

Measuring Consumer Confusion through Online Surveys

Practical Guide to Survey Acceptance

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Introduction: Trademark practitioners have begun using the Internet as an alternative to telephone, mall-intercept, and other in-person surveys. The shift to the online format comes from a variety of factors including the rise of consumers using the Internet, the affordability, speed, and ability to track real-time results of the online format, and the increased comfort level of online surveys in general. The relative newness of the Internet format, however, may cause some trademark practitioners pause before recommending the online format to their clients. Moreover, the relative lack of a clear, proven track record in federal court opinions for the online survey has dissuaded online surveys in the past. This outline discusses the issues trademark professionals should consider in deciding whether to use an online survey. The outline also includes references to recent federal court opinions addressing online surveys.

I. The Online Survey – An Overview

Online surveys are taken by respondents who are logged on the Internet. Respondents typically click a link from a survey invitation and are then sent to a website that contains a survey programed on the site. The survey site has instructions, questions, and survey stimuli on a succession of screens that interact with the respondent. The respondents' answers are then logged directly to the server. Real-time results may be reported.

The online survey is not limited to dealing with trademark issues that appear exclusively online. Rather, the online format can be used to survey a wide variety of topic areas that relate to trademark issues on and off-line. Some common survey formats that may be tested on the Internet include:

- Eveready confusion surveys
- Squirt confusion surveys
- Secondary meaning surveys
- Genericness surveys
- Dilution surveys
- Advertising perception surveys
- Multi-phased surveys

Online panels make it feasible to conduct multi-phase research in which respondents are initially exposed to a mark and then later invited to take part in a subsequent survey (that they have no reason to connect to the first survey) in which they are exposed to other marks. Such an approach can be used to combine the benefits of an Eveready and Squirt survey or to test for dilution.

II. Requirements for Admissible Trademark Surveys in General

The proponent of a survey bears the burden of establishing the survey was conducted in accordance with generally accepted principles of survey research and that the survey is sufficiently reliable to be admitted into evidence.¹ The admissibility of surveys is governed by Federal Rule of Evidence 702. Surveys must also meet the standards outlined in *Daubert v. Merrel Dow Pharmaceuticals, Inc.*² and *Kumho Tire Co. v. Carmichael*.³ To be admissible, surveys are generally required to meet the following requirements:

- (1) the relevant universe was properly defined;
- (2) a representative sample was selected from the universe;
- (3) the questions were clear, precise, and non-leading;
- (4) the person conducting the survey has sufficient expertise and used reliable interviewing procedures;
- (5) the data gathered was accurately reported;
- (6) the data was properly analyzed; and
- (7) objectivity of the process was assured.

Although it is widely accepted that all surveys can be subjected to varying forms of criticism and that perceived flaws in survey methodology generally go to the weight, courts may exclude surveys if flaws are so severe that the survey's value is substantially outweighed by its tendency to mislead or result in prejudice at trial.

III. Selecting Respondents for an Online Survey

Potential respondents to an online survey may be selected in a variety of ways, including online panels, real-time sampling, and email lists. The following section summarizes these three areas, though other sources may be available depending on the survey universe.

¹ *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 452 F. Supp. 2d 772, 777-8 (W.D. Mich. 2006); *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507 (D.N.J. 1986).

² *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

³ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

A. Online Panel Surveys

A primary method to draw potential respondents is through the use of online panels. In the past, telephone sample providers maintained databases of individuals who were willing to participate in telephone surveys. There is now a sizeable industry of organizations that develop those databases for individuals who are willing to complete online surveys. Those panelists generally receive incentives, such as small monetary reports or points that can be redeemed for merchandise. There are two main types of panels, including consumer and professional panels.

Consumer Panels: This type of panel is generally composed of individuals who have provided contact and other personal information and agreed to be sent survey invitations by email. The individuals usually sign up for the panels as part of programs that offer small incentives for taking the surveys. Consumer panels may be targeted to specific consumers.

Professional Panels: This type of panel is generally composed of certain professionals, such as medical/health care professionals, who can be contacted to take online surveys relevant to their profession. The respondents who are on professional panels may also receive incentives, though the incentives are generally higher than the general consumer panel.

One of the key benefits of using an online panel is that the providers generally supply data regarding the age, gender, geographic location, and other relevant information regarding the panelists. The potential panelists, therefore, can be selected from random from that base of demographic data.

B. Real-time Sampling

Online sample providers also offer contacts to respondents beyond the panel respondent. Real-time sampling respondents are those individuals who are visiting certain websites. Generally, a pop-up invitation appears while the consumer is visiting the website, inviting the individual to take part in the survey. Potential respondents then follow the pop-up link to the online survey website where they are qualified for the survey.

