INTELLECTUAL PROPERTY SURVEYS: MID 2014 – 2015

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I. INTRODUCTION

This paper is the annual follow-up to thirteen previous papers:1
(8) “Intellectual Property Surveys: 2006” published on the INTA web site
(9) “Intellectual Property Surveys: 2007” published on the INTA web site

The following provides short excerpts of a number of selected opinions referencing survey evidence published in opinions from July 2014 through December 2015,2 which might be of interest to the Lanham Act litigator. The bibliographies to this paper provide citations, by circuit and by survey issue, for all identified opinions published during this time period in which survey evidence was referenced.

1 Copies of the previous papers published by the Practising Law Institute (PLI) are available from the PLI or Westlaw. The previous paper published in the Proceedings of the American Intellectual Property Law Association (AIPLA) is available from the AIPLA. A compilation of all these papers is available at INTA.org. Copies of these papers and the compilation are also available from Ford Bubala & Associates.
2 The primary focus of this paper and prior annual reviews of survey evidence is on surveys related to Lanham Act claims. Notwithstanding this focus, this paper, as well as previous papers, may include reference to surveys in other intellectual property matters as they are identified.
II. THE YEAR IN REVIEW: Mid 2014 – 2015

A. GENERICNESS SURVEYS


...[Plaintiff] asserted...that the GOOGLE mark has become generic...

...Defendant's survey expert...conducted a consumer survey modeled after the one used in E. I. DuPont de Nemours & Co. v. Yoshida Int'l, Inc...to prove that the primary significance of the TEFLON mark in the minds of consumers was DuPont's non-stick coating, rather than non-stick coatings in general.

Plaintiffs object that [Defendant’s expert’s] survey is irrelevant because it “does not even address the verb issue” and “tests only whether the word ‘google’ when used as a noun, is a proprietary name or common name”...The pertinent inquiry here is whether the primary significance of the GOOGLE mark to a majority of the consuming public (those who utilize internet search engines) is to indicate the Google search engine in particular or to indicate the common descriptive term for search engines in general. [Defendant's expert’s] survey is evidence that the significance of the GOOGLE mark “with respect to searching the internet” to an overwhelming majority of the consuming public (93.77%) is a particular brand name rather than a common name like “website” (identified as such by 97.76% of respondents). Therefore, [Defendant's expert’s] survey is relevant.

While [Plaintiff’s expert] was aware that Thermos style surveys ordinarily ask several questions, his survey asked only one substantive question. [Plaintiff’s expert] conceded that he was not aware of any other Thermos style survey in which only one substantive question was posed, nor was he aware of a court ever accepting such a survey. Moreover, [Plaintiff’s expert] testified that he was not aware of any treatises or articles that endorse the use of a single substantive question Thermos style survey.

...However, the fact that a majority of the public understands a trademark as an indiscriminate verb is not dispositive on whether the mark is generic. The dispositive question is whether “the primary significance of the trademark is to describe the type of product rather than the producer”...


...[I]n finding the mark generic, the Board indicated that it considered the evidence of record "including the surveys (which in any event arrive at different conclusions)," but gave controlling weight to dictionary definitions, evidence of use by the public, and evidence of use by Princeton Vanguard...The Board seems to have treated the surveys as though they cancelled each other out, but failed to offer any explanation for doing so. The Board thus overlooked or disregarded a genericness survey as to which it apparently found no flaw. On remand, the Board...
will have the opportunity to make the relevant factual findings based on all of the evidence of record, and must give appropriate consideration to the proffered survey evidence.


[Defendant]…has a trademark registration for the word mark "PORNTUBE"…

…

[Plaintiff] argues that consumer surveys are only relevant where the trademark at issue is a newly-coined or "fanciful term," or in the context of a descriptive term, to determine if the word has acquired "secondary meaning."

…

Because the combination of the words "porn" and "tube" could have nongeneric meaning to the consuming public, the Court finds that the [Defendant's expert's] survey is relevant because it relates to factual issues of consumer perception.

