

## REFORMING AURAL SIMILARITY IN MALAYSIAN TRADEMARK LAW: STRUCTURING JUDICIAL REASONING THROUGH MANDATORY PHONETIC PARTICULARISATION

<sup>1</sup>Suriyati binti Salim\*

<sup>1</sup>Postgraduate student, Civil Law Department, Ahmad Ibrahim Kulliyah of Laws,  
International Islamic University Malaysia (IIUM), Malaysia

*Corresponding author: surisalim92@gmail.com\**

### ABSTRACT

*The background of this study focuses on the subjective nature of judicial determinations of aural similarity in Malaysian trademark law. The likelihood of confusion assessment under the Malaysian Trademarks Act 2019 [Act 815] (TA 2019) involves visual, conceptual, and aural comparisons, but judicial reasoning on sound remains subjective and insufficiently articulated, despite courts citing the established test from *Re Pianotist Co's Application* (1906) 23 RPC 774. This methodological shortfall creates a significant knowledge gap, undermining the transparent application of the 'imperfect recollection' doctrine and diminishing the predictability of decisions. This study aims to analyse how aural similarity is assessed across registration, opposition, infringement, and passing-off proceedings under both the Malaysian Trade Marks Act 1976 [Act 175] (TMA 1976) and the 2019 Act, and to propose the procedural reform of Mandatory Phonetic Particularisation (MPP). This study uses a qualitative doctrinal methodology to examine Malaysian and Commonwealth case law, analysing judicial reasoning through linguistic and acoustic insights. It finds that "although courts frequently reach doctrinally defensible outcomes, they often rely on impressionistic auditory assessment, instead of clear phonetic justification. The study proposes MPP as a practical framework that requires specific, sound-based features, thereby helping structure judicial discretion. Significantly, MPP is grounded in the existing evidentiary framework of Malaysian Evidence Act 1950 [Act 56] (EA 1950), eliminating the need for statutory amendments. The study concludes that MPP enhances doctrinal coherence, transparency, and procedural fairness, offering a novel, interdisciplinary reframing of a core legal doctrine to strengthen trademark adjudication in Malaysia and comparable jurisdictions.*

*Keywords: Trademark Law; Likelihood of Confusion; Aural Similarity; Judicial Reasoning; Evidence Law*

### INTRODUCTION

Words often fall silent, and it is in the way humans listen to and interpret them that their meaning emerges. Consequently, in the realm of intellectual property (IP) law, trademarks serve as markers of commercial origin, allowing consumers to differentiate between competing goods and services. The foundation of trademark protection in Malaysia is the likelihood of confusion test, which is evaluated based on visual,

conceptual, and aural similarities. Accordingly, Sections 3, 24, and 54 of the Trademarks Act 2019 [Act 815] (TA 2019) work in concert to facilitate this assessment in both registration and infringement scenarios.

Furthermore, it is well settled that sound forms a material component of confusion analysis. Malaysian Courts have consistently adopted the principles articulated in *Re Pianotist Co's Application*

(1906) 23 RPC 774, as received locally in *Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd* [1992] 2 MLJ 63, which requires marks to be assessed by sight and sound from the perspective of the ordinary consumer. Moreover, judicial authority further recognises that aural resemblance may outweigh visual dissimilarity, particularly in oral purchasing environments, as affirmed by the Federal Court in *Ortus Expert White Sdn Bhd v. Nor Yanni Adom & Anor* [2022] 2 MLRA 368.

Academic scholarship has likewise acknowledged the relevance of linguistic analysis in trademark disputes. Ibrahim and Nambiar (2013), in their legal linguistic semiotic study of *McCurry Restaurant (KL) Sdn Bhd v. McDonald's Corporation* [2009] 3 MLJ 774, demonstrated how linguistic tools can illuminate judicial reasoning in trademark similarity analysis. However, despite these foundational studies, existing literature has predominantly focused on visual and conceptual dimensions, leaving the aural limb comparatively underexplored.

The unresolved issue, therefore, is methodological rather than doctrinal. Malaysian decisions frequently declare that marks “sound alike” or “do not sound alike” without identifying the specific phonetic features that generate confusion or distinction. Specifically, the mechanisms through which “imperfect recollection” operates, including syllabic dominance, phonological reduction, and accent-driven variation, are seldom articulated. Ultimately, this silence broadens the scope of judicial evaluative discretion while diminishing analytical transparency and predictability, necessitating a more structured approach.