C. Organization and Email lists

Certain organizations make their member data available to take online surveys. Further, there may be industry email lists available to contact potential respondents.

IV. Universe Requirements for Online Surveys

The fact a survey is online does not forgive the “relevant universe” requirement of a trademark survey. Online surveys are ideal for efficiently covering certain low-incidence

populations that would be very expensive and time-consuming to survey by telephone or in-person. However, online surveys can be poorly suited for reaching certain consumer categories.

Trademark practitioners should continue to question, among other things, (1) the size of the respondent pool, (2) accurate representativeness in terms of age, gender, geography, and other demographics, and (3) response rates.

Size of Sampling Pool: The number of people who have access to an Internet survey is a potential concern. In the early days of the Internet, the number of people with online access was small enough there was reason for concern related to the size of the sampling pool. With increased Internet coverage, this concern has been diminished to some extent. Trademark practitioners conducting online surveys, however, should be mindful of the sampling pool, especially when surveying a group that may have limited Internet access.

Representativeness of Sampling: Similar to the concern of the size of the sampling pool, there is a concern that those who are online may differ from those who are not online, thus skewing the results of an online survey. Trademark practitioners who consider conducting online surveys should be mindful that certain surveys may not translate to the Internet because the representative class is not online or a significant portion of the class who may have different behavior is not online.

Response Rates: Response rates in online surveys are a potential concern because individuals who do not respond could be different from individuals who do respond – thus creating an issue whether the full universe actually responded. Trademark practitioners should consider the response rate when preparing a survey to assure the proper universe is responding. Likewise, practitioners who are defending an online survey may consider attacking a survey with a low response rate where there is evidence a group of potential respondents did not respond.

In assessing the universe issue related to online surveys, courts should be informed of the statistics related to online use, particularly when comparing to traditional survey formats. For example, approximately 80 percent of Americans use the Internet.⁴ That percentage is similar to the percentage of Americans who have a land telephone line⁵ and greater than the percentage who live near a shopping mall with an interviewing facility.

⁴ The most recent report from the Pew Research Center's Internet & American Life Project indicates that 79% of Americans use the Internet; *available at* <http://pewinternet.org/~media/Files/Reports/2011/PIP%20-%20Social%20networking%20sites%20and%20our%20lives.pdf> .

⁵ A recent study by the Center for Disease Control found that 29.7 percent of American homes do not have landlines. *See* discussion of National Health Interview Survey, *available at* <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.htm>.

V. Stimuli Requirements for Online Surveys

The stimuli that is to be tested should be considered when deciding whether the survey is appropriate in an online format. Trademark practitioners should consider whether the use of the marks and important marketplace conditions be fairly portrayed on a computer screen. A product that is sold online may be well suited for an online survey format because the marketplace conditions can be replicated easily. A product sold in a boutique shop, however, may not be replicated as easily in an online format. This is not to say that the Internet is the only marketing channel that should be assessed when conducting online surveys. In fact, online surveys may be particularly useful for simulating an off-line marketplace.

Additionally, the technical aspects should be taken into consideration when deciding whether the online survey format is proper. The size and resolution of a respondents computer monitor may alter the look of the product or mark at issue. Different web browsers may display the online survey differently. Moreover, consumers have different download speeds, CPU speeds, and video capabilities. Each of these factors should be considered when assessing the types of stimuli that should be assessed with an online survey.

VI. Validation of an Online Survey

A traditional mall intercept survey is generally validated by a follow up call to the respondent to confirm that the respondent did in fact take the survey. The validation not only confirms the person took the survey, but that the interviewers did not falsify answers to screening questions or the interview itself. To some extent, the reasons for validation do not exist for Internet surveys. The respondent must have provided the answers because online surveys have no interviewer who could possibly commit error or fraud.

Online surveys, however, may have their own validation concerns. Some theoretical concerns to address with online surveys include whether the individual completing the survey is the actual person who was sent the invitation and whether the respondent, and not a computer program, completed the questionnaire.

To address that issue, it may be appropriate to use traditional telephone validation to rule out any irregularities. Online validation, however, may also be accomplished by asking questions that reduce to negligible any concerns regarding the identity of the respondent. The online survey, therefore, can be validated immediately, maintaining the real-time results.

VII. Cost and Time Considerations of Online Surveys

The cost and time associated with conducting a survey is generally an issue in trademark cases that rely on surveys. Online surveys are typically less expensive than mall or telephone surveys. However, the costs have increased to reflect the value that access to online respondents has to the growing online survey field. The greatest cost savings for an online survey occur in surveys of low incidence populations and/or where large sample sizes are desirable.

The advantages of time saving from an online survey can be seen when conducting full-sized studies or studies among hard-to-reach consumers. Time savings are not as great for small-scale or pilot-sized surveys.