…

[Plaintiff’s] argument that consumer surveys may only be considered where a court is analyzing a newly-coined or fanciful term, or in the context of a descriptiveness analysis, is unavailing…[S]urvey evidence is relevant in this case...

**B. DESCRIPTIVENESS/SUGGESTIVENESS SURVEYS**


One of Defendants' defenses is that the Disputed Mark [GO AWAY GRAY] is descriptive, rather than suggestive, and that accordingly the mark is not protected absent a secondary meaning, which the parties agree is absent here. In seeking to rebut this defense, Plaintiff retained…an expert to conduct a survey regarding whether the purchasing public views the Disputed Mark as descriptive or suggestive. [ Plaintiff’s expert] conducted an online survey adapted from and modeled after the Teflon survey, which is commonly used to determine whether a trademark is generic.

…

(n.1 The Court notes that the survey asked respondents whether the Disputed Mark "refers to a product's brand name[] or describes a product's function or purpose..." and that this distinction is not necessarily the same as asking whether it is descriptive or suggestive. Specifically, just because a mark is a brand name (and perceived as such) does not mean that it is suggestive rather than descriptive...[T]he test for relevance [however] is whether evidence has "any tendency to make a fact [of consequence] more or less probable than it would be without the evidence"…and the Court finds that evidence of the purchasing public's understanding of the Disputed Mark…meets this standard.)
C. SECONDARY MEANING SURVEYS


Plaintiff markets and sells an athletic shoe using the trademark "G Defy®". [Defendant] markets and sells several styles of athletic shoes using the trademark "Micro G®". One style of shoes sold under the "Micro G®" trademark is called "Defy". That shoe is advertised and sold under the name "Micro G® Defy." Plaintiff contends that the use of the [Defendant's] "Micro G®" trademark in combination with the word "Defy" to create the name "Micro G® Defy" has caused consumer confusion.

... Plaintiff and Defendants both engage in advertising and online sales of athletic shoes...

... Defendants have presented the results of a survey that they commissioned. It found that, among prospective purchasers of athletic shoes, only 1.5% (5 out of 336) were aware of "G Defy" as a brand of athletic shoes...Among prospective purchasers of athletic shoes that claim to protect joints from impact, only .9% (1 out of 108) of respondents were aware of the "G Defy" mark. Plaintiff contends that the survey used an improper sample of the population and is unreliable. It argues that "the proper universe is the potential buyers of the junior user’s goods or services." ...[P]laintiff’s position is not persuasive. The “appropriate universe should include a fair sampling of those purchasers most likely to partake of the alleged infringer’s goods or services...” “Where the senior and junior user’s products are of the same kind, the population of consumers is the same.”

D. LIKELIHOOD OF CONFUSION SURVEYS


In 2009, [Defendant] began selling the eos Smooth Sphere...a lip balm container based on the design of the '939 patent.

...[Plaintiff] developed a product similar to the Smooth Sphere.

...[Plaintiff] argues that [Defendant] has no evidence of actual consumer confusion, but instead relies on a survey conducted by [Defendant’s expert]. The Court disagrees with the contention that [Defendant] fails to show actual confusion. First, the Tenth Circuit recognizes survey results as evidence of actual confusion...

...[Defendant's expert's] survey results provide additional evidence of actual post-Sale confusion. [Defendant's expert's] survey found a total confusion (net of the confusion concerning the control product) of 29.3 percent...The level of confusion evidenced in the study is sufficient to create a genuine dispute of material fact.

...
[Plaintiff] argues that [Defendant's expert's] survey is irrelevant because he used an overly narrow survey universe, improperly surveyed confusion as to the [Plaintiff] and [Defendant] products themselves without including the products' point-of-sale packaging, and used improper questions that did not provide a "don't know" response…[Plaintiff] argues that its rebuttal expert report…corrected the faults in [Defendant's expert's] methodology and found a net confusion rate of only 5.8 percent…[The Court] cannot decide at the summary judgment stage that [Plaintiff's expert's] conclusions are entitled to greater weight than [Defendant's expert].