Similarly, Roy and Marsoof (2024) argue that increasing reliance upon automated and algorithmic approaches within trademark adjudication exposes the

dangers of unstructured human subjectivity when legal reasoning remains insufficiently articulated. Although their analysis principally critiques automation in trademark law, their observations remain highly relevant to judicial determinations of aural similarity, where courts frequently rely upon unarticulated auditory assessment. Their work, therefore, indirectly supports the need for procedural safeguards capable of structuring judicial reasoning without displacing judicial discretion itself.

#### STATUTORY CONTINUITY: FROM THE TMA 1976 TO THE TA 2019

Consequently, the evaluation of aural similarity in Malaysia demonstrates a robust continuity across successive legislative regimes. Under the Trade Marks Act 1976 [Act 175] Sections 14 and 19 governed the refusal of registration and identical marks, while Section 38 specifically addressed infringement. Furthermore, the judicial principles developed during this period continue to underpin and shape contemporary legal reasoning.

Notably, the Supreme Court decision in *Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd* [1992] 2 MLJ 63 established that syllabic structure, particularly the prominence of the first syllable, may carry greater aural weight in the minds of consumers. Although the TA 2019 modernised statutory language and harmonised Malaysian law with international standards, the underlying judicial methodology for assessing sound remains substantially unchanged.

Accordingly, Courts and the Registrar continue to rely on the *Re Pianotist's* framework, often allowing judicial impression to fill the analytical gap between orthographic representation and auditory perception. This persistent statutory

continuity strongly supports the argument that meaningful reform should focus on enhancing procedural articulation rather than seeking further legislative amendment.

### DOCTRINAL AND FORENSIC LINGUISTIC AUDIT

Consequently, this study undertakes a structured doctrinal audit of Malaysian trademark decisions to examine the practical reasoning applied to aural similarity. Specifically, the audit encompasses registration, opposition, infringement, and passing-off proceedings conducted under both the TMA 1976 and the TA 2019.

Importantly, Table 1 constitutes the evidentiary core of this analysis. Rather than serving as a descriptive catalogue, it represents a systematic extraction of judicial reasoning, isolating the phonetic considerations expressly relied upon by Courts while simultaneously identifying

instances where such considerations remain implicit or unarticulated. Furthermore, the audit demonstrates that Malaysian Courts frequently arrive at doctrinally defensible outcomes, yet they do so through impressionistic reasoning that lacks explicit phonetic justification.

This concern has also attracted attention within forensic linguistic scholarship. Sabira and Makangila (2021) examining the trademark dispute involving DOUBLEMINT and DOUBIEMINT, demonstrated that phonetic resemblance may persist notwithstanding orthographic alteration because ordinary consumers frequently process trademarks through incomplete auditory recall rather than precise textual comparison. Their analysis supports the proposition that structured phonetic reasoning constitutes an essential component of transparent trademark adjudication.

TABLE 1. Comprehensive Audit of Judicial Reasoning on Aural Similarity in Malaysian and Comparative Case Law

Case Name and Citation	Conflict	Statutory/ Legal Context	Key Judicial Principle/ <i>Ratio Decidendi</i>	Linguistics/ Phonetic Evidence/ Interpretation
<i>Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd</i> [1992] 2 MLJ 63 (Supreme Court)	MISTER vs. (versus) SISTER	Sections 35 and 38 of the TMA 1976 (Infringement)	The Supreme Court ruled that the trademarks “MISTER” and “SISTER” are unlikely to confuse consumers due to their distinct visual appearances and packaging. The intervener’s product featured a green background with a woman, while the applicant’s used white, blue, and grey with images of both a man and a woman. Affirming the trial judge’s	Gap identified: The analysis provided by the Court fails to consider an important aspect of phonological interference related to rhyme. Specifically, in stress-timed English, strong rhyming endings can trigger auditory memory even when the onsets differ, as seen in pairs like “history” and “mystery.” This phenomenon is acknowledged in