VIII. Reliability Comparisons with Other Survey Methodologies

A properly designed and conducted online survey can be as reliable as traditionally accepted mall-intercept and telephone surveys. A detailed analysis comparing the three methodologies is set forth in *A Comparative Empirical Analysis of Online Versus Mall and Phone Methodologies for Trademark Surveys*, 100 TMR 756 (May-June 2010). That report compares a wide variety of features from the methodologies, including response rates, representativeness of sample, geographic coverage, presentation of stimuli, expression of no opinion, errors in survey administration, quality of open-ended questions, time to complete the survey, validation of interviews, and survey results.

The findings of the comparative empirical analysis showed that online surveys are just as reliable as other traditional methods. Response rates for the online surveys were as high as or higher than the mall-intercept and telephone surveys. The online survey methodology was at least equally, if not more, suitable for obtaining representative samples. Only negligible numbers of respondents had trouble viewing stimuli, gave gibberish or nonsense answers, or took a troublingly small or large amount of time to complete the survey. Additionally, the rates of expressing “no opinion” were similar in all three formats. Validation of the surveys caused little concern about the identity and characteristics of those taking the surveys. The only apparent disadvantage of the online survey was that online respondents provided shorter, possibly less thorough responses to open-ended questions.

IX. Tips On Conducting a Reliable Online Survey

Trademark practitioners looking to use an online survey should be mindful of the traditional requirements for conducting a survey. The following are some issues that are particularly relevant to conducting an online survey:

- Selecting a reliable sample supplier, survey host and programmer;
- Implementing procedures for targeting the relevant universe online and sampling among the online universe in a representative fashion;
- Achieving online response rates in line with industry standards;
- Using quality control measures to ensure respondents pay adequate attention to survey instructions and questions and properly complete survey;
- Creating proper, representative stimuli that are easily viewable and ensuring that respondents can view the stimuli without problems;
- Ensuring that the types of questions asked will result in sufficiently thorough answers, particularly if the survey results are reliant on open-ended questions; and
- Verifying respondent characteristics, either through collecting data that can confirm characteristics to a sufficiently high degree of probability or through independent validation methods.

X. Court Acceptance of Online Surveys

Recent federal court decisions show that online surveys are being treated like traditional methodologies when assessing the reliability of the surveys. Online surveys are generally accepted when they are properly designed and implemented and being criticized or rejected when seriously flawed. Below are a summary of some recent federal court decisions.

A. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 2010 U.S. Dist. LEXIS 132948 (D. Utah Dec. 15, 2010)

Summary

1-800 Contacts brought a trademark infringement action against Lens.com. Both parties sell contact lenses over the internet. 1-800 Contacts conducted an online survey to assess likely confusion. Defendant sought to strike the survey. The Court struck the survey based on flaws in the design of the survey.

Survey Design

The survey at issue was a web-based survey comprised of four cell groups. The universe included respondents that had or where planning to buy contact lenses within 12 month before or after the survey, not limited to buying them online. Respondents were asked how frequently they had been on the Internet in the last month. Additionally, respondents were asked whether they had used a search engine to search the Internet in the last month. The survey was not limited to those who used Google as their search engine in the last month.

Expert Qualifications: The court criticized the Plaintiff's survey expert's qualifications because he never designed a survey to address likelihood of confusion before. The Court concluded that "Plaintiff has failed to demonstrate that Degen is an expert in consumer-confusion surveys, which impacts his credibility." However, the Court deemed the expert's qualifications sufficient by acknowledging the expert had some experience in designing surveys in other disciplines.

Universe: The court found the universe to be over-inclusive because it was not limited to online sales.

Questioning: The Court found the questions used in the survey were flawed based on at least three reasons.

1. The Court concluded that the questioning was flawed because the survey did not contain "close-ended question that [offered] exhaustive alternative responses." The court found, that when the only name that is suggested to the survey respondents is '1800Contacs', the choice of 'yes', 'no' or 'don't know' was too narrow and should have been designed to also include such choices as 'Lens.com', 'ContactLens.com' or 'DiscountedContactLense' to make the questioning less suggestive.
2. The Court found the questioning was unclear. Respondents were told the search term was "1800contacts" and that the next screen would show the results of that search. They were then asked if the highlighted link "originates from 1-800-CONTACTS." Even though the term "originate from" is taken from a statute, the court found that it might be confusing to the respondents. The expert did not run a proper pre-test to find out if there are "unexpected question interpretations".
3. The Court also criticized the question "Please indicate the corresponding letter of all lettered links, if any, that you think originate from 1-800-CONTACTS or have sponsorship or approval from 1-800-CONTACTS. Select all that apply" to be unclear because it uses the term "to originate from" as well as posing two questions at the same time.