Anheuser-Busch, LLC v. Innvopak Systems, 2015 TTAB LEXIS 260, *45 (TTAB 2015) This opinion is a precedent of the TTAB

We…note that the survey was appropriate in its general design. The likelihood of confusion part of the survey follows the familiar "Eveready" model, a widely used and well-accepted format for likelihood of confusion surveys...

We…reject Applicant's suggestion that a 24 percent rate of potential confusion as to the source or affiliation of Applicant's wine would be insufficient to support a finding that confusion is likely. As evidence that confusion is likely, a higher rate of confusion will always be better than a lower one, but the Trademark Act does not set a threshold percentage of relevant consumers who must be confused in order to bar registration under Trademark Act § 2(d)...

While we are mindful of the limitations and advantages of various types of surveys, it cannot be said that Opposer's survey was unsound merely because it was conducted online.


[Defendant] relied upon an October 2012 customer survey conducted by its expert...The survey included a thousand respondents and was targeted to internet users, who (1) had agreed to participate in such surveys for monetary compensation and (2) had existing financial investments...

...[Defendant’s expert’s] survey presented each respondent with 3 webpages: one from [Plaintiff’s] site, one from [Defendant’s] site, and one from a separate "control" site...The presentation order was rotated for different respondents...The respondents were asked to view the sample webpages and note whether they believed that any of the three companies were associated or affiliated with each other...Based upon the data, [Defendant’s expert] opined that the level of likely consumer confusion between [Plaintiff] and [Defendant] was between 2.5% and 4.2%.

...First, [Plaintiff] questions whether the survey accurately replicated the relevant universe and market conditions...
[Plaintiff’s] second criticism that [Defendant’s expert’s] survey utilized an improper control is more troubling. In any methodologically sound study, a control is intended to minimize the effect of variables other than the variable at issue...

... Despite this, [Defendant’s expert] selected "American National Bank" as the control for his study. But this control shares the very characteristic whose influence is being assessed -- the mark "American National." Accordingly, the control does nothing to eliminate background noise from the survey and undermines the survey's probative value...

... Rather than studying whether [Defendant’s] use of the "American National" mark in and of itself resulted in consumer confusion, the self-described purpose of [Defendant’s expert’s] survey was to determine whether consumers would confuse the two companies based upon all of the information contained on their websites (which, of course, included the names of the companies, as well as other factors that are not the subject of this dispute)...

... What is more, to the extent that Defendant's survey has any probative value, it appears to support the proposition that there is a substantial likelihood of confusion as to the two companies. Of the individuals surveyed, thirty-six percent believed that all three entities -- American National Insurance Company, American National Investment Advisors, and American National Bank -- were affiliated, and of these individuals, approximately forty-four percent stated that this belief was due to the similarity in the names...Furthermore, based upon [Defendant’s expert’s] own data, an additional eight percent of the respondents believed that [Defendant] and [Plaintiff] were affiliated. (n.15 [Defendant] makes the further argument that, once the control is factored into the analysis, of this eight percent, only between 2.5% to 4.2% of respondents attributed their confusion to the names of the companies. But, as discussed above, the reliability of this conclusion is highly suspect given the inadequacy of the control...)

_Abita Brewing Company, LLC v. Mother Earth Brewing, LLC_, 2014 TTAB LEXIS 502, *5-*6 (TTAB 2014) This opinion is a precedent of the TTAB

Applicant also argues that the [Opposer’s] survey is flawed because it "did not present the marks as they would have been viewed by an actual consumer in the marketplace," _i.e._, on beer bottles or cans, and that the survey images did not include Opposer's or Applicant's house marks. However, as Opposer correctly states, in questions regarding the registrability of a mark before the USPTO, marketplace conditions are not relevant to the question of likelihood of confusion between Opposer's standard character mark PURPLE HAZE and Applicant's standard character mark SUNNY HAZE...