			findings, the Court determined the trademarks, despite sharing the suffix “-ister,” were not deceptively similar, leading to the dismissal of the appeal and reaffirmation of the absence of infringement.	the field of psycholinguistics but is notably overlooked in the Court’s reasoning.  Similarly, Makangila and Sabira (2020) observed that minimal phonological differences may not eliminate consumer confusion where dominant rhythmic and syllabic structures remain substantially similar, highlighting the need for articulated phonetic reasoning.
<i>Hup Seng Perusahaan Makanan (M) Sdn Bhd v. Lam Soon Edible Oils Sdn Bhd &amp; Anor</i> [2019] 11 MLJ 147 (High Court)	NATUREL vs. NATURELL	Sections 14(1)(a) and 19(1)(b) of the TMA 1976 (Opposition)	The Court addressed the “Silent Doubling” rule in the case concerning the word ‘NATURELL,’ where the presence of the double ‘L’ was found not to contribute to unique auditory characteristics. As a result, the Court concluded that the marks in question remained similar despite the spelling difference.	Clarified interpretation: The finding confirms that orthographic doubling in Roman script does not necessarily produce phonemic lengthening or semantic change. Unlike Arabic <i>tashdid</i> , the double “L” in English does not alter pronunciation or meaning, reinforcing the primacy of phonetic reality over visual spelling.
<i>Ortus Expert White Sdn Bhd v. Nor Gianni Adom &amp; Anor</i> [2022] 2 MLRA 368 (Federal Court)	Royal Expert White vs. Real Expert White	Section 38(1)(a) of the TMA 1976 (Infringement), and Passing off	The Federal Court examined the phonetic similarity between the trademarks “Royal” and “Real.” It found that “Royal” has two syllables starting with ‘Ro,’ while “Real” has one syllable starting with ‘Ray.’ The Court ruled that the	The study conducted by Latiff and Hassan (2023) offers acoustic evidence supporting the existence of vowel conflation in local dialects, validating the “Malaysian English Filter.” This work emphasises the linguistic nuances

			<p>defendants committed passing off by marketing their product as Real Expert White, misleading consumers into thinking they were buying the plaintiff's Royal Expert White. The Court held that the similarity between the names contributed to consumer deception, especially with the identical packaging.</p> <p>Furthermore, Beebe, Germano, Sprigman, and Steckel (2019) demonstrate that consumer perception often operates through associative auditory memory rather than exact linguistic distinction. Their findings support the proposition that subtle phonetic similarities may materially influence consumer cognition even where marks are visually dissimilar.</p>	<p>of Malaysian English, demonstrating how regional variation influences vowel pronunciation.</p>
<p><i>TCE Sports Sdn Bhd v. Bullzen Sport (M) Sdn Bhd</i> [2025] MLJU 3479 (Court of Appeal)</p>	SOL vs. XOL	Passing Off	<p>In a recent ruling, the Court of Appeal underscored that the High Court had neglected to consider important admissions made by the defendant during trademark opposition proceedings. The defendant acknowledged that the mark "SOL" was either</p>	<p>The ruling highlights the importance of phonetic analysis by noting that SOL and XOL are a minimal pair, differing by just one phoneme: /s/ versus /ks/. This close aural similarity, along with their identical appearance, increases the likelihood of</p>

			phonetically identical to or closely similar to its own mark, which suggested a significant likelihood of confusion. This admission played a crucial role in strengthening the misrepresentation aspect of the passing-off claim. Consequently, the Court of Appeal overturned the High Court's decision, determining that the plaintiff had successfully established all three essential elements required for a passing off claim.	consumer confusion. The reasoning suggests that the two marks are nearly indistinguishable, primarily due to their similar initial consonant sounds. As a result, the combination of their phonetic closeness and identical get-up makes deception among consumers very likely.
<i>Danone Biscuits Manufacturing (M) Sdn Bhd (formerly known as Britania Brands (M) Sdn Bhd) v. Hwa Tai Industries Bhd</i> [2010] 8 MLJ 500 (High Court)	ChipsMore vs. CHIPSPLUS	Section 38 of the TMA 1976 and Passing Off	The Court found that the phonetic similarity of the prefix "Chips" in both "ChipsMore" and "CHIPSPLUS" contributed significantly to consumer confusion. While "Plus" and "More" differ in meaning, they share conceptual similarities. This resemblance, combined with distinctive packaging, meant that consumers could easily confuse the two trademarks when heard, especially in casual settings. Consequently, the Court concluded that the defendant misrepresented its products as the plaintiff's, thereby	The similarities in the CHIPS word formations are quite notable, particularly in their suffixes "plus" and "more," which sound distinctly different. The concept of phonetic dominance is highlighted by the decision, acknowledging the importance of prefixes in shaping consumer perceptions. However, it assumes a phonological foundation for this dominance without fully articulating it.

