erroneous when, although some evidence supports the finding, the entire evidence taken as a whole firmly convinces the reviewing court that the lower court erred. Id. at 395.


46. Id.; see FED. R. CIV. P. 52(a) (mandating limited review for questions of fact and thus impliedly preserving liberal review for questions of law). De novo means “anew” and “afresh.” BLACK’S LAW DICTIONARY 435 (6th ed. 1990). De novo trials have traditionally meant new adjudications independent of lower court proceedings. See id. (explaining review power of appellate courts).

47. Orvis, 180 F.2d at 539. In Orvis, the Second Circuit stated that it could reverse lower court findings in two other situations when the evidence is partly oral: (1) when written evidence casted doubt on the credibility of witnesses and (2) when the credibility of testimony is not necessary for adjudicating the case. Id.

48. See Cooper, supra note 40, at 648-649 (commenting that amendment was central to division of power between trial judges and appellate judges); 105 F.R.D. 179, 221-23 (including comments of Advisory Committee concerning Rule 52(a)).

49. Cooper, supra note 40, at 648. Rule 52(a) provides in part: “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous...” FED. R. CIV. P. 52(a). In the same year, the Supreme Court confirmed that the clearly erroneous standard of review applied to findings of both oral and documentary fact. Anderson v. Bessemer City, 470 U.S. 564 (1985). In Anderson, the Supreme Court rejected the Second Circuit’s decision in Orvis that allowed free appellate review of documentary evidence. Anderson, 470 U.S. at 574. However, Anderson did not compel clearly erroneous review for all lower court findings. Id. Instead, the Anderson Court already assumed the factual nature of the discriminatory intent inquiry before the Court
In contrast to questions of fact, Rule 52(a) mandates that questions of law warrant close appellate scrutiny.\textsuperscript{50} Under Rule 52(a), appellate courts may reverse findings of law if a trial court's legal conclusions are merely erroneous but not "clearly erroneous."\textsuperscript{51} Since appellate courts, not trial courts, declare and develop the law, appellate courts independently review questions of law.\textsuperscript{52} Appellate review, therefore, promotes justice by correcting trial court legal errors and developing the law.\textsuperscript{53}

C. Fact, Law, and Mixed Questions

Although Rule 52(a) addresses both questions of fact and questions of law, it does not address mixed questions of fact and law.\textsuperscript{54} The Supreme Court, however, has addressed mixed questions of fact and law. In 1944, the Court acknowledged two tiers of findings of fact, subsidiary and ultimate.\textsuperscript{55} The Court noted that subsidiary facts, also known as foundational facts, are evidentiary findings.\textsuperscript{56} The Court stated that ultimate facts are results that courts reach through analyzing the legal significance of subsidiary facts.\textsuperscript{57} The Court further explained that ultimate facts—conclusions a judge draws from mechanically applied Rule 52(a)'s mandate of limited review. \textit{Id.} at 573. Thus, \textit{Anderson} does not provide guidance in characterizing likelihood of confusion as legal or factual. \textit{See id.} (making no mention of Rule 52(a)'s applicability to questions of law). The Court extended trial court independence to promote judicial economy. Christie, \textit{supra} note 39, at 16.

Professor Christie also suggests that constitutional deference to jury findings may also help explain increasing deference to judges. \textit{Id.} at 16-17. Historically, that deference extended to civil cases. \textit{Id.} Since trial judges now accept fact-finding roles traditionally held by juries, trial judges have embraced historical protections against appellate court encroachment into their fact-finding duties. \textit{Id.}

\textsuperscript{50} See PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2-3 (1976) (stating that one primary goal of appellate courts is guiding the development of law).
\textsuperscript{51} FED. R. CIV. P. 52(a).
\textsuperscript{52} DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 933 (2d ed. Supp. 1992); \textit{see also} Cooper, \textit{supra} note 40, at 657 (arguing that appellate courts' main responsibility is developing law).
\textsuperscript{53} See Donald L. Horowitz, \textit{Decreeing Organizational Change: Judicial Supervision of Public Institutions}, 1983 DUKE L.J. 1265, 1273 (1983) (citing Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 319-20 (3d Cir. 1944), cert. denied, 325 U.S. 867 (1945) for the proposition that the only purpose of appellate courts is to assist the trial court in arriving at the correct result in complicated litigation).
\textsuperscript{54} FED. R. CIV. P. 52(a).
\textsuperscript{56} \textit{Id.} \textit{See also} Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954).
\textsuperscript{57} Baumgartner, 322 U.S. at 670-71.
subsidiary facts—are subject to liberal appellate review because they are legal conclusions a judge draws from evidence.\(^{58}\) By allowing de novo appellate review of ultimate facts, the Court recognized that ultimate facts were mixed questions consisting of both fact and law.\(^{59}\)

In 1982, in *Pullman-Standard v. Swint*, however, the Court expressly rejected distinctions between subsidiary and ultimate facts when applying Rule 52(a).\(^{60}\) In *Pullman-Standard*, the plaintiffs, black employees, alleged that their employer and union's seniority system violated Title VII of the Civil Rights Act.\(^{61}\) The critical issue was how courts should characterize the question of discriminatory intent in a Title VII action.\(^{62}\) The District Court found for the employer and union, holding that they did not intentionally discriminate.\(^{63}\) On appeal, the Fifth Circuit held that discriminatory intent was an ultimate fact that it could review de novo.\(^{64}\) Accordingly, the Fifth Circuit reversed the District Court, finding an intent to discriminate.\(^{65}\)

The Supreme Court granted certiorari and reversed.\(^{66}\) The Court held that labeling discriminatory intent findings as ultimate facts did not justify de novo review.\(^{67}\) The Court held that the discriminatory intent issue was entirely factual with no legal characteristics.\(^{68}\) Accordingly, it held that discriminatory intent was subject to Rule 52(a)'s clearly erroneous review.\(^{69}\)

Although *Pullman-Standard* specifically refused to acknowledge that discriminatory intent was a mixed question of fact and law, it did not generally overrule precedent supporting de novo review of mixed questions of fact and law.\(^{70}\) The *Pullman-Standard* Court thus conceded that de novo review of some legal questions based on

\(^{58}\) *Id.* The Baumgartner Court explained that some judicial inquiries, using the label "finding of fact," are inferences drawn from evidence. *Id.* Accordingly, these judicial inquiries fall within the scrutiny of appellate court powers. *Id.*

\(^{59}\) *See id.* at 677-78 (reversing lower court).


\(^{61}\) *Id.* at 275.

\(^{62}\) *Id.* at 276.

\(^{63}\) *Id.* at 275.

\(^{64}\) *Id.* at 285.

\(^{65}\) Swint v. Pullman-Standard, 624 F.2d 525, 533-34 (5th Cir. 1980).


\(^{67}\) *Id.* at 293.