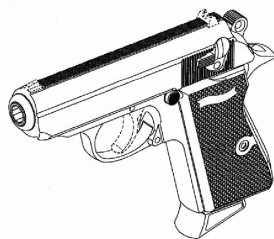
Other Issues:

Defendant also asserted the survey failed to approximate actual market conditions and that the cell groups were uncontrolled, which further skewed the data. But the Court did not address these issues because the above mentioned flaws were already sufficient to not accept the survey.

B. *In re Carl Walther GmbH*, 2010 TTAB LEXIS 410 (Trademark Trial & App. Bd. Oct. 26, 2010)

Summary

Carl Walther GmbH filed an application to register as a trademark on the Principal Register the product configuration design shown below for "firearms; pistols; and air soft guns" in International Class 13.



The trademark examining attorney has finally refused registration under Trademark Act Sections 1, 2, and 45 on the ground that the design sought to be registered is not inherently distinctive and that applicant has not established acquired distinctiveness. In order to prove the design had acquired distinctiveness, applicant submitted an online survey. The Board accepted the survey as evidence of distinctiveness.

Survey Design

Applicant commissioned a blind, online survey of individuals (over 18 years old) who "own a handgun or plan on purchasing a handgun in the near future" and have not previously worked for a gun manufacturer. The participants were shown images and asked whether or not they were able to identify each pistol "based on [their] shape[s]" and, if so, to identify the "company or companies that make a pistol with this shape. Applicant's handgun design was among the other handguns from various manufactures. Approximately 54% of the participants who completed the survey stated that they were able to identify who makes applicant's PPK pistol based on the shape of the pistol; and 33% of survey participants correctly identified applicant, or its licensee, as the maker.

The survey was accepted as evidence of distinctiveness, but was not considered to be conclusive on its own. The examining attorney argued that "by only surveying consumers with extensive knowledge of handguns, the applicant has not shown that the public recognizes that [the PPK handgun design] identifies the source of the goods." The TTAB however found that "applicant need only show that the mark has become distinctive as a source identifier in the minds of consumers or prospective consumers of handguns, and not the 'public' at large".

C. Kargo Global, Inc. v. Advance Magazine Publr., Inc., 2007 U.S. Dist. LEXIS 57320 (S.D.N.Y. Aug. 6, 2007)

Summary

Kargo Global, Inc., a distributor of online content to wireless devices, claimed that its "KARGO" trademark was infringed by Advance Magazine Publishers, Inc.'s publication of the now-defunct Cargo magazine. Plaintiff commissioned an online survey to assess consumer confusion. The Court did not accept the online survey based on flaws in the design and implementation of the survey because the results would be unfairly prejudicial under Rule 403 of the Federal Rules of Evidence.

Survey Design

The participants of the online survey were males, aged 17 to 45, who resided in the United States. Individuals who worked in advertising, marketing, or for a company that offered wireless cell phone services were excluded. Participants who did not read or skim a magazine at least once per month or

did not own a cell phone or plan to buy a cell phone within the next year were also excluded. Further, participants who did not currently have or would not consider obtaining within the next year various wireless products for their cell phones (for example, ringtones, video games, music videos, and magazine content) were also excluded.

The online survey's initial page showed the respondents materials from Cargo magazine, including front covers and content displaying – among other things – the “CARGO” logo, and the “cargomag.com” logo. One page entitled “Cargo-to-go” showed a picture of a Blackberry cell phone and advertised the Cargo website.

After a number of distraction questions, the next phase showed materials that contained the “KARGO” mark as part of an magazine ad for “Premiere Mobile”, a download page for cell phone content.

Each respondent was then informed that the "next ad you will see is for a service available for cell phone users." The respondent was then shown a blown-up picture of a Blackberry cellphone, with the "KARGO" logo displayed in large font above the picture.

Each respondent then was asked a series of multiple choice questions designed to ascertain whether he believed there was any connection regarding source, business relationship, or sponsorship between the company that produced the materials for Cargo magazine and the company that produced the "ads" that displayed the "KARGO" logo – and if they did believe so, they were asked to explain what made them think so.

The Plaintiff's survey utilized a two-pronged test to determine whether a respondent could be counted as "confused". In order to be counted as "confused", a respondent first had to answer one of the three initial multiple choice questions affirmatively, indicating that he believed that the Kargo "ads" either (1) came from the same source as the Cargo or Carry magazine that was displayed; (2) came from a company that had a business connection with Cargo or Carry magazine; or (3) came from a source that was required to obtain permission from Cargo or Carry magazine. Next, when asked to state the reason for his answer as to the initial multiple choice questions, the respondent "had to give an answer that referred to the names Cargo (Carry) and Kargo or the equivalent." Thus, a participant who indicated that he believed there was a connection as to source, relationship, or sponsorship between the Cargo (or Carry) materials and the Kargo materials, but who then did not refer to the similarity of the companies' names when asked why he thought there was a connection, would not be counted as "confused" in the final tally.