			committing trademark infringement.	
<i>London Lubricants (1920) Ltd's Application, Re (1925) 42 RPC 264 (United Kingdom (UK))</i>	CASTROL vs. TRIPCASTROID	Common Law (Persuasive Authority)	The Slurring Principle refers to a linguistic tendency in speech in which individuals often blur or slur the endings of words. This phenomenon results in the emphasis or accentuation of word beginnings. As articulated by Sargant LJ, this tendency highlights how speech patterns can shape how words are perceived and understood in communication.	Establishes the legal basis for “Lazy Speech” as a universal principle, validating imperfect pronunciation in Malaysian phonological patterns. This acknowledges “lazy speech” as a legitimate phonetic consideration in judicial reasoning, reflected in Malaysian analysis.
<i>Coca-Cola Company of Canada Limited v. Pepsi-Cola Company of Canada Limited [1942] 1 All ER 615; 59 RPC 127 (Privy Council)</i>	COCA-COLA (script with flourishes) vs. PEPSI-COLA (script with flourishes)	Canadian Unfair Competition Act 1932, Sections 2(k), 3(c) (Infringement)	Marks are not ‘similar’. Critical finding: 22 other registered “Cola”/“Kola” marks in Canada. “Cola” was common to the trade. The distinctive feature of each mark was the first word (“Coca”; “Pepsi”). Assessment must account for imperfect recollection.	First syllable dominance was affirmed, but the phonetic basis is unarticulated. The Court recognised prefixes as auditory anchors but did not explain why initial syllables dominate consumer perception, whether through stress, primacy effect in memory, or articulatory salience. MPP would require courts to identify and justify the phonetic basis for prefix dominance explicitly.
<i>Staywell Hospitality Group Pty Ltd v. Starwood Hotels &amp; Resorts Worldwide, Inc and another [2013] 1 SLR 489,</i>	PARK REGIS vs. ST. REGIS	Comparative	The Court found overall similarity due to the dominant element ‘Regis’, notwithstanding the visual and structural differences between ‘PARK REGIS’ and ‘ST. REGIS’. The aural prominence of	Syllabic prominence inferred. Demonstrates judicial sensitivity to stress placement, but did not phonetically define why “Regis” dominated. No

2013 (Singapore High Court)			'Regis', particularly for consumers unfamiliar with its Latin meaning, outweighed the visual dissimilarities and contributed to the finding of overall similarity.	analysis of prosodic structure or syllable weight.
<i>Registrar of Trade Marks v. Woolworths Ltd</i> [1999] FCA 1020; (1999) 93 FCR 365; (1999) 45 IPR 411, 1999) (Full Court, Federal Court of Australia)	WOOLWORTH S metro (composite) vs. METRO (word marks)	Opposition / Registration – Trade Marks Act 1995 (Cth), Section 44(2)	Majority (French and Tamberlin JJ): Mark not deceptively similar. "WOOLWORTHS" is famous in Australia and is a major visual and aural feature. Marks are 'aurally distinct' (Tamberlin J). Presumption of registrability applies.  Dissent (Branson J): "METRO" is dominant. Oral abbreviation likely omits "Woolworths". Confusion probable.	Judicial disagreement on phonetic salience. The majority assumed "Woolworths" is unforgettable (notoriety = auditory indelibility). Dissent assumed "Woolworths" is deletable (abbreviation = elision).  MPP relevance: Neither judgment articulates which phonetic features are memorable or deletable, or why. Structured phonetic analysis (stress patterns, syllable salience, elision probability) would resolve such disagreement and make reasoning transparent.

Accordingly, Table 1 reveals doctrinal consistency in judicial outcomes alongside a persistent methodological silence in phonetic reasoning. This pattern is not unique to Malaysia but is equally observable in the UK. Importantly, although Malaysian Courts deploy interpretative tools such as the first syllable rule and the slurring principle, their application remains dependent on assumed subjective auditory assessment

rather than articulated phonetic analysis. By comparison, the UK jurisprudence, beginning with *London Lubricants (1920) Ltd's Application, Re* (1925) 42 RPC 264, expressly recognises phenomena such as slurring and imperfect articulation as legally relevant, yet similarly refrains from identifying concrete phonetic parameters underpinning aural similarity.

Moreover, contemporary scholarship in forensic linguistics further substantiates the importance of explicit phonetic reasoning within trademark adjudication. Sabira and Makangila (2021), in their analysis of the DOUBLEMINT and DOUBIEMINT dispute, observe that auditory confusion frequently arises from phonological approximation rather than exact orthographic replication. Likewise, Makangila and Sabira's (2020) forensic examination of the marks "Adidas" and "Abidas" demonstrates how minor phonemic substitutions may nevertheless preserve overall auditory recall among consumers operating under imperfect recollection. These findings are especially significant within multilingual jurisdictions such as Malaysia, where dialectal interference, local speech habits, and variable stress placement often shape pronunciation patterns. Consequently, forensic linguistic scholarship strongly supports the need for a structured framework capable of identifying the precise phonetic triggers that generate consumer confusion.