\(^{68}\) *Id.*

\(^{69}\) *Id.*

\(^{70}\) *Id.*
evidentiary facts would still be appropriate if the question was truly one of both fact and law.\textsuperscript{71} The \textit{Pullman-Standard} Court, however, did not specify which conclusions based on evidentiary facts are mixed questions of fact and law.\textsuperscript{72}

The Court again tried to clarify its treatment of mixed questions of fact and law in 1984.\textsuperscript{73} The Court recognized that Rule 52(a) did not provide guidelines to distinguish facts from law.\textsuperscript{74} Overruling itself, the Court found that ultimate facts are entirely factual and thus declared that Rule 52(a)'s clearly erroneous standard applied equally to ultimate facts.\textsuperscript{75} Therefore, under current law, the clearly erroneous standard applies to ultimate facts because they do not possess a legal nature.\textsuperscript{76} This standard, however, does not foreclose de novo appellate review of a conclusion based on evidentiary findings that a court recognizes as truly a mixed question of fact and law.\textsuperscript{77}

Under current law, Rule 52(a) does not subject all trial courts' conclusions based on evidentiary findings to clearly erroneous review.\textsuperscript{78} Although the Court has rejected de novo review for ultimate facts, it has also acknowledged that certain "facts" retain a legal nature sufficient to warrant de novo review.\textsuperscript{79} The Supreme Court thus permits appellate courts to exercise their corrective and declarative roles for all questions of a legal nature.\textsuperscript{80}

\textsuperscript{71} \textit{Id.} at 286 n.16. The \textit{Pullman-Standard} Court distinguished \\textit{Baumgartner}. \textit{Id.} The \textit{Pullman-Standard} Court held that discriminatory intent was not an ultimate fact. \textit{Id.} However, it conceded that courts should apply legal review standards to ultimate facts. \textit{Id.}

\textsuperscript{72} \textit{Id.} at 273-93 (omitting reference to which conclusions based on preliminary fact-
findings Court will review de novo).


\textsuperscript{74} \textit{Id.} at 501 (citing \textit{Pullman-Standard} v. Swint, 456 U.S. 273, 288 (1982)).

\textsuperscript{75} Bose Corp., 466 U.S. at 501.

\textsuperscript{76} See \textit{id}.

\textsuperscript{77} See \textit{id.} (permitting appellate courts to correct legal errors in mixed findings of fact
and law).

\textsuperscript{78} See \textit{supra} notes 57-77 and accompanying text (summarizing case law interpreting
Rule 52(a)).

\textsuperscript{79} See Bose Corp., 466 U.S. at 501 n.17 (explaining that at some point fact becomes
less like finding based on ordinary experience, acquires legal characteristics, and requires
reviewing courts' independent judgment).

\textsuperscript{80} See Cooper, \textit{supra} note 40, at 660 (revealing framework that allocates judicial
power between trial and appellate courts). Professor Cooper states that courts formulate
review standards based on the need for review, not on the status of the question. \textit{Id}.
Therefore, review standards, he maintains, do not ultimately depend on whether the issue
is factual or legal. \textit{Id}. 
II

Current Review Standards for Trademark Infringement Suits

Findings of trademark infringement have not escaped the controversy over the proper scope of appellate review. 81 Although the Lanham Act sought uniformity in trademark law, it fails to guide a judge trying to characterize likelihood of confusion. 82 Circuit courts disagree on whether likelihood of confusion is a legal or factual inquiry. 83 Accordingly, circuit courts also split on how Rule 52(a) applies in trademark infringement appeals. 84

A majority of circuits view the likelihood of confusion inquiry as entirely factual. 85 Under this approach, the trial judge considers a variety of “confusion factors” to determine likelihood of confusion. 86

81. See, e.g., Aktiebolaget Electrolux v. Armatron Int’l, Inc. 999 F.2d 1 (1st Cir. 1993) (holding that defendant’s LEEF EETER gardening products infringed plaintiff’s trademark WEED EATER).

82. See McCARTHY, supra note 15, § 23:22 (stating that traditionally courts treated likelihood of confusion as question of fact); 15 U.S.C. §§ 1051-1127 (1976) (neglecting to provide provisions that address whether likelihood of confusion is question of fact or law).

83. See infra notes 85-113 and accompanying text (discussing inconsistent circuit approaches in reviewing likelihood of confusion).

84. See infra notes 85, 100 (dividing circuit courts into majority and minority approaches).

85. Aktiebolaget Electrolux, 999 F.2d at 3 (stating that likelihood of confusion is question of fact); Country Floors, Inc. v. Gepner, 930 F.2d 1056, 1058 (3d Cir. 1991) (stating that likelihood of confusion is question of fact); Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 458 (4th Cir. 1996) (reversing lower court because its findings of fact were clearly erroneous); Moore Business Forms, Inc. v. Ryu, 960 F.2d 486, 489 (5th Cir. 1992) (deciding likelihood of confusion is finding of fact reviewable under clearly erroneous standard); Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 912 (7th Cir. 1996) (stating that likelihood of confusion is question of fact); ConAgra, Inc. v. George A. Hormel, & Co., 990 F.2d 368, 370-71 (8th Cir. 1993) (stating that likelihood of confusion is question of fact); Murray v. Cable Nat'l Broadcasting Co., 86 F.3d 858, 860 (9th Cir. 1996) (holding likelihood of confusion should be reviewed under clearly erroneous standard); Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1355 (9th Cir. 1985) (en bane) (stating that likelihood of confusion is question of fact); Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 967 (10th Cir. 1996) (stating that likelihood of confusion is question of fact); Dieter v. B & H Indus. of Southwest Florida, Inc., 880 F.2d 322, 326 n.2 (11th Cir. 1989) (stating that likelihood of confusion is question of fact); Reader’s Digest Ass’n, Inc. v. Conservative Digest, Inc., 821 F.2d 800, 804 (D.C. Cir. 1987) (stating that likelihood of confusion is question of fact). These circuits all use Rule 52(a)’s clearly erroneous standard of review for likelihood of confusion.

86. See infra note 87 (listing factors that courts incorporate into likelihood of confusion test). Courts also refer to these preliminary findings as Polaroid factors. See Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492 (2d Cir. 1961).
The confusion factors include factual inquiries into evidence of actual consumer confusion between trademarks, similarity between trademarks, and consumer caution in differentiating trademarks. According to the majority-rule view, a confusion factor, as well as the resulting likelihood of confusion determination, is a question of fact. Thus, these reviewing courts defer to trial court findings and only reverse a trial court’s decision when its findings are clearly erroneous.