Criticism - Improper format to match marketplace conditions: The back-to-back showing of the Cargo and Kargo marks did not approximate conditions that consumers would encounter in the marketplace. The Court doubts that a non-negligible number of prospective consumers of Kargo's products would see Cargo magazine, followed a minute or less later, by the KARGO logo.

The court found that “Here, where Kargo has alleged that "reverse" confusion has occurred because of the infringing use by the better-known Cargo magazine of the lesser-known senior user's (Kargo's) name, it would have been far more replicative of actual marketplace conditions to have displayed only Kargo's materials and then asked the respondents open-ended questions regarding their beliefs about the source, business relationship, or sponsorship of the Kargo materials.” --- known as the “Eveready” format.

Criticism - Leading questions: “After viewing the seriatim display of non-competing products that few if any respondents actually would have encountered in close physical or temporal proximity in

real life, the respondents were given multiple choice questions in which they were asked whether they believed a connection, as to source, business relationship, or sponsorship, existed between the companies whose marks the respondents had just seen. Rather than measure any actual confusion, however, these questions were far more likely to generate "demand effects" by suggesting the existence of a connection between the products that the respondents would not have made on their own. [...] Certainly, in light of the non-competing nature of the products at issue, the multiple choice questions that immediately followed the display of the marks implied connections or associations that otherwise would not have occurred to the respondents."

Improper stimuli: The Plaintiff's survey displayed to respondents a purported "ad" for Kargo, in the form of a blown-up photo of a Blackberry cellphone that prominently featured the KARGO logo. That "ad", however, was not an actual advertisement that a prospective user of Kargo's products would ever encounter but rather was a page prepared by Kargo as promotional material, designed for viewing by Kargo's direct, business-to-business customers.

D. *GoSmile, Inc. v. Levine*, 769 F. Supp. 2d 630 (S.D.N.Y. 2011)

Summary

Plaintiff Go SMiLE develops and markets teeth-whitening and oral-care products that are used in the home, and sells them directly to consumers via "high-end retail stores," "high-end hotels," a cable shopping channel, and other retailers. Defendant Dr. Jonathan B. Levine co-founded Go SMiLE in 2002, and, after he sold a majority interest to investors, remained affiliated with the company as an officer, director and spokesperson. His relationship with Go SMiLE ended in April 2008, after which he began to develop a new tooth-whitening product line that is being marketed under the mark "Glo." Go SMiLE alleges that Levine's "Glo" product line violates Go SMiLE's trademarks under the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a), and New York state law. The court accepted defendants' online survey showing zero percent confusion.

Survey Design

Defendants proffered expert testimony related to two online surveys of individuals who were prospective consumers of tooth whitening products. The surveys were double blind: participants were not informed of the survey's purpose or sponsorship, and the firm retained to administer the survey was not told of the study's sponsor or purpose.

The first survey was a so-called "Eveready" survey. Fifty survey participants were shown an image of the Glo packaging, and a separate image of the Glo light-whitening products in their packaging. Another fifty were shown an image of the packaging on "GLO Brilliant" whitening gels. The survey asked participants to "look at this product" as if they were viewing it on a cable shopping channel such as QVC or HSN, in a store such as Sephora or on a website." It then asked all participants: "Do you have an opinion about what company or brand puts out the product you were just shown, or do you not?" Respondents who answered "yes" were then asked to identify the brand or company responsible for the product. All participants were asked if they knew of any other products marketed by the same company, and if so, the brand and product marketed by that company.

All respondents were then asked if they believed that "the company that puts out the product you were shown is affiliated with or received approval from any other company or brand that you know of

... ?" None of the 100 respondents in the Eveready survey named Go SMiLE as a potential source of the Glo product. The product was associated with other brands, which were as varied as Sony and Crest. Four associated Glo with Sephora, but when asked to explain the basis for making the association, responses included that it looked like a product that Sephora would sell, that "it is nice," and, erroneously, that the product said Sephora on the box.

The second survey was a "sequential lineup survey" of 400 respondents, 200 of them assigned to a test cell and 200 to a control cell. Respondents were first shown an image of a Go SMiLE product package. Half saw the packaging of the "GO SMiLE SMILE WHITENING SYSTEM." Half saw an image of the "GO SMiLE GO WHITER" product. As explained in the Poret Report, "The purpose of including two products in the study was to cover two different manners in which consumers could encounter the GOSMILE mark on GOSMILE products." Respondents were directed to "take your time looking at this product" and then to continue with the survey.