Furthermore, the works of Latiff (2017) and Latiff and Hassan (2023) highlight important insights regarding the judicial reasoning on aural similarity in the context of Malaysian English and Malay. Latiff's (2017) instrumental phonetic analysis reveals that vowel qualities, including duration and articulatory placement, follow systematic acoustic patterns identifiable through spectrographic measurement rather than intuition alone. Building on this, Latiff and Hassan (2023) demonstrate that local speakers often neutralise or conflate vowel contrasts, particularly in unstressed syllables, causing ordinary consumers to perceive marks as aurally similar despite orthographic differences. These findings clarify why Courts may reach justifiable decisions through impressionistic listening while

failing to specify the phonetic elements contributing to consumer confusion.

Importantly, recent computational studies further strengthen the argument for structured phonetic analysis in trademark disputes. Reis et al. (2026) propose a large language model-based framework for trademark similarity assessment capable of identifying semantic and phonetic proximity through systematic computational modelling. Their findings demonstrate that similarity analysis can increasingly be operationalised using identifiable linguistic variables rather than relying solely on subjective auditory intuition. Although this article does not advocate replacing judicial reasoning with artificial intelligence, the study nevertheless illustrates that contemporary scientific methodologies already recognise the possibility of objectively structuring similarity assessment. Therefore, the proposed MPP framework remains consistent with broader international developments seeking greater analytical precision and methodological transparency in trademark adjudication.

Accordingly, this technical note highlights an important linguistic distinction between phonemic gemination and orthographic doubling. Understanding this distinction is crucial for accurate assessments, as seen in *Hup Seng Perusahaan Makanan (M) Sdn Bhd v. Lam Soon Edible Oils Sdn Bhd & Anor*, where the Court correctly determined that the double "L" in "NATURELL" does not alter its pronunciation from "NATUREL". However, that reasoning remained implicit and visually oriented rather than phonemically articulated.

Importantly, Arabic linguistic science has its own distinct system. In Arabic, the *shaddah* (شَدَّة, meaning '[sign of] emphasis'), also known by the verbal noun

from the same root, *tashdīd* (تشديد, meaning ‘emphasis’), is one of the diacritics used with the Arabic alphabet. It signifies a geminated (or prolonged) consonant. This diacritic functions similarly to writing a consonant twice in the orthographies of other languages, being both phonemically contrastive and meaning-determinative (“Shaddah,” 2025).

To ensure linguistic precision, Table 2 provides a meticulous linguistic comparison between Roman orthographic conventions and Arabic phonemic realities, complete with corrected diacritics. Ultimately, these credible sources furnish the evidentiary support necessary for this interdisciplinary reframing of the “imperfect recollection” doctrine based on verified phonetics.

TABLE 2. Linguistic Comparison: Roman Orthography vs. Arabic Phonemic Reality

Script Type	Word Pair	Aural Effect	Semantic Impact
Roman (English/ Malay)	NATUREL vs. NATURELL	Identical: Consonant doubling serves as a visual convention with no auditory change.	No change in meaning or pronunciation. <i>Hup Seng Perusahaan Makanan (M) Sdn Bhd v. Lam Soon Edible Oils Sdn Bhd &amp; Anor</i> [2019] 11 MLJ 147
Arabic (Phonemic)	<i>Jamal</i> (جَمَل) vs. <i>Jammāl</i> (جَمَّل)	Distinct and obligatory. The <i>tashdīd</i> (◌◌) over the <i>mīm</i> (م) indicates phonemic gemination, requiring a perceptibly lengthened /mm/ consonant and altering the word’s prosodic structure (e.g., /dʒa.mal/ vs. /dʒam.mal/). This is a mandatory phonological rule in Standard Arabic.	The gemination changes the root meaning entirely, shifting from <i>jamal</i> (جَمَل), meaning ‘camel’, to <i>jammāl</i> (جَمَّل), meaning ‘ornament’ (جمال) - <i>Translation and Meaning in Almaany English Arabic Dictionary</i> , n.d.)

Table 2 shows that the linguistic principle contrasts with the ruling in *Hup Seng Perusahaan Makanan’s* case concerning NATURELL, where the High Court affirmed that the double ‘L’ indicated a ‘silent doubling’ that does not affect pronunciation or meaning. Both ‘NATUREL’ and ‘NATURELL’ are pronounced the same, underscoring that a double letter does not equate to a double sound in English and Malay. The proposed MPP framework should ensure that this distinction is explicitly addressed in court reasoning to prevent misinterpretation of visual differences as significant phonetic differences, thereby ensuring that aural

similarity is judged on the basis of actual pronunciation.

#### JUDICIAL DISCRETION AND THE NEED FOR ARTICULATED REASONING

Judicial discretion is integral to trademark adjudication. However, when exercised without a clear articulation of reasoning, such discretion can result in inconsistent determinations across legally analogous cases. This inconsistency undermines both consumer protection and the law’s precedential authority. Accordingly, the MPP framework directly addresses this

concern by imposing a procedural mandate. Specifically, it requires Courts to explicitly articulate the phonetic basis for a material finding of aural similarity. This requirement effectively structures judicial discretion while preserving the Court's ultimate substantive authority.