87. Id. at 495. Circuit courts, both majority and minority, consider a variety of likelihood of confusion factors. The First Circuit factors are: (1) similarity of marks; (2) similarity of goods; (3) channels of trade; (4) advertising; (5) class of prospective purchaser; (6) evidence of actual confusion; (7) appellee’s intent in adopting the mark; and (8) strength of mark. Aktiebolaget Electrolux, 999 F.2d at 3-4. The Second Circuit factors are: (1) the strength of the plaintiff’s mark; (2) similarity between the two marks; (3) relative positions of the two marks in the marketplace; (4) likelihood of bridging the gap; (5) actual evidence; (6) the bad faith of defendant; (7) the quality of defendant's product; and (8) the sophistication of the consumer group. This list does not exhaust all the court may consider in determining likelihood of confusion. Paddington Corp. v. Attiki Importers & Distrib., Inc., 996 F.2d 577, 584 (2d Cir. 1993). When a new entity arrives in a market, the already established business need only prove a possibility of confusion. Country Floors, Inc. v. Gepner, 930 F.2d 1056, 1064 (3d Cir. 1991). The Fifth Circuit factors are: (1) the strength of the trademark; (2) amount of similarity between the two contested trademarks; (3) similarity of the subject of the trademarks; (4) kind of retailers and purchasers; (5) the kind of advertising media employed; (6) the defendant’s intent; and (7) actual confusion. Moore Business Forms, Inc., 960 F.2d at 486. The Sixth Circuit factors are: (1) the strength of plaintiff’s trademark; (2) relatedness between the parties’ products; (3) similarity between the trademarks; (4) actual confusion; (5) marketing strategy; (6) degree of purchaser care; (7) defendant’s intent; and (8) likelihood of expansion of the products’ markets. Conglomerated Hosts, Ltd. v. Jepco, Inc., 1992 U.S. App. LEXIS 1672, at *11 (6th Cir. Feb. 5, 1992) (“not recommended for full-text publication”). The Seventh Circuit factors are: (1) similarity of appearance and suggestion between the trademarks; (2) similarity between the subjects of the trademarks; (3) nature of the concurrent use of the trademarks; (4) consumer care; (5) strength of plaintiff’s trademark; (6) actual confusion; and (7) defendant’s intent. Smith Fiberglass Prods., Inc. v. Ameron, Inc., 7 F.3d 1327, 1329 (7th Cir. 1993). The Ninth Circuit factors are: (1) strength of the mark; (2) proximity of the goods; (3) resemblance of the marks; (4) actual confusion; (5) marketing strategies; (6) consumer care in light of product type; (7) defendant’s intent in choosing the mark; and (8) probability of product expansion. Official Airlines Guides, Inc. v. Goss, 6 F.3d 1385, 1391 (9th Cir. 1993). The Eleventh Circuit factors are: (1) type of mark; (2) similarity of mark; (3) similarity of products; (4) similarities between the plaintiff’s and defendant’s retail outlets and customers; (5) similarity of advertisements; (6) defendant’s intent in adopting the trademark or tradename; and (7) actual confusion. Dieter, 880 F.2d at 322.

88. See supra note 85 (listing majority of circuits that employ clearly erroneous review).

89. See Fed. R. Civ. P. 52(a) (requiring clearly erroneous review for all findings of fact).
According to the majority-rule circuits, clearly erroneous review of likelihood of confusion determinations preserves the prestige of trial judges by immunizing their decisions from reversal. Such limited review also purportedly discourages appeals, helping to conserve scarce judicial resources. For example, trademark litigants will less frequently appeal trial court likelihood of confusion determinations if the probability for reversal is slim.

Moreover, trial judges have more exposure to live testimony than appellate court judges. Trial court judges are, thus, amply qualified to hear consumer or expert witness testimony about the confusion factors. Accordingly, trial judges' experience gives them special expertise in determining witness credibility regarding the confusion factors. Therefore, these majority-rule circuits, by using the clearly erroneous standard, indicate that trial judges may be able to weigh the evidence of likelihood of confusion better than appellate judges.

Despite the policies that support limited review, not all circuits agree that likelihood of confusion is a question of fact. Even the minority circuits will not disturb a trial judge's findings regarding each confusion factor unless those findings are clearly erroneous. Minor


As a related matter, some critics feel that by limiting avenues for appeals, litigants will not view trial as merely a warm-up for an appeal. JAMES ET AL., supra, at 670. If litigants view their trial court proceedings as potentially final, they may be more adamant in their advocacy. Id. This rigor is consistent with the ideals of the adversarial system. See id. (arguing that litigants without opportunity to appeal will focus their energies on trial court).

92. See Weiner, supra note 91, at 1039-41 (stating that the value of limited review depends on inhibiting appeals).
93. JAMES, supra note 91, at 669-70.
94. Id. at 669.
96. JAMES ET AL., supra note 91, at 669 (acknowledging that trial judges can better assess oral testimony and witness credibility than appellate judges).
97. See infra note 100 (listing circuits that deny that likelihood of confusion is a question of fact).
98. MCCARTHY, supra note 15, § 23:22 [2][c]; Inwood Lab., Inc v. Ives Lab., Inc., 465 U.S. 844, 845 (1982). The Ives Court announced that a reviewing court cannot reverse a trial court finding merely because the reviewing court might give the facts another interpretation. Id. (citing United States v. National Ass'n of Real Estate Bds., 339 U.S. 485,
disagreement with the trial judge over the confusion factors, thus, will not justify appellate reversal. 99 Both the majority-rule circuits and the minority-rule circuits, therefore, follow the same rule for factual, underlying findings.

The minority-rule circuits, however, differ with the majority-rule circuits because they view the overall likelihood of confusion determination as a legal question. 100 These minority circuits will reverse lower courts' ultimate determinations when they find that the underlying facts found at trial mandate a different likelihood of confusion decision. 101 This approach to the likelihood of confusion inquiry acknowledges the inquiry's factual and legal aspects. 102 For the minority-rule circuits, likelihood of confusion is a mixed question of both fact and law. 103 Consequently, these circuits permit de novo

495 (1950)).

99. See, e.g., McGregor-Doniger, Inc. v. Drizzle, Inc., 599 F.2d 1126, 1135 (2d Cir. 1979) (applying clearly erroneous standard to actual confusion factor because it is question of fact).

100. See, e.g., Opryland USA Inc. v. The Great Am. Music Show, Inc., 970 F.2d 847, 851 (Fed. Cir. 1992) (treating likelihood of confusion as question of law); Kellogg Co. v. Pack'Em Enters., Inc., 951 F.2d 330, 332 (Fed. Cir. 1991) (granting judgment as matter of law in likelihood of confusion issue); Cadbury Beverages, Inc. v. Cott Corp., 73 F.3d 474, 478 (2d Cir. 1996) (stating that a lower court's balancing of Polaroid factors is subject to de novo review); Murphy v. Provident Mutual Life Ins. Co. of Philadelphia, 923 F.2d 923, 928 (2d Cir. 1990) (treating likelihood of confusion as question of law); Universal City Studios, Inc. v. Nintendo Co., Ltd., 746 F.2d 112 (2d Cir. 1984) (stating that summary judgment is appropriate in trademark infringement suits when no questions of fact remain); Holiday Inns, Inc. v. 800 Reservation, Inc., 86 F.3d 619, 622 (6th Cir. 1996) (declaring that whether foundational factors establish likelihood of confusion is question of law); Wynn Oil Co. v. American Way Serv. Corp., 943 F.2d 595, 599 (6th Cir. 1991) (treating likelihood of confusion as question of law).