_Pita Jungle Inc. v. Pita Pal Foods, LP_, 2014 TTAB LEXIS 307, *20-*21 (TTAB 2014) This opinion is a precedent of the TTAB

We do not find [Opposer’s] survey reliable and accordingly do not rely on it in our likelihood of confusion analysis. Indeed, the survey did not include a "control," _i.e._ the survey was not divided into a "test cell" and a "control cell"...Furthermore, the universe of interviewees
was skewed because it only included Opposer's customers who were leaving the restaurant and they were questioned immediately after being exposed to Opposer's marks in the restaurant...Finally, the survey's key question was leading, as it asked whether Opposer's customers would believe the hummus bearing Applicant's mark was produced by Opposer, rather than asking open-ended questions, such as "who do you think produced this hummus?"


...Plaintiff argues Defendants have failed to establish infringement because there has not been a sufficient showing of "likelihood of confusion." To this end, Plaintiff attacks the relevance of the survey commissioned by Defendants on the ground that the survey universe did not properly screen for "reasonably prudent consumers," which, according to Plaintiff, are the consumers made relevant under applicable legal standards...

...Plaintiff contends, "[t]he appropriate inquiry, which is used in numerous appellate circuits in addition to the Fifth Circuit, is whether a reasonably prudent consumer in the marketplace would be likely to be confused as to the origin or source of the goods or services bearing one of the marks or names at issue in the case. For [Plaintiff’s expert’s] opinion to be of any use, it must address that question"...

...Plaintiff concludes...[Defendant’s expert] was asked if his report was aimed at determining whether a reasonably prudent consumer would be confused, and he not only rejected the idea that he should be testing for reasonability, he rejected the applicability of consumers themselves to the case at bar"...[Defendant’s expert] clearly resisted the notion of "consumer" as that term is understood in a traditional retail context (i.e., a purchaser of goods), but confirmed that he screened for potential visitors to Plaintiff's website...

..."[R]easonably prudent consumer"...defies precise definition. What matters in the context of a trademark infringement action is that the universe "include a fair sampling of those purchasers most likely to partake of the alleged infringer's goods or services."

...[T]he survey questions were clearly targeted at the relevant issue for purposes of this matter; namely, whether visitors to Plaintiff's site would be confused as to the possibility of Defendants as the source of or affiliated with the content posted there...

...[T]he Court concludes the format of the questions was valid and relevant. In light of [Defendant's expert's] finding of an adjusted 19.1% net confusion rate, Defendants have successfully shown at least some degree of actual confusion with respect to Plaintiff's use of the disputed mark.

...[T]he Court determines that Plaintiff’s use of the mark “Voice of America”...produces a “likelihood of confusion” for the purposes of Trademark Infringement under the Lanham Act...

[In 2008, a survey was conducted for Defendant] "...to determine the existence of and the extent of confusion between the Opal Financial Group brand and the Opalesque brand among hedge fund industry participants."

...3.9% of the respondents [reported] that Opal Financial Group and Opalesque are "one and the same company."

...OFG does not proffer a survey by an expert its attorneys retained which supports a claim of likely confusion. That is a telling circumstance, since an infringement plaintiff's "failure to offer a survey showing the existence of confusion is evidence that the likelihood of confusion cannot be shown."


FIU relies primarily on the survey conducted by FNU's expert...who found that anywhere from 30 to 50 percent of those surveyed believed that Florida National University was affiliated with the state of Florida or some other government entity...In Plaintiff's view, this is evidence that "the public is confused as to whether FNU is operated by or affiliated with the State of Florida or another governmental entity, just like FIU"...However, the relevant inquiry is whether FNU's use of the mark is likely to lead consumers to confuse FNU with FIU...So while a significant portion of the public may be confused about FNU's affiliation with the State of Florida, this confusion has not resulted in an appreciable increase in confusion over FNU's affiliation with FIU, which is the basis of this claim...