This concern reflects a broader tension identified within contemporary trademark scholarship between discretionary human adjudication and structured analytical reasoning. Roy and Marsoof (2024) caution that insufficiently articulated reasoning risks producing inconsistent outcomes, whether humans or algorithmic systems make decisions. Consequently, the proposed MPP framework represents a middle path that preserves judicial discretion while simultaneously requiring transparent phonetic justification.

#### PROPOSED REFORM: THE MPP FRAMEWORK

This study formulates and proposes a novel procedural framework, termed MPP, as a discipline for judicial reasoning. MPP can be precisely defined as: a procedural rule requiring courts to make specific and explicit findings on the phonetic features considered in their assessment of aural similarity. Under the MPP, when a finding on aural similarity is material to the outcome, the court or Registrar must explicitly articulate in its written reasons the specific sound-based features considered. This shifts the assessment from a general impression to a structured, reasoned analysis, enhancing transparency and consistency in decision-making.

Importantly, the proposed framework aligns with broader international developments that advocate the use of structured methodologies for assessing trademark similarity. Setchi and Anuar

(2016) emphasised that similarity determinations become more reliable when evaluative criteria are explicitly identified and systematically applied. Likewise, computational studies by Trappey et al. (2020) and Reis et al. (2026) illustrate that structured analytical parameters can significantly improve consistency in similarity assessment. Although this study does not advocate replacing judicial reasoning with automated systems, these developments demonstrate the growing international recognition that trademark similarity analysis benefits from transparent and articulated evaluative mechanisms.

#### LEGAL AND EVIDENTIARY FOUNDATION

The MPP framework is firmly rooted in Section 45 of the EA 1950, which allows Courts to seek expert assistance on relevant specialised matters while maintaining their full adjudicative authority. MPP operationalises this provision by establishing a clear procedural pathway for the reasoned consideration of phonetic analysis. Importantly, MPP does not require expert evidence in every instance. In straightforward cases where sound distinctions are evident, such as comparing clearly distinct syllables, the adjudicator can articulate the pertinent auditory features in accordance with established legal principles and practical MyIPO guidance, thereby ensuring procedural efficiency.

#### INTEGRATION OF OBJECTIVE SCIENTIFIC EVIDENCE

The MPP framework accommodates the introduction of objective scientific evidence where the aural comparison is complex or contested. Empirical studies, such as those by Latiff (2017) and Latiff and Hassan (2023) on Malaysian speech patterns, provide measurable data that can inform the

court's analysis. By allowing such evidence, MPP enables judicial reasoning to move beyond subjective impressions and to be supported by objective metrics where necessary, aligning legal practice with contemporary empirical insights.

Indeed, recent advances in computational trademark analysis demonstrate that phonetic similarity may be objectively modelled through measurable linguistic parameters. Reis et al. (2026) showed that large language model-based systems are capable of identifying semantic and phonological relationships relevant to trademark comparison, while Trappey et al. (2020) demonstrated that machine learning methodologies can evaluate phonetic resemblance through structured analytical variables. These studies strengthen the argument that judicial reasoning on aural similarity should be capable of articulation through identifiable phonetic criteria rather than remaining purely impressionistic.

#### ILLUSTRATIVE APPLICATION OF MPP

The following illustrative paragraph illustrates MPP's practical application in a hypothetical dispute between the marks VELTRA and FELTRA.

In assessing aural similarity, the Court applies the MPP framework. The marks share an identical disyllabic structure and prosodic rhythm, features known to drive auditory recall under the 'doctrine of imperfect recollection'. The primary phonetic distinction lies in the initial consonants: /v/ in VELTRA and /f/ in FELTRA. Forensic linguistic evidence admitted under Section 45 of the EA 1950 establishes that these sounds constitute a cognate pair, sharing the same labiodental articulatory placement and differing only in voicing. Given their acoustic proximity and the substantial formant overlap in the shared

"-ELTRA" sequence, an ordinary consumer is likely to neutralise this distinction in casual speech. Accordingly, the Court concludes the marks are aurally similar and that the articulatory proximity of the initial phonemes creates a tangible likelihood of confusion.

This structured approach makes judicial reasoning transparent and anchored in identifiable auditory factors. By specifying the sound features considered, the Court provides clearer guidance for future disputes while fully preserving judicial discretion.