101. See, e.g., Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ. Co., 886 F.2d 490, 496 (2d Cir. 1989) (reversing district court's grant of preliminary injunction, finding a strong likelihood of confusion was in error); Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1185 (6th Cir. 1988) (reversing district court's finding of no likelihood of confusion); In re Four Seasons Hotels, Ltd., 987 F.2d 1565, 1567 (Fed. Cir. 1993) (reversing finding of likelihood of confusion in registration application).


review of likelihood of confusion determinations.\textsuperscript{104}

De novo review of likelihood of confusion determinations furthers justice. Some trial judges will have inadequate knowledge of trademark law. Consequently, appellate review of likelihood of confusion decisions safeguards litigants from uninformed trial judges and their incorrect rulings.\textsuperscript{105} In addition, judges must accurately analyze consumer confusion surveys, compelling evidence in trademark infringement cases, to fairly adjudicate likelihood of confusion cases.\textsuperscript{106} Appellate court judges have more experience in reading documentary evidence than trial court judges.\textsuperscript{107} Accordingly, by allowing de novo review of likelihood of confusion, courts recognize the importance of likelihood of confusion surveys at trial and appellate judges' superiority in assessing them.\textsuperscript{108} Furthermore, because of the Supreme Court's limited capacity to hear appeals, circuit courts now serve as courts of last resort in many trademark infringement disputes.\textsuperscript{109} Consequently, liberal involvement by numerous circuit judges in likelihood of confusion appeals helps guarantee justice by ensuring meaningful, thorough appellate review.\textsuperscript{110}

Thus, by following conflicting policy approaches, the circuit courts are split over the proper scope of appellate review in trademark infringement cases.\textsuperscript{111} Both majority and minority-rule circuits follow

\textsuperscript{104} See, e.g., Sterling Drug, Inc. v. Bayer Inc., 14 F.3d 733, 742 (2d Cir. 1994) (using district court's findings on likelihood of confusion factors to judge whether they establish likelihood of confusion); In re Shell Oil Co., 992 F.2d 1204, 1209 (Fed. Cir. 1993) (considering all factors to find likelihood of confusion).

However, the Ninth Circuit acknowledges the legal and factual aspects of the likelihood of confusion question. See Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1355 (9th Cir. 1985) (en banc) (conceding legal and factual nature of likelihood of confusion inquiry). Nevertheless, the Ninth Circuit reviews trial court findings on a clearly erroneous basis. Id.; Official Airline Guides, Inc. v. Goss, 6 F.3d 1385, 1395 (9th Cir. 1993).

\textsuperscript{105} See Cooper, supra note 40, at 655-56; JAMES ET AL., supra note 91, at 670.

\textsuperscript{106} See MCCARTHY, supra note 15, § 23:2 (stating that properly conducted surveys are crucial in likelihood of confusion cases).

\textsuperscript{107} JAMES ET AL., supra note 91, at 670.

\textsuperscript{108} See CARRINGTON ET AL., supra note 50, at 2 (stating that appeals limit negative consequences of basic decisionmakers' shortcomings). See Louis, supra note 47, at 1015-16 & n.160 (revealing that appellate courts more carefully scrutinize certain notorious trial judges' decisions than others' decisions).

\textsuperscript{109} CARRINGTON ET AL., supra note 50, at 201 (discussing en banc procedures).

\textsuperscript{110} See Louis, supra note 41, at 1014 (praising appellate panels as a system of checks and balances).

\textsuperscript{111} Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033, 1043 (2d Cir.
the same approach to underlying confusion factors. However, the circuits differ over what review to grant likelihood of confusion determinations.

This circuit court split frustrates the Lanham Act’s goal of providing uniformity in trademark law. Given the availability of differing review standards, trademark litigants will often forum shop to obtain procedural advantages that prevent just and equal applications of the law across the nation. Trademark litigants also face uncertainty because a circuit may simply decide to change its

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112. See, e.g., King v. Innovation Books, 976 F.2d 824, 828 (2d Cir. 1992) (stating that findings of fact are subject to clearly erroneous standard of review); Little Caesar Enters., Inc. v. Pizza Caesar, Inc., 834 F.2d 568, 572 (6th Cir. 1987) (citing Carson v. Here’s Johnny Portable Toilets, Inc., 693 F.2d 831, 833 (6th Cir. 1983) for the proposition that clearly erroneous review applies to likelihood of confusion factors).

All other circuit jurisdictions review the likelihood of confusion issue on a clearly erroneous basis. See, e.g., Smith Fiberglass Prods., Inc. v. Ameron, Inc., 7 F.3d 1327, 1329 (7th Cir. 1993) (reviewing likelihood of confusion as factual finding under clearly erroneous standard); International Jensen Inc. v. Metro Sound U.S.A., Inc, 4 F.3d 819, 822, 825 (9th Cir. 1993) (reviewing likelihood of confusion as factual finding under clearly erroneous standard); Blue Bell Bio-Medical v. Cin-Bad, Inc., 864 F.2d 1253, 1259 (5th Cir. 1989) (declaring that likelihood of confusion is reversible only if clearly erroneous).

113. See supra notes 100-104 and accompanying text (explaining that circuit conflict focuses on final likelihood of confusion determination).

114. See supra note 16 and accompanying text (noting congressional intent to federalize interstate commerce in trademarks). The scope of appellate review in trademark infringement cases has not been consistent even within a circuit. See Life Technologies, Inc. v. Gibbco Scientific, Inc., 826 F.2d 775, 776-77 (8th Cir. 1987) (using de novo review for likelihood of confusion issue); Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 398-99 (8th Cir. 1987) (reviewing likelihood of confusion on clearly erroneous basis according to Federal Rule of Civil Procedure 52(a)’s requirement for questions of fact). The Eighth Circuit finally resolved its own disagreement six years later. See ConAgra, Inc. v. George A. Hormel & Co., 990 F.2d 368, 370-71 (8th Cir. 1993) (resolving uncertainty in the Eighth Circuit by overruling Life Technologies). The Eighth Circuit now treats the likelihood of confusion as a question of fact and accordingly uses clearly erroneous review. Id. at 371.

The Ninth Circuit has also been inconsistent. See Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1355 (9th Cir. 1985) (en banc) (declaring that Ninth Circuit regards likelihood of confusion as both factual and legal, but reviewing as clearly erroneous). Prior to Levi Strauss, the Ninth Circuit reviewed likelihood of confusion on a de novo basis. See Alpha Indus., Inc. v. Alpha Steel Tube & Shapes, Inc., 616 F.2d 440, 443-44 (9th Cir. 1980) (holding that likelihood of confusion is reviewable de novo). Currently, however, the Ninth Circuit reviews on a clearly erroneous basis. Pacific Telesis Group v. Int'l Telesis Communications, 994 F.2d 1364, 1367-68 (9th Cir. 1993).

III

Proposal: Likelihood of Confusion is a Legal Conclusion

Circuit disagreement over the proper scope of likelihood of confusion review frustrates the Lanham Act's goal of uniformity in trademark law. Neither Congress nor the circuit courts have resolved this conflict. Furthermore, the Supreme Court has refused to address the issue. This article proposes that Congress, to clarify the appropriate standard of review in trademark infringement cases, should amend the Lanham Act to state:

"Final likelihood of confusion determinations are questions of law, and, thus, subject to de novo review."

Under this proposal, the confusion factors remain questions of fact. Accordingly, courts will review them under the clearly erroneous standard. The final likelihood of confusion determination, however, is one of law, and thus subject to de novo review.