Respondents in the control cell were then shown Glo packaging, with the word "glo" removed, and the product renamed as "Brilliant G." The control-cell alterations were intended to "measure noise — i.e., the extent to which survey respondents will make a connection between the two products even when the GLO marks have been removed." Respondents in the test cell were shown images of the original, unaltered Glo packaging. Respondents also were shown images of the packaging of other tooth whiteners that presently are on the market. Respondents were then asked a variety of questions as to whether they perceived the products to be related.

In the test cell, 37.5% of respondents concluded that the GLO Brilliant product "is put out by the same company as Gosmile" or is otherwise affiliated with Gosmile. (Poret Report at 21.) In the control cell, which did not use "Glo," 38.5% of respondents reached the same conclusions.

The Court found the survey was properly designed and administered. In that holding, the court considered the fact that 4661 respondents were screened for participation that led to 500 selected respondents. The respondents were screened to ensure they were actual and prospective purchasers of tooth whitening products, and also screened them as to their willingness to pay for the products in the applicable price ranges.

E. Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., 618 F.3d 1025 (9th Cir. 2010)

Summary

Plaintiff Fortune Dynamic, owner of the DELICIOUS mark for footwear, sued Victoria's Secret regarding its use of the word "Delicious" on tank tops that were given away with the purchase of BEAUTY RUSH personal care products. Plaintiff conducted an online survey to assess the confusion. The district court excluded Plaintiff's survey because the survey compared the products side-by-side, failed to replicate real world conditions, failed to properly screen participants, and was "highly suggestive." The Ninth Circuit Court of Appeals reversed that decision, finding the criticisms went to the weight, not admissibility of the survey.

Survey Design

Plaintiff conducted an online survey among young women ages fifteen to twenty-four to determine the likelihood of confusion between Fortune's DELICIOUS footwear and Victoria's Secret's tank top. The survey was conducted online using an e-Rewards panel consisting of 211,000 members, ages thirteen to twenty-five. Most survey participants met two criteria: in the past six months they had purchased shoes and a tank top or in the next six months they planned to purchase shoes and a tank top. Participants were excluded if anyone in their household worked in the advertising industry.

Respondents were divided into test and control groups, each composed of 300 members. The members of the test group were exposed to pictures of Fortune's DELICIOUS shoes and Victoria's Secret's "Delicious" tank top, one at a time and in rotated order. They were then asked a series of questions about whether they thought the two marks come from the same company, related companies, or they did not know. The same protocol was followed with the control group, of which there were also 300 members, except that instead of the word "Delicious" on the tank top, one-third of the control group saw the word "Beautiful," one-third saw "Fabulous," and one-third saw "Incredible."

The district court rejected the survey, finding the methodology, survey design, and reliability were questionable. The Court of Appeals for the Ninth Circuit reversed and remanded to the district court.

F. *Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F. Supp. 2d 671 (W.D. Ky. 2010)

Summary

Plaintiff's mark protected a red dripping wax seal covering the cap of their bottles of bourbon whisky. The court noted that the mark had become "incontestable" pursuant to 15 U.S.C.S. § 1065 and found that it was valid because defendants' failed to show that it was functional or generic. The court found that defendants' use of a red dripping wax seal was likely to cause confusion among the relevant consumers as the products occupied the same general market and liquor companies used co-branding frequently enough to lead consumers to believe that the red dripping wax could indicate a relationship between the two products.

Survey Design

Defendant conducted an online survey to assess the confusion related to the red dripping wax seal. The survey involved 500 respondents who were shown pictures of various liquors with the brand name listed below each product.

Criticism – False Recreation of Marketplace: The Court held “The survey created an environment that was dissimilar to that in which a typical consumer would encounter Maker's Mark or Reserva.”

Criticism - Suggestive Stimuli: The Court held the Plaintiff “showed the respondents pictures of various liquors with the brand name listed below each product, which would tend to suggest that the products were not affiliated”

Criticism - Control Group: The Court found the Plaintiff’s “control group was problematic and may have skewed the confusion results. [...] In that group, the expert replaced the picture of the Reserva at issue with another picture of Reserva that included a red wax seal but had no drips. Then, he subtracted the number of confused respondents in the control group from the number of confused

respondents in the test group. Such an approach ignores the fact that the control group picture could have been confusing also.”

Criticism - Exclusion of respondents: The Court found the Plaintiff’s survey “excluded respondents who indicated that the products were related but said that they were "guessing."

The Court found that the survey, based on its improper design, was “neither useful nor persuasive.”