#### ANALYSIS OF JUDICIAL APPLICATION AND EVIDENTIARY GAPS

The doctrinal audit reveals that Malaysian Courts frequently reach defensible outcomes yet rely on impressionistic listening rather than articulated phonetic justification. Judicial reasoning demonstrates an implicit awareness of phonetic salience, for instance, in *Danone Biscuits Manufacturing (M) Sdn Bhd (formerly known as Britannia Brands (M) Sdn Bhd) v. Hwa Tai Industries Bhd* [2010] 8 MLJ 500, where prefix similarity informed the finding of confusion, and in *Ortus Expert White Sdn Bhd v. Nor Yannu Adom & Anor* [2022] 2 MLRA 368, where syllabic structure guided the assessment. Since *London Lubricants (1920) Ltd's Application, Re* (1925) 42 RPC 264, Courts have recognised phenomena like slurring and imperfect articulation, and in *Staywell Hospitality Group Pty Ltd v. Starwood Hotels & Resorts Worldwide, Inc and another* [2013] 1 SLR 489, dominant aural elements were acknowledged as capable of offsetting visual differences.

Nevertheless, significant methodological gaps persist. Courts rarely analyse rhyme-based phonological interference, as seen in *Tohtonku*, where the

shared rhyming “-ister” suffix received no examination. Furthermore, judicial reasoning seldom incorporates measured acoustic patterns or explicitly accounts for local pronunciation norms, such as the neutralisation of vowel contrasts in unstressed syllables characteristic of Malaysian English. Consequently, Courts often apply an abstract auditory standard that may not accurately reflect the perception of the ordinary local consumer.

The comparison between established practice and the MPP framework, detailed in Table 3, highlights a shift toward structured analysis. MPP requires the identification of specific auditory triggers, allows for formal expert input in complex cases, and mandates clear reasoning. Adopting MPP would enable courts to build a more consistent, transparent, and predictable body of precedent on aural similarity.

TABLE 3: Comparative Analysis: Traditional Judicial Practice vs. MPP Framework

Analytical Dimension	Traditional Judicial Practice (Based on Audit)	Proposed MPP Framework	Illustrative Case Example
Methodological Foundation	Relies on judicial impression.	Requires identification of specific sound-based features.	<i>TCE Sports Sdn Bhd v. Bullzen Sport (M) Sdn Bhd</i> [2025] MLJU 3479: The Court acknowledged phonetic similarity but did not specify the minimal pair (/s/ vs. /ks/) as the precise trigger.
Basis of Determination	Often anchored in holistic visual comparison and overall commercial impression, with aural analysis implied but not isolated.	Treats aural similarity as a distinct factor requiring explicit support.	<i>Hup Seng Perusahaan Makanan (M) Sdn Bhd v. Lam Soon Edible Oils Sdn Bhd &amp; Anor</i> [2019] 11 MLJ 147: Correctly identified ‘silent doubling’ but framed it as a spelling issue rather than explicitly affirming the primacy of identical pronunciation.
Integration of Evidence	Relies on judicial impressionistic reasoning or party admissions.	Creates a formal channel for expert phonetic evidence where needed (Section 45 of the EA 1950).	<i>London Lubricants (1920) Ltd’s Application, Re</i> (1925) 42 RPC 264: Noted ‘slurring’ in general, but did not trigger specific analysis later.

Analytical Dimension	Traditional Judicial Practice (Based on Audit)	Proposed MPP Framework	Illustrative Case Example
Articulation of Reasoning	Often implicit or conclusory (for example, “sound alike”).	Mandates a structured explanation of sound features considered.	<i>Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd</i> [1992] 2 MLJ 63: Did not analyse the auditory effect of the shared, strongly rhyming “-ister” suffix.
Use of Evidence	Limited formal use of phonetic evidence; reliance on judicial impressionistic reasoning or admissions by parties.	Creates a formal channel for forensic linguistic evidence under Section 45 EA 1950, where complex comparisons necessitate expert input.	<i>London Lubricants (1920) Ltd's Application, Re</i> (1925) 42 RPC 264: Established the ‘slurring principle’ but as a general observation, not as a trigger for specific phonetic analysis in subsequent cases.
Precedential Value	Outcomes are defensible, but reasoning offers limited guidance.	Generates transparent reasoning that builds predictable precedent.	<i>Staywell Hospitality Group Pty Ltd v. Starwood Hotels &amp; Resorts Worldwide, Inc and another</i> [2013] 1 SLR 489: Identified syllabic prominence but did not phonetically define why “Regis” was the dominant aural element.

In conclusion, this analysis demonstrates that MPP is a procedural reform. It does not alter the substantive legal test but significantly enhances its application by transforming aural assessment into a clear, reasoned, and evidence-based judicial process.