...[Plaintiff’s] survey collected data from 509 face-to-face interviews conducted by professional interviewers with individuals in shopping malls. The survey respondents were divided into a test group and a control group. Interviewers showed the test group an actual [Defendant’s] T-shirt bearing Bob Marley's image and showed the control group a T-shirt bearing the image of an unrenowned African-American man with dreadlocks. Several questions were put to both groups, including: "Who do you think gave their permission or approval for this particular Tshirt [sic] to be made or put out?" Thirty-seven percent of the test group answered that "Bob Marley/the person on the shirt or his heirs, estate, or agents" gave their permission or approval for the T-shirt to be made or put out. Twenty percent of the control group answered the same...Defendants...argue that the "survey questions were indefinite with respect to endorsement by Marley...A viable false endorsement claim should have an identifiable person as the putative endorser." [Defendant] offers no precedent showing that it must be a single entity that is falsely attributed as the party that approved the product or that the survey taker must be able to identify
the party. Thus, identifying Marley or whoever holds the rights to his persona in the alternative does not render the survey data useless or irrelevant...


(n.2 ...[Plaintiff’s] expert witness...conducted a national survey in which he asked participants whether the '048 trademark reminded them of anything else...Although the survey results indicated that no statistically significant number of participants associated the '048 trademark with the Netherlands's flag, the survey suffers from at least one significant flaw in that the participants were shown the '048 design on a yard sign and not on a plain background. Thus, the context of the survey may have biased the results against an association with the Netherlands's flag...Additionally, the survey fails to account for the participants' ability or inability to identify any flags of any European countries.)


...[Plaintiff’s] study...surveyed women between the ages of 21 and 59 who said they were interested in women's fashion and regularly read a women's fashion magazine or blog. The [Plaintiff’s] Survey found that 26% of respondents, and 57% of respondents who reported having heard of [Plaintiff], identified [Plaintiff] as the source of authentic [Plaintiff's] jewelry. 31% of respondents, and 53% of respondents who had heard of [Plaintiff], identified [Plaintiff] as the source of the Accused Products bearing the Isis Cross Design. 25% of respondents, and 51% of respondents who had heard of [Plaintiff], identified [Plaintiff] as the source of the Accused Products bearing the Predecessor Design. [Plaintiff’s] expert concluded, on the basis of the Survey, that there is a strong likelihood, in the post-sale context, that the source of the Accused Products would be misidentified as [Plaintiff].

...The fifth factor, actual consumer confusion, strongly favors [Plaintiff]. [Plaintiff's] survey shows that a similar proportion of respondents identified [Plaintiff] as the source of both [Plaintiff’s] products and the Accused Products. In fact, a greater proportion of respondents erroneously identified the Accused Products bearing the Isis Cross Design as [Plaintiff's] products (31%) than identified actual [Plaintiff's] products as genuine (26%). The record includes no other survey.


...200 survey respondents were presented with an image of the packaging for Defendants' [Ball Park] Park's Finest product, 26 of them (13%) identified "Parks" or "Park's" as the company responsible for making the product...[Only eight respondents had previously heard of
"Parks" and only one identified Plaintiff's products when asked to name other products made by "Parks."

...The respondents were also asked whether the company they believed to have made the product was "sponsored or approved" by another company or had "a business affiliation or connection" with another company...

...Plaintiff, of course, was free to conduct its own consumer survey using its preferred methodology, but Plaintiff elected to not present any survey evidence at this time to aid in carrying its burden of proof.

...[T]he Court cannot say that telling the participants that the Plaintiff's product is a "hot dog" had no impact on the incidence of deception the survey detected, and the Court has taken this possibility into account in weighing the evidentiary value of Defendants' survey. Of course, Defendant's expert could have easily avoided this problem by simply referring to the Plaintiff's product as "the product."


Turning to the confusion studies, Defendant's expert...conducted a Squirt survey with an array...The respondents in [his] Internet survey were people whose jobs involved payroll, insurance, and personnel, although [he] did not limit the sample to employees with the authority to make human resources or payroll decisions. In the survey, respondents were presented six logos, including Defendant and Plaintiff's logos...All of the logos had interlocking bars, and three of the logos were green (including Defendant's and Plaintiff's). In addition to other questions, [he] asked each respondent if he or she thought any of the logos belonged to (1) the same company, (2) associated companies, (3) affiliated companies, or (4) sponsored companies. He found that 4.6% of respondents thought Defendant's and Plaintiff's logos belonged to the same company, 6.6% thought they were associated, 5.6% thought they were affiliated, and 2% thought they were sponsored...[He] did not indicate how many unique respondents answered at least one of the four questions in the affirmative. That is the relevant inquiry, as the Court must consider "whether the customer would believe that the trademark owner sponsored, endorsed or was otherwise affiliated with the product."...