116. See supra note 114 and accompanying text (listing circuits that have changed their standard of review of likelihood of confusion).

117. See supra note 16 and accompanying text (explaining that Lanham Act attempted to promote uniformity in trademark law).

118. See supra note 16 and accompanying text (explaining Congress' goal of uniformity in trademark protection).

119. See supra notes 85-110 and accompanying text (detailing circuit conflict over appellate review of likelihood of confusion).


122. See supra note 87 and accompanying text (listing confusion factors).

123. See supra notes 85-89 and accompanying text (describing clearly erroneous review of confusion factors).

124. See supra notes 100-104 and accompanying text (describing de novo review of likelihood of confusion).
Several rationales support this proposal. First, the de novo standard better serves judicial policies than the clearly erroneous standard. Second, answering the likelihood of confusion question draws upon appellate courts' special expertise in formulating legal norms. Finally, courts recognize that determinations analogous to the likelihood of confusion determination in non-trademark contexts are mixed questions of fact and law, and, thus, subject to de novo review.

A. Policy Considerations

By categorizing issues as either factual or legal, courts make policy choices between limited or liberal appellate review. Critics of this Proposal may argue that clearly erroneous review better protects trial court prestige by limiting appellate court opportunities to overrule trial courts. Overruling trial courts in these situations without a "clearly erroneous" label, however, merely suggests subtle legal misunderstandings. The appellate courts' disagreement with the trial court, thus, does not necessarily attack a trial judge's competence. Appellate review, therefore, neither inflicts morale problems on trial judges nor derogates them to an inferior judicial status.

125. See infra notes 150-163 and accompanying text (advocating that likelihood of confusion is legal question).
126. See infra notes 131-147 and accompanying text (questioning policy arguments that favor clearly erroneous review for likelihood of confusion).
127. See infra notes 150-163 and accompanying text (classifying likelihood of confusion as inquiry falling within traditional scope of appellate court duties).
128. See infra notes 164-182 and accompanying text (comparing likelihood of confusion to patent law's obviousness standard).
129. Cooper, supra note 40, at 659-60.
130. See supra notes 44, 46 and accompanying text (defining de novo review and clearly erroneous review).
131. See supra note 44 (defining clearly erroneous). If appellate judges disagree with lower court findings and must maneuver in the face of limited appellate power, trial judge prestige may in fact decline. Weiner, supra note 91, at 1039-41. An "active" appeals court in conflict with the trial court may label the offending decision below as clearly erroneous if it has no other choice but to declare better law. Id. In these instances, clearly erroneous review may indeed threaten unsuspecting trial court judges. Id.
133. Louis, supra note 41, at 1015.
Additionally, critics might argue that the clearly erroneous standard maximizes judicial economy by discouraging appeals. These critics might claim that many litigants will not appeal because they will be unable to prove that trial court decisions were obviously incorrect. Concerns about preserving scarce judicial resources, however, do not necessarily favor clearly erroneous review of trademark cases for two reasons. First, no evidence supports the assertion that independent appellate review would increase litigation in jurisdictions that currently employ the clearly erroneous standard. Indeed, jurisdictions that employ the clearly erroneous standard may experience increased caseloads because trial judges cannot decide factual issues on summary judgment. Rather, if likelihood of confusion is a question of fact, then the trial judge must determine likelihood of confusion only after a full trial. Consequently, clearly erroneous review would actually expend judicial resources.

The second reason why clearly erroneous review does not further judicial economy is that litigants in expensive trademark cases will probably appeal regardless of the scope of appellate review. After a substantial investment in trial preparation, litigants will spend the relatively modest additional amount of money to appeal. Thus, many rationales for promoting judicial economy do not apply to

134. See Kaeding, supra note 115, at 1303 (arguing that clearly erroneous review of likelihood of confusion enhances judicial economy).
135. See id. (promoting appellate court deference to trial court findings).
136. See Weiner, supra note 91, at 1039-41 (stating that some judges may not allow economic considerations to influence scope of appellate review). Some judges may believe that justice requires overturning all wrong determinations, not just the clearly erroneous ones. Id.
137. Louis, supra note 41, at 1015.
138. FED. R. CIV. P. 56(c); Reynolds, supra note 28, at 771. Reynolds argues that promoting judicial economy alone should not validate de novo review. Id. at 773. Reynolds also asserts that efficiency and cost effectiveness do not justify appellate encroachment into a trial judge’s domain. Id. However, this paper argues that de novo review does not infringe on the traditional roles of trial judges. See infra notes 150-163 and accompanying text (advocating de novo review of likelihood of confusion because it falls within historical appellate court duties).
139. See FED. R. CIV. P. 56(c) (entitling moving party to summary judgment only if no genuine issue of material fact remains).
140. Id.
141. Weiner, supra note 91, at 1039-42.
142. See CARRINGTON ET AL., supra note 50, at 5 (contending that one reason for increase in number of appeals is relative decreased cost of appeals).
trademark infringement cases.

Critics might also argue that trial courts are the more able judicial body to examine evidence of likelihood of confusion. They might cite trial courts' expertise in hearing live testimony. Important evidentiary concerns, however, actually compel increased appellate court review of likelihood of confusion. Surveys often help courts decide likelihood of confusion between two trademarks. Accordingly, courts skilled in analyzing documentary evidence should evaluate surveys. Since appellate bodies are as equally skilled in considering documentary evidence as trial judges, litigants should have access to appellate review. Appellate courts' experience in reviewing documentary evidence and records favors liberal appellate court involvement in analyzing likelihood of confusion surveys.

Thus, commentators' contentions that generally support limited appellate review do not apply well to trademark infringement cases. Judicial policies and appellate court expertise in interpreting documentary evidence favor plenary appellate court involvement in likelihood of confusion decisions by trial courts. In addition to these concerns, the likelihood of confusion question also requires appellate courts to exercise their traditional, law-corrective function.

143. See JAMES ET AL., supra note 91, at 669-70 (stating that trial judges are skilled in many evidentiary matters).
144. See infra notes 150-163 and accompanying text (associating likelihood of confusion determination with appellate courts' functions).
145. MCCARTHY, supra note 15, § 23:2(B); see also JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 8.11 (1992) (stating that courts regard surveys as most probative evidence of likelihood of confusion).

Generally, plaintiffs may use three methods to prove likelihood of confusion: (1) employing the results of a properly conducted survey; (2) presenting evidence of actual confusion such as introducing evidence that the plaintiff's employees received mail from consumers intending contact with the defendant; and (3) relying on a judicial determination of likely confusion based on direct examination of the trademarks by judges themselves. MCCARTHY, supra note 15, § 23:2(B).