#### IMPLICATIONS FOR EVIDENCE AND PRACTICE

The adoption of the MPP framework would pragmatically refine the evidentiary process in trademark litigation. Crucially, MPP does not mandate a universal obligation to call a

linguist as an expert witness under Section 45 of the EA 1950. Instead, it establishes a structured procedural requirement for explicit phonetic reasoning. In straightforward cases, such as those involving identical syllabic structures or clear minimal pairs, Courts and the Registrar at the MyIPO can discharge their MPP obligation by applying basic phonetic principles set out in the established guidelines, thereby articulating their reasoning without external expertise.

In complex or contentious cases where aural similarity is a crucial factor,

particularly those involving subtle dialectal differences, disputed stress patterns, or acoustically similar vowels, parties may choose to submit expert linguistic reports. In these situations, Section 45 provides a legal framework for the introduction of such specialised evidence. The linguist's role, in accordance with the Act, is to assist the tribunal in identifying and comprehending relevant phonetic features, rather than making case determinations.

Furthermore, comparative disputes involving brand dilution similarly demonstrate the importance of structured auditory reasoning in preserving market distinctiveness. Syahroni, Nu'man, and Heniarti (2022), in their analysis of the IKEA versus IKEMA dispute, highlight how phonetic resemblance may contribute to consumer confusion even where visual distinctions remain identifiable. Such disputes illustrate that modern trademark conflicts increasingly involve subtle forms of auditory approximation that can dilute brand identity through repeated consumer exposure. Accordingly, clearer phonetic articulation within judicial reasoning becomes increasingly necessary to maintain coherence and predictability in contemporary trademark enforcement.

This approach aims to enhance the forensic rigour and procedural efficiency of proceedings, shifting away from expensive, often inconclusive survey evidence towards focused, scientifically sound analysis when urgently needed.

## CONCLUSION

This study reveals that while Malaysian trademark law is doctrinally sound, it grapples with procedural ambiguities in how courts assess aural similarity. Courts apply established legal tests based on the concept of 'imperfect recollection', yet often reach

conclusions that lack clear, structured reasoning regarding the phonetic factors contributing to consumer confusion.

Despite recognising aspects of phonetic salience, such as syllabic dominance and emphasis, judges rarely implicitly translate these insights into formal reasoning, thereby increasing judicial discretion without the necessary analytical clarity. This lack of transparency diminishes the precedential value of decisions and undermines consistency across cases.

To address this issue, the proposed MPP framework requires courts to articulate their sound-based reasoning regarding aural similarity. This framework does not alter the existing likelihood of confusion test or mandate expert witness testimony in every case. Instead, it operationalises provisions from Section 45 of the EA 1950, structuring judicial discretion and facilitating the use of forensic linguistic support when necessary.

By grounding the analysis of aural similarities in identifiable phonetic features rather than relying on subjective auditory assessments, MPP seeks to harmonise legal reasoning with scientific understanding.

Moreover, the implementation of this framework promises to improve transparency, predictability, and fairness in Malaysian trademark law. It offers a model that could benefit other common law jurisdictions facing similar methodological challenges. By clearly explaining phonetic reasoning in cases involving aural similarity, adjudicators can ensure that routine proceedings follow standardised guidelines while more complex issues are resolved through specialised evidence. This reform enhances judicial clarity without requiring legislative changes, aligning legal practices with linguistic realities and modern acoustic science. Ultimately, adopting this framework

is expected to improve the effectiveness and fairness of trademark adjudication in Malaysia, ensuring that objective and scientific principles inform judicial assessments.

Furthermore, the proposed framework remains consistent with emerging international scholarship advocating structured and evidence-based approaches to trademark similarity analysis. Comparative doctrinal, forensic linguistic, and computational studies increasingly recognise that phonetic similarity assessment cannot rely solely upon impressionistic auditory assessment. Instead, transparent articulation of phonetic reasoning is necessary to enhance consistency, predictability, and procedural legitimacy within trademark adjudication.

Finally, substantively, the article's strongest contribution is not merely the proposal of MPP itself. Rather, its principal scholarly contribution lies in reframing aural similarity from a purely impressionistic judicial exercise into an evidentially articulable forensic inquiry grounded within the existing framework of the EA 1950. That doctrinal positioning is your real originality and should remain central throughout the manuscript.

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#### AUTHOR'S CONTRIBUTIONS

The author is the sole contributor to this manuscript. She was responsible for the study's conceptualisation, the formulation of research objectives, the execution of the doctrinal audit, and the development and integration of the interdisciplinary framework. The entire research process, including analysis, authorship, and revision, was conducted independently.

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