This is the first of a number of problems with Defendant's expert's survey. It was clear from his testimony that [he] was not personally involved in the administration of the survey or the analysis of its results. Though that is not a basis to disqualify him from testifying, [he] was unable to answer basic questions about the study...Additionally, [his] sample was not limited to people with the authority to make decisions about human resources. The relevant customers are purchasers of human resources services. [His] study is appropriately given less weight because he did not limit his universe of respondents to potential customers.

Additionally, the independent validation of Defendant's expert's study casts doubt on his methodology. Of thirty-one survey participants contacted by an independent firm, ten were not actually qualified to take the survey...[His] methodology was also called into question by the fact that he issued a supplemental report after opposing counsel identified a problem with his methodology...
...[I]t was clear that no one from [Defendant’s expert’s] firm had read the verbatim responses to the survey questions...Respondents listed answers such as "LOL" and "cool" to substantive questions...[Defendant’s expert] should have removed nonresponsive answers from the survey data.

...[Plaintiff's] expert...came up with a thirty-nine percent rate of source confusion when he conducted a two-room survey with a control cell...All of the respondents were "people involved in making decisions about employee benefits and/or payroll administration as part of their work."...Respondents viewed and answered questions about logos depicted on two separate screens...Interviewers contacted each respondent by telephone and instructed the respondent to view a website. Respondents viewed and answered questions about logos depicted on two separate screens (historically, the marks were presented in two rooms, hence the term used for this type of survey). On the first screen, respondents were shown [Plaintiff's] logo. As a respondent viewed the first screen, the interviewer asked whether she had seen the logo and whether she knew the name of the company that uses the logo. Each respondent was then directed to the second screen, where she viewed an array of five logos--half of the respondents viewed an array that contained [Defendant's] mark and half viewed a control cell that did not contain the mark...Otherwise the logos in the control cell were identical to those in the experimental cell. The interviewer asked if the respondent thought

1. one or more of these logos is used by a company that is connected or affiliated with the company that uses the first logo I showed you, or
2. none of these logos are used by a company that is connected or affiliated with the company that uses the first logo I showed you, or
3. don't you have an opinion.

No study is perfect, of course...Additionally, the Court recognizes the inherent limitations of consumer confusion surveys conducted by...experts. Nonetheless, [Plaintiff’s expert] presented a well-designed and well-supported study and thoughtfully discussed its results and justified his methodology. Accordingly, the Court finds [Plaintiff’s expert’s] thirty-nine percent rate of confusion to be probative evidence of actual confusion.


In this case, the [Opposer’s expert’s] survey loosely resembles the Squirt format and, for several reasons explained below, has some flaws...[W]e have considered the [Opposer’s] survey in our likelihood of confusion analysis, with its limitations...

...First, we find that the universe of respondents that [Opposer’s expert] used was too narrow. As noted above, there are no restrictions to the channels of trade, classes of consumers, or price points in either description of goods...

...Second, the [Opposer’s] survey did not present enough marks for the respondents to consider in light of the numerous third parties that use the term SPARKLE(S) in connection with
jewelry. It would have been preferable had [Opposer’s expert] included an array of branded products including the parties' marks...

...Finally, we note that the [Opposer’s expert’s] conclusory 16.5% rate of likelihood of confusion falls closer to the lower end of the spectrum for purposes of assessing a likelihood of confusion...

...In view of the foregoing, we find that the [Opposer’s] survey slightly favors a finding that there is a likelihood of confusion.

...In sum, Opposer has not shown by a preponderance of the evidence that there is a likelihood of confusion between its registered mark SPLASHES & SPARKLES and Applicant's mark, SPARKLE LIFE...[W]e find that the differences between the respective marks are sufficient so as to avoid a likelihood of confusion.

E. FALSE ADVERTISING SURVEYS


...[T]his Court finds the lack of a control to be a significant flaw under the circumstances presented here...