146. See Charles Alan Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751, 782 (1957) (noting that trial judge has advantage of first sifting entire record and arranging into logical sequence).
147. JAMES ET AL., supra note 91, at 670.
148. See supra Part II (discussing benefit of liberal appellate court involvement in likelihood of confusion determination).
149. See CARRINGTON ET AL., supra note 50, at 2 (explaining that appellate courts review within range of error law allows trial judge); Henry P. Monaghan, Constitutional Fact Review, 85 COLUM. L. REV. 229 (1985) (explaining that allocating judicial authority between trial and appellate courts may depend on capabilities of each court).
B. A Law Application Approach to Consumer Reactions

Exercising their duty to correct and formulate law, appellate courts should review the trial court’s likelihood of confusion determinations de novo because trial courts apply legal standards to confusion factors. The degree of likelihood of confusion necessary to enjoin a defendant’s use of her infringing trademark is a legal question because it requires more than mere observation. Because likelihood of confusion requires judicial attempts to define a governing norm, the likelihood of confusion inquiry implicates appellate courts’ duty to say what the law is.

Essentially, likelihood of confusion is a dual question of fact and law. On one level, trial judges can easily determine confusion factors because they only require evidentiary analysis. For example, a judge will detect trademark resemblance in form, sound, or spelling by superficial inspection. At most, the confusion factors will tap the trial judge’s expertise in assessing evidence.

However, after finding basic confusion factors, a trial judge will

150. Colburn v. Puritan Mills, Inc., 108 F.2d 377, 378 (7th Cir. 1939). Instead, the ultimate conclusion will rest on a subjective application of a subtle legal standard. See id. (stating that judicial analysis of likelihood of confusion involves contemplation, speculation, and weighing of chances for mistake).


153. See Northam Warren Corp. v. Universal Cosmetic Co., 18 F.2d 774, 775 (7th Cir. 1927) (explaining that infringement exists when allegedly infringing trademark is so like another in form, spelling, or sound that it will confuse consumer with imprecise recollection of infringed trademark).

154. See Kaeding, supra note 115, at 1315 (recognizing trial judge’s skill in evaluating witness credibility and weighing evidence) (citing Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 855 (1982)). Kaeding argued that likelihood of confusion is largely a factual issue. Id. Accordingly, she believed that trial judges would best handle the question by utilizing their expertise in handling evidence. Id. This article concedes that trial judges do have great skill in deciding evidentiary matters. However, this article establishes that the likelihood of confusion question also retains legal characteristics. See infra notes 155-163 and accompanying text (describing process where judges must reflect, rather than merely observe, to determine likelihood of confusion).
engage in a more analytical process. For example, suppose John believes that pencils bearing his trademark SCRIBBLE alongside Grant’s pencils bearing the trademark SKRIBBLER will likely cause confusion as to the source of both parties’ pencils. Additionally, suppose some consumers who saw both trademarks testified that confusion about the source of John’s pencils was very possible, yet others testified that confusion was doubtful. No consumer’s testimony could, by itself, definitively settle whether consumer confusion was “likely” because courts lack an exact definition for “likely.” The definition of “likely,” therefore, takes on legal characteristics and courts must develop a standard for determining how much “likelihood” constitutes infringement.

Generally, in the likelihood of confusion inquiry, courts use an “ordinary prudent consumer” standard. Under this standard, courts ask if a judicially-created “average” consumer would be able to discriminate between two trademarks. Likelihood of confusion thus requires a judge to reflect on the degree of possibility of consumer confusion. To decide likelihood of confusion, therefore, a judge subjectively applies a subtle legal standard to confusion factors. Because the final decision requires discretionary judgment


156. See MCCARTHY, supra note 15, § 19:2 (including consumer’s testimony of actual confusion is one way to prove likelihood of confusion).

157. See, e.g., Henri’s Food Prods. Co. v. Kraft, Inc., 717 F.2d 352, 358 (7th Cir. 1983) (holding that defendant’s trademark that confused 7.6% of survey respondents did not infringe plaintiff’s trademark). One judge, however, disagreed, asserting that 7.6% was enough confusion to find infringement. Id. at 365 (Coffey, J., dissenting).

158. Mushroom Makers, Inc. v. R.G. Barry Corp., 580 F.2d 44, 47 (2d Cir. 1978), cert. denied, 439 U.S. 1116 (1979). The ordinarily prudent purchaser standard asks whether the allegedly infringing trademark will likely mislead or confuse an appreciable number of ordinarily prudent purchasers about the source of the goods in question. Id.


160. See Colburn v. Puritan Mills, Inc., 108 F.2d 377, 378 (7th Cir. 1939) (noting that trial judges have no formulaic scheme to tally results of findings about each underlying confusion factor to mathematically derive whether confusion is “likely”). Moreover, likelihood of confusion is a problem without a precise solution. The issue depends on different human reactions and is not answerable by exact rule or measure. See id.; see also
in the application of law to facts, courts should consider likelihood of confusion a legal decision.¹⁶¹ As a legal determination, likelihood of confusion implicates appellate courts' duties to guide and develop legal standards.¹⁶² Accordingly, likelihood of confusion should fall within the de novo review power of appellate courts.¹⁶³

Janet S. Thomas, Comment, Likelihood of Confusion Under the Lanham Act: A Question of Fact, a Question of Law, or Both?, 73 KY. L.J. 235, 253 (1984) (stating that judges cannot formulaically arrive at likelihood of confusion decisions). Thomas argues that because courts lack a well-defined framework to decide likelihood of confusion, appellate courts should review on a clearly erroneous basis to respect lower court findings. Id. This article, however, suggests that de novo review will protect trial court's findings in some instances. See supra notes 131-132 and accompanying text (noting that labeling lower court findings as clearly erroneous attacks trial court prestige).

¹⁶¹ See Roy L. Stone-de Montpensier, The Compleat Wrangler, 50 MINN. L. REV. 1001, 1009-10 & n.27 (1966) (characterizing answers to questions that judges derive from reflection as questions of law); Cooper, supra note 40, at 660 (revealing that need for review is factor in allocation of judicial power between trial and appellate courts). Professor Cooper notes that characterizing a particular issue is merely a decision that one judicial actor can better decide the issue in question than another judicial actor. Id. at 659. Accordingly, judges can avert difficulties by not relying solely on draconian law and fact categorizations. See JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 52.05 (2d ed. 1985) (stating that rigid categorizations of law and fact are not helpful); see also infra, note 169.

¹⁶² See Cooper, supra note 40, at 658 (stating that policy of appellate review is to correct trial courts and to develop law).

The duty to declare and develop law in trademark cases is sometimes not implicated when a case is highly fact-specific. See Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1356 (9th Cir. 1985) (noting limited precedential value of a case that "stands upon its own facts"). Nonetheless, many trademark disputes do implicate an appellate court's duty to proclaim law and, thus, by precedent guide the future conduct of trademark owners. The "crowded field" doctrine is one example that illustrates the precedential significance of infringement determinations. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11.01[1] (3d ed. 1996).