G. *ComponentOne, L.L.C. v. ComponentArt, Inc.*, 2008 U.S. Dist. LEXIS 87066 (W.D. Pa. Oct. 27, 2008)

Summary

A trademark dispute arose between two firms that develop, sell, and provide support for users of reusable software tools designed to be integrated into larger software applications, generally known as "components," "tools," or "controls." Defendant ComponentArt's components are designed for Microsoft Windows and web-based development. ComponentArt also provides consulting services in conjunction with its products. A number of ComponentOne and ComponentArt's products have overlapping functionality and the two firms consider themselves to be direct competitors. Plaintiff commissioned an online survey to assess confusion. The Court, because of methodological flaws in the survey, did not accept the survey.

Survey Design

Plaintiff conducted an online survey using a panel of respondents recruited by the firm Authentic Response. The survey targeted respondents "whose titles indicated involvement with the IT process." The targeted respondents were emailed an invitation to participate in the survey and offered a \$ 5 reward for completing it. In order to qualify for the survey, a respondent had to affirm they lived in the United States, developed software using Microsoft Visual Studio, were familiar with components and how they are used with Microsoft Visual Studio, and do not develop or work for a company that develops components for sale to users of Microsoft Visual Studio. If the respondent answered "yes" to each question, they were presented with a second series of screening questions.

Qualifying respondents were randomly assigned to either the "main test," "main control," "supplemental test," or "supplemental control" survey. In the "main test" survey, respondents were shown the "ComponentArt" name in a large block letters followed by a description of the company taken from its website as the survey's stimulus. In the "main control" survey, the stimulus was the same in all respects to the "main test" stimulus except that "Cyberakt" replaced the word "ComponentArt" wherever it appeared.

In the "supplemental main" survey, the stimulus was the "ComponentOne" name in large block letters followed by a description of ComponentOne that appeared on the sponsors webpage for the Fall 2007 "Mobile Connections" trade show. In the "supplemental control" survey, respondents were shown the same Cyberakt stimulus as in the "main control" survey. Respondents were allowed to view the stimulus for as long as they wished, but once they clicked the "Next" button they could not return to the stimulus.

Following a series of "distraction" questions, the respondents were asked, "If you see the name of the

company whose description you viewed earlier [in the stimulus], check the radio button next to it. CHOOSE ONE ONLY". Respondents of the "main test" and "supplemental test" surveys were then given the choice of clicking the radio box next to the names "Dundas Software," "Infragistics," "Xceed," "Syncfusion," "ComponentArt," "telerik," "ComponentOne," "None of the Above," or "Don't know/No opinion" for their answer. In the "main control" and "supplemental control" surveys, "Cyberakt" replaced "ComponentArt" in the list of choices. Klein explained his list of possible answers was chosen because it comprised "companies that sold components including ComponentOne and ComponentArt (or Cyberakt)." The list of potential answers was randomized for each participant "to avoid any order effects."

The next question presented the respondents with the same randomized list of potential answers except the answer that the respondent chose in the preceding question, if any, and asked, "Which, if any, of the following companies is associated or affiliated with the company whose description you viewed earlier [in the stimulus]?" If the respondent chose one or more of the given responses to that question, he was asked a follow up question for each chosen answer asking why the respondent believed that the firm "is associated or affiliated with the company whose description you viewed earlier?" The respondent was able to type an answer to that question.

Respondents were then presented with a randomized list of URLs belonging to the companies listed in the preceding two questions and asked, "Which, if any of the following URLs would direct you to a web page for the company whose description was seen earlier?" Next, the respondents were given a list of those companies' products and queried, "Which, if any, of the following products is put out by the company whose description you viewed earlier?"

The survey considered a respondent as "confused" if they gave an incorrect answer to the questions asking (1) which companies' description did you see earlier in the stimulus, (2) which company, if any, are associated or affiliated with that company, (3) which of the URLs refers to that company, or (4) which product is produced by that company. Net confusion of the main survey was 22.0% and 13.3% for the supplemental survey.

Defendant's Criticisms: Defendant attached the survey on numerous grounds, including (1) failure to replicate marketplace conditions, (2) use of an improper stimulus, (3) improperly inducing respondents to confuse the parties' marks,(4) using an improper control, and (5) an artificial inflating the amount of "confusion" responses.

Court Criticism – Stimuli: The Court found the survey was fundamentally flawed in its methodology and chose to focus its opinion on the Plaintiff's choice of stimuli. The Court held:

A survey is only useful as evidence of actual confusion if it replicates the conditions in which instances of actual confusion, whether of the "source" or "initial interest" variety, would occur. The survey's stimuli did not replicate the parties' marks as they would be encountered in any of these situations in which a potential purchaser would encounter the parties' products or services. Instead of using screen shots of the parties' websites, common Google searches potential purchasers would use, or ComponentSource or other resellers' product listings, Klein presented the parties' marks on a plain background in large block letters followed by descriptions of the companies Klein gathered from ComponentArt's website and a listing of sponsors (not vendors) for a trade show.