...Moreover, even if a control was not necessary, there are several other troubling aspects to [Defendant’s] survey. For example, the survey tested consumer perceptions based upon the name of the product alone and divorced the name from any of the typical marketing materials that consumers would encounter. Moreover, the original, online version of the survey was not preserved and was never turned over to [Plaintiff]...

Church & Dwight Co. v. SPD Swiss Precision Diagnostics, 2015 U.S. Dist. LEXIS 86170, *64-*65 (S.D.N.Y 2015)

...[Plaintiff’s expert] concluded that 19.0% or 21.9% (depending on the base used) of participants answered both that the product estimates the number of weeks a woman is pregnant and that the product's estimate of weeks is the same as a doctor's estimate of weeks pregnant...Even this conservative figure reveals that a substantial number of participants understood the Launch Package to communicate the message that the Weeks Estimator provides an estimate of weeks pregnant that is consistent with the estimate a doctor would provide...
Specifically, 50% of respondents who saw the "Resolution Solution" advertisement said that [Defendant’s] e-cigarettes were either "safe for your health," "safer for your health than traditional tobacco cigarettes," or both "safe" and "safer for your health." Similarly, 56.7% said the "Try Something New in Bed" advertisement suggested that [Defendant’s] e-cigarettes were either "safe for your health," "safer for your health," or both "safe" and "safer for your health." The survey need not do more...

To the extent [Defendant] contends close-ended questions are impermissible, the court cannot agree. Respondents' answers to open-ended questions are recorded verbatim, while respondents select from a set field of responses when answering close-ended questions. Although open-ended questions are generally considered less likely to undermine reliability, close-ended questions are not inherently suspect, and courts frequently rely on the data obtained from such questions.

[Defendant’s] expert...has proffered no evidence or opinions that rebut [Plaintiffs’] survey evidence. Rather, consistent with [Defendant’s] mistaken understanding of plaintiffs' omission claim, [Defendant’s expert] tested whether the product packaging conveyed an implied safety message. [Defendant’s expert] did not ask respondents questions relevant in assessing the materiality of information omitted from the packaging. His survey results are thus not probative of the materiality of [Defendant’s] alleged omissions...[N]o evidence rebuts [Plaintiffs’] survey data, which is sufficient to show materiality with respect to [Plaintiffs’] omissions claim.

The lack of an external control group also does not make [Plaintiff's expert's] study inadmissible. His study was designed with a before and after format in which each participant served as his or her own control. The weaknesses of conducting a study in that format go to the weight of [Plaintiff’s] study, not its admissibility. Likewise, the failure to conduct a double-blind study does not make [Plaintiff’s] study wholly inadmissible; it simply limits the reliability of it.

F. FAME SURVEYS

First, [Defendant] claimed that [Plaintiff] did not establish fame both because [Plaintiff] did not offer evidence from surveys restricted to the time before [Defendant] entered the market, and because [Plaintiff’s] evidence did not show sufficient recognition by the general population...In addition, [Defendant] asserted that, even if it were relevant, [Plaintiff’s] June 2011 survey evidence was insufficient to establish fame because it shows recognition by less than sixty-four percent of likely cell phone purchasers--a subset of the general
population...[Plaintiff] replied that surveys are not required to demonstrate fame, and that most of [Plaintiff’s] other fame evidence—which is made up of advertisements, media clips, and press coverage—was from before July 2010, when [Defendant] entered the market...

G. DILUTION SURVEYS

*McDonald’s v. McSweet*, 2014 TTAB LEXIS 351, *69, *74 (TTAB 2014) This opinion is a precedent of the TTAB

...Forty-six percent of the test cell respondents who responded spontaneously mentioned [Opposer] when they saw the "[Applicant’s]" name. By contrast, no one mentioned [Opposer] when they saw "Mr Sweet" in the control cell...

...Both the courts and the Board have found the "brings to mind" survey format acceptable as evidence of actual association, which is required to establish likelihood of dilution...