Similar marks on similar goods having uncommon ownership comprise a "crowded field" of marks. Id. § 11.01[1]. In a crowded field of similar marks, each trademark owner thereof is relatively weak in her ability to prevent similar trademark usage by others in the crowd. See, e.g., Miss World (U.K.) Ltd. v. Mrs. American Pageants, Inc., 856 F.2d 1445 (9th Cir. 1988). The rationale for the doctrine holds that, in such a crowd, customers have carefully learned to pick out one trademark from another. Id. at 1449. Thus, the finding of a crowded field by a court has substantial precedential value. The acknowledgment of a crowded field to support a noninfringement finding could potentially invite new usage of similar trademarks on similar goods that would otherwise constitute infringement. On the other hand, a finding of infringement without the invocation of the crowded field doctrine would discourage later trademark owners from using confusingly similar marks. Accordingly, judicial determinations of trademark infringement in specific cases can serve as powerful precedent by defining the permissible scope of future trademark usage.

¹⁶³ Weiner, supra note 91, at 1034 (favoring free review when applying law to fact).
C. Comparisons with Patent Law's Non-Obviousness Requirement

In determining legal guidelines and standards, courts often investigate and analogize to various areas of law to help resolve specific issues. Trademark law is, in some ways, analogous to patent law because both protect intellectual property. More specifically, trademark law is similar to patent law in that both will typically employ legal standards based on hypothetical persons in connection with infringement determinations. To determine the validity of a patent, as is often necessary in an infringement case, courts will inquire whether a specific invention was "obvious." Patent law's obviousness standard uses an inventor of average skill. Similarly, trademark law uses an ordinarily prudent consumer to gauge possible infringement. Therefore, to characterize likelihood of confusion, courts can analogize to patent law. The manner in which courts


165. See infra notes 171-181 and accompanying text (comparing patent law and trademark law).

166. See infra notes 171-176 and accompanying text (defining obviousness). Nonobviousness is the most important and most frequently litigated of all the patentability requirements. 2 DONALD S. CHISUM, PATENTS § 5.02[6] (1996).

167. See In re Wright, 848 F.2d 1216, 1219 (Fed. Cir. 1988) (using knowledge of ordinarily-skilled inventor to find obviousness); Custom Accessories, Inc. v. Jeffrey-Allan Indus., Inc., 807 F.2d 995, 962 (Fed. Cir. 1986) (stating that actual inventor's skill is irrelevant in determining obviousness).

168. See supra notes 158-163 and accompanying text (describing ordinarily prudent consumer).

169. See supra note 164 and accompanying text (citing analogies in other legal contexts). Resort to recently developed principles in patent law is instructive. See Markman v. Westview Instruments, Inc., 116 S. Ct. 1384 (1996). In Markman, the Supreme Court considered, inter alia, whether the construction of patent claims are questions of law or questions of fact. Id. After generally discussing the historical development of the construction of writings, the Court indicated that precedent provided no clear resolution of the issue. See id. at 1395. The Court emphasized that functional considerations should be relevant in choosing between a judge and a jury. Id. Agreeing with the earlier case law, the Court stated:

that when an issue "falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial
characterize the obviousness determination suggests how courts should resolve the circuit split over likelihood of confusion.\textsuperscript{170}

To determine obviousness in patent cases, a judge uses the inventor's hypothetical knowledge of all pertinent prior art to decide if the invention is patent-worthy.\textsuperscript{171} A judge must only consider the actor is better positioned than another to decide the issue in question.’ \textsuperscript{Id.} (citing Miller v. Fenton, 474 U.S. 104, 114 (1985)). Because it is better handled by judges, the Court held that patent claim construction is a question of law. \textit{Markman}, 116 S. Ct. at 1395.

\textsuperscript{170} \textit{See Reynolds, supra} note 28, at 767-69 (distinguishing likelihood of confusion from patent law's obviousness and advocating clearly erroneous review for likelihood of confusion).

\textsuperscript{171} For patent law purposes, the hypothetical person is deemed to know all the relevant prior art. \textit{See} Custom Accessories, Inc. v. Jeffrey-Allan Industries, Inc., 807 F.2d 955, 962 (Fed. Cir. 1986). This presumption complicates the obviousness doctrine since, as courts have recognized, no one person can know of all relevant technical information. \textit{See} Tvetter v. AB Turn-O-Matic, 633 F.2d 831, 834 (9th Cir. 1980). This hypothetical person is a legal construction, “a legal ghost called 'a person having ordinary skill in art' (like the 'reasonable man' ghost in negligence cases).” \textit{Chisum, supra} note 166, § 5.04[1] (citing Nickola v. Peterson, 580 F.2d 898, 911 (6th Cir. 1978)).

Courts use other hypothetical persons, in addition to inventors and consumers, to define legal standards. \textit{See} W. PAGE KEETON ET AL., \textit{PROSSER AND KEETON ON TORTS} § 32, at 175 (5th ed. 1988 Supp.) (introducing reasonably prudent person in tort law's negligence). In negligence, a reasonably prudent person standard inquires whether a defendant acted with the legally required caution. \textit{Id.} A negligence case involves whether the defendant acted with the proper care that a reasonable person of ordinary prudence would have exercised. Vaughan v. Menlove, 132 Eng. Rep. 490, 490 (C.P. 1837).

Traditionally, negligence has four elements: (1) a legal duty requiring the person to protect others against risk; (2) that person's breach of that duty; (3) a legally-required causal connection between the person's action and resulting injury; and (4) actual injury to another's interest. \textit{See} KEETON ET AL., \textit{supra}, § 30. What matters is the objective standard of conduct the community demands of the actor. Low v. Park Price Co., 503 P.2d 291 (1972). All circuits, except the Second Circuit, view negligence as a question of fact. \textit{See} Hendry v. United States, 418 F.2d 774, 784 (2d Cir. 1969) (reviewing negligence on de novo basis because it is question of law); Vollendorff v. United States, 951 F.2d 215, 217 (9th Cir. 1991) (ruling that negligence requires clearly erroneous review); Athas v. United States, 907 F.2d 142, 142-44 (1st Cir. 1990) (explaining that negligence is question of fact); Kaeding, \textit{supra} note 115, at 1314 (noting that only Second Circuit allows de novo review of negligence determination).

Interestingly, Professor Weiner differentiates between jury and nonjury cases in negligence matters. Weiner, \textit{supra} note 91, at 1033. In jury cases, he argues that the "reasonable man standard" should be a question of fact for the jury. \textit{Id.} However, he considers nonjury negligence determinations to be questions of law. \textit{Id.} He reasons that, by analogy to jury cases, appellate court judges are better situated to decide the negligence issue than are trial judges acting alone. \textit{Id.} Moreover, Judge Learned Hand's formula helps judges to determine negligence. \textit{See} United States v. Carroll Towing Co., 159 F.2d 169, 170 (2d Cir. 1947) (deriving rule to determine negligence). Using Judge Hand's formula, a
A court considers a number of factors in comparing a new invention's features with the prior art. The Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over patent appeals, treats these factors as questions of fact. A court's ultimate obviousness conclusion based on these

judge will ask if the cost of adequate precautions was less than the probability of injury multiplied by damages from the resulting injury. Likelihood of confusion, in contrast, requires involved inquiries without mathematical precision. See supra notes 150-152 (describing subjectivity in determining likelihood of confusion).

172. Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1566 (Fed. Cir. 1987), cert. denied, 481 U.S. 1052 (1987). Obviousness is whether the subject matter that an inventor seeks to patent and the prior art make the invention obvious to a person having ordinary skill in the art to which the subject matter relates. Graham v. John Deere Co., 383 U.S. 1, 1-5 (1966); 35 U.S.C. § 103 (1988 & Supp. IV 1992). To facilitate this inquiry, a judge must travel back in time to view the invention without current know-how. Panduit Corp., 810 F.2d at 1566. The first steps in the obviousness inquiry involve determining the merits of the prior art and the nature of the inventor's improvement over the prior art. Armour & Co. v. Wilson & Co., 274 F.2d 143, 156 (7th Cir. 1960). These determinations are questions of fact. Id. at 156. Nonetheless, the application of section 103 and the skill of the hypothetical inventor in assessing the merits of the claimed invention involves the application of the proper legal standard to factual questions. Id. "This calls for the exercise of a legal judgment and as such is subject to review by an appellate tribunal as a question of law." Id.

173. See GOLDSTEIN, supra note 29, at 378-79 (explaining multitude of tests for obviousness). The test is a multi-level test of primary and secondary factors. See id. (introducing various tests). The primary factors are: (1) the nature of the prior art; (2) the difference between preexisting technology and the claims at issue; and (3) the level of ordinary skill in the invention's subject area. See R.L. Sherman, Obviousness: A Question of Law or of Fact?, 51 J. PAT. OFF. SOC'y. 547, 550 (1969) (breaking down Patent Act section 103 into three primary factors). Professor Chisum has stated, "[t]he conclusion as to the obviousness of an invention turns on whether a hypothetical person with ordinary skill and knowledge in the art to which the invention pertains with full knowledge of all the pertinent prior art, when faced with the problem to which the claimed invention is addressed, would be led naturally to the solution adopted in the claimed invention or at least would naturally view that solution as an available alternative." CHISUM, supra note 166, § 5.04[1].

In addition, the Supreme Court has announced a list of secondary considerations that help illuminate the proper standard of invention. Graham, 383 U.S. at 1. Such secondary considerations include commercial success, long felt but unsolved needs, and failure of others. Id.

This list of factors is not exhaustive. See GOLDSTEIN, supra note 27, at 379 (citing factors other than six that Graham Court explicitly mentioned); see also Graham, 383 U.S. at 3 (using language that implied existence of other obviousness factors).


175. See Panduit Corp., 810 F.2d at 1566 (stating that primary and secondary John Deere factors are questions of fact); In re Fritch, 972 F.2d 1260, 1264 (Fed. Cir. 1992)
factors, however, is a question of law.\textsuperscript{176}

A judge analyzes likelihood of confusion in a way that resembles how a judge analyzes obviousness. With no precise legal formula to instruct judges on how to weigh the various confusion factors, the likelihood of confusion test resembles the obviousness analysis from patent law.\textsuperscript{177} Both likelihood of confusion and obviousness require judges to decide underlying facts that help define the dispute's context.\textsuperscript{178} These factors, taken together, lay the basis for a judge's subjective conclusion about whether the invention or the trademark meets a legally required threshold.\textsuperscript{179}

Both likelihood of confusion and obviousness questions are also similar in that they cannot be resolved by direct, formulaic tests. To resolve a likelihood of confusion question in a trademark case, a judge has the formidable task of predicting product association in the minds of various potential consumers, who undoubtedly possess contrasting sensibilities.\textsuperscript{180} Likewise, a judge in a patent case may struggle to

\footnotesize{(stating that primary and secondary \textit{John Deere} factors are questions of fact); \textit{see also} \textit{GOLDSTEIN}, \textit{supra} note 29, at 380-81 (discussing importance of whether obviousness is question of law or fact).}

\textsuperscript{176} \textit{Panduit}, 810 F.2d at 1566; \textit{John Deere}, 383 U.S. at 485. The final obviousness determination is a question of law for all circuits, except possibly the First and Tenth Circuits. \textit{CHISUM}, \textit{supra} note 166, § 5.04[3]. However, because of the Federal Circuit's special jurisdiction over patent matters, regional circuit law will be more of historical import rather than legal precedent. \textit{Id}.


\textsuperscript{178} \textit{See supra} notes 87, 173 (listing confusion factors and \textit{Graham} factors).

\textsuperscript{179} \textit{See B. E. Colaianni, 35 U.S.C. § 103: A Quest for Objectivity}, 39 FED. B.J. 23, 28 (1980) (addressing obviousness). Colaianni concedes that a judge could imagine herself to be a reasonable person. \textit{Id}. However, he argues that a judge cannot analogize her experience to adequately sympathize with inventors in highly technical fields. \textit{Id}.

\textsuperscript{180} Reynolds, \textit{supra} note 28, at 749; Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1195 (2d Cir. 1971).

In a famous tax case, Commissioner v. Duberstein, 363 U.S. 278 (1960), the Court handled the similar issue of a transferor's intent. \textit{See id} at 293 (holding that transferor's intent is question of fact). The Court explained that the intent of a transferor clearly calls upon the trial court's experience with the mainsprings of human conduct. \textit{Id}. As a result, the majority considered the transferor's intent a question of fact. \textit{Id}. However, in a concurring and dissenting opinion, Justice Frankfurter observed that experience with
conjure the knowledge and skill of a hypothetical technologist. In short, likelihood of confusion issues and obviousness issues both require technical considerations for which judges cannot simply draw upon their everyday experience or intuition. The parallels between likelihood of confusion and obviousness warrant similar judicial treatment. Accordingly, courts should view likelihood of confusion as a question of law, as they do obviousness in patent law.

Congress should, therefore, amend the Lanham Act to allow independent review of likelihood of confusion. This amendment furthers the judicial goals of ensuring justice and promoting efficiency. In addition, this amendment would respect the traditional role of appellate courts by entrusting to them questions that require discretionary judgment to define legal norms. Patent law already entrusts such questions to appellate judges.

IV

Conclusion

Rule 52(a) ensures that judges reverse findings of fact only when they are clearly erroneous. The rule, however, does not define a question of fact. In trademark law issues, policy considerations do not provide clear guidance about the applicability of Rule 52(a) to a likelihood of confusion question. However, closer study of the nature of the likelihood of confusion standard supports treating the standard as a legal question. A trial judge's expertise sufficiently masters confusion factors because they are straightforward, evidentiary findings. However, to determine likelihood of confusion based on confusion factors, a judge must deliberate extensively over how trademarks are "likely" to influence varying consumer sensibilities. This process of judicial reflection and law application

human affairs is diverse and also often drastically conflicting. Id. at 297 (Frankfurter, J., dissenting).


182. See CARRINGTON, supra note 132, at 77-78 (explaining proper role of appellate courts). Carrington notes that trials are becoming longer and more complex. Id. Accordingly, he advocates more appellate oversight when courts must decide issues requiring technical expertise. Id.

183. FED. R. CIV. P. 52(a).

184. See id. (omitting provision identifying questions of fact).

185. See supra notes 90-96, 100-110 and accompanying text (addressing policy concerning limited and liberal review for likelihood of confusion).
falls within the traditional expertise of appellate courts. Consequently, likelihood of confusion should fall within the de novo review power of appellate courts.