H. *3M Co. v. Mohan*, 2010 U.S. Dist. LEXIS 124672 (D. Minn. Nov. 24, 2010)

Summary

Plaintiff 3M Company brought a trademark suit against Pradeep Mohan regarding use of the mark LITTMANN in connection with stethoscopes. Plaintiff engaged a survey expert to assess the level of confusion based on Defendant's use of the mark on the Internet. The Court accepted the survey.

Survey Design

The survey's universe included prospective purchasers of the stethoscopes Defendant advertised for sale on eBay. Respondents had to possess the following five characteristics: 1) be a physician or a nurse; 2) use a stethoscope as part of their practice; 3) personally make the decision about what stethoscope to purchase for their personal use; 4) have previously purchased a stethoscope on the Internet or be open to purchasing their next stethoscope over the Internet; and 5) be open to purchasing a stethoscope through eBay.

A total of 400 physicians and nurses participated in the online survey. Physicians completed 200 of the online surveys, and nurses completed 200 of the online surveys.

The universe was divided into four separate "cells" of 100 respondents per cell. Each cell contained 50 physicians and 50 nurses. Three cells were test groups, and the remaining cell was a control group. The respondents in Cells 1, 2, and 3 were shown and asked about one of Defendant's eBay listings. Each listing contained a photograph of the stethoscope for sale, as well as descriptions, specifications, and other information provided by Defendant - including a comparison chart with photographs of Defendant's stethoscopes.

Cell 1, 2 and 3 respondents were asked a number of screening questions, and were then shown an eBay web page. The web page displayed was a complete and accurate copy of Defendant's actual eBay listing as it would have appeared to a customer on the Internet, with the sole exception that the ads were digitally altered to remove the end date of the eBay auction.

After the web page disappeared from the screen, the respondents were asked to answer a series of questions. These questions are part of a series of approximately ten questions known as the "Eveready" survey.

Cell 4 respondents were asked the same questions as those described above and administered to Cells 1, 2 and 3. However, to ensure that respondents were not simply guessing LITTMANN or 3M because they are well-known brands, the advertisement in Cell 4 was altered to remove all traces of LITTMANN or 3M marks.

The 3M survey also captured the verbatim responses from respondents who stated they believed the stethoscope advertised was a LITTMANN or was made by the company that makes LITTMANN.

The Court accepted the survey as evidence of confusion and specifically held: "The Poret survey: 1) was double-blind; 2) surveyed medical professionals who were likely to purchase stethoscopes online; 3) showed respondents Defendant's eBay advertisements in an almost identical format; and 4) used questions previously approved to determine likelihood of confusion under the Lanham Act. The

survey also controlled for "noise," and provided verbatim responses demonstrating confusion. [...]Moreover, the verbatim responses from survey respondents are illuminating.”

I. *General Motors Co. v. Urban Gorilla, LLC*, 2010 U.S. Dist. LEXIS 136711 (D. Utah Dec. 27, 2010)

Summary

Plaintiff General Motors Company claimed Urban Gorilla, LLC’s "body kits" and marketing related to the kits infringe upon and dilute GM's Hummer trademarks and trade dress. The Urban Gorilla product line consists of steel and fiberglass "body kits" which customers install on an existing truck chassis.

Survey Design

GM designed and completed a survey to examine confusion in the marketplace regarding the Urban Gorilla body kits. The survey pool consisted of 1127 respondents, 1100 of which were ultimately included in the statistical calculations. Dr. Christensen identified individuals in the "relevant" group as a "consumer who has purchased in the last three years or plans to purchase within the next three years a new or used four-wheel drive SUV with off-road capability and who is a decisionmaker in their household for a car, truck, or SUV" because both GM and Urban Gorilla market their products to this group. A random selection of individuals who met market data demographics affiliated with this group were invited to participate in the survey.

The survey was a double-blind, test-control survey administered online. Respondents viewed three images from different viewpoints of either an assembled Urban Gorilla wagon model body kit or a military-style control vehicle. Each respondent then answered a series of questions related to the images. The terms "Hummer," "GM," or "Urban Gorilla" were not used in the questions about the images and there were no other brand identifiers.

Failed Criticism: Defendant argued “that only actual or potential Hummer purchasers should have been surveyed and attacks the survey pool on the grounds that its demographic data does not mirror the demographic data for the Hummer target market.” The Court held, however, “If it was only the confusion of Hummer purchasers that was of concern, then Urban Gorilla would be correct that the pool was over broad. However, the Tenth Circuit recently stated while explaining why post-sale confusion is relevant in trade dress infringement actions that the "Lanham Act was intended to protect the market as a whole from confusion as to the source of a product.”” The Court accepted the online survey as evidence of confusion.