H. DAUBERT/ADMISSIBILITY ISSUES


..."A witness can qualify as an expert through practical experience in a particular field, not just through academic training"...("Nothing in this amendment is intended to suggest that experience alone -- or experience in conjunction with other knowledge, skill, training or education -- may not provide a sufficient foundation for expert testimony")...


In its motion to exclude, [Plaintiff] makes four primary challenges to the survey evidence submitted with the [Defendant's expert] declaration: (1) the survey examines the wrong issue, (2) the use of the Eveready design is improper, (3) the survey test and control stimuli are improper, and (4) the survey population is not clearly defined and is improper.

...The Ninth Circuit has held, on multiple occasions, that "[c]hallenges to survey methodology," including "the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility."...Thus, while the court does find a number of serious deficiencies in the [Defendant’s] survey, those deficiencies bear on the weight given to the survey, rather than its admissibility...
I. PROCEDURAL ISSUES


Plaintiff's counsel…designed and executed surveys…

... Even if the surveys were admissible, their introduction at trial would require the testimony of [Plaintiff’s counsel], which would preclude him from acting as an advocate.

... An expert who seeks to opine about the results of a survey that he or she did not personally conduct should demonstrate familiarity with the survey methodology including target population, sampling design, and survey design, as well as rates and patterns of missing data and statistical analyses used to interpret results…[I]nformation about the methodology and statistical analyses of the [Plaintiff's counsel's] surveys is absent from the record—[Plaintiff's expert] did not claim to know such information nor was it included in his report.


[Plaintiff] argued that the [Defendant’s expert’s] evidence is inadmissible because it is unsigned...This argument relies on the old version of *Rule 56*, which required that, to be considered on summary judgment, evidence had to be presented in a form that would be admissible at trial...The rule has since been amended to allow consideration of evidence so long as that evidence “can[] be presented in a form that would be admissible in evidence [at trial].”...Under the new rule, the proper objection on summary judgment is that the evidence cannot be presented at trial in an admissible form...


It appears from the latter pages that consumers may have been asked a question about “computer stores.” However, we are unable to determine from the information given what that question may have been and we can only speculate. Furthermore, no methodology is provided for the survey. Thus, we have no information as to what was asked, nor as to how it was asked. As a result, there is nothing in the record to provide a basis for the results provided, or even what those results are intended to signify. Without those missing pieces, we can only give the survey such limited probative value as it may provide.


NJOY also complains that [Plaintiff’s] survey, although designed and analyzed by him, was carried out by a third party survey company…It cites no case law holding that surveys conducted by third parties are inherently “flawed” or unreliable, and the court has located none.
What little case law there is on the subject in fact suggests there is nothing inherently problematic with having a survey conducted by a third party.


Defendants argue that [Plaintiff’s expert’s] reports, his declaration, and any corresponding testimony should be excluded in connection with the motion for class certification and trial because [Plaintiff’s expert] was not retained as an expert in this case, and his documents were submitted long after the deadline for expert disclosures. The Court agrees.


...Plaintiff and its expert point out aspects of the [Defendant’s] study that they contend should have been done differently but...[P]laintiff's methodological criticisms "would have been substantially aided by proof that the 'correct' methodology would have led to a different result...."


Opposers' arguments confuse the dual meanings of "rebuttal." Rebuttal may refer to the type of evidence at issue, specifically evidence intended to contradict an adverse party's evidence, or it may refer to the procedural phase of a trial, specifically the time accorded a party to respond to an adverse party's evidence...[Applicant’s expert] testified that he was retained by Applicant to conduct a survey to rebut the [Opposer’s expert’s] survey... We see no reason why the [Applicant's expert] survey cannot stand in rebuttal to the [Opposer's expert's] survey despite the fact that it did not use the latter as a template and despite [Applicant's expert's] failure to reference the [Opposer's expert] survey in his report.


...I find that [Plaintiff’s expert’s] second report, being substantially responsive to [Defendant’s expert’s] detailed criticisms, qualifies as a supplemental report...

...[Plaintiff’s second expert] did not previously file an expert report...[Plaintiff] argues that [Plaintiff’s second expert’s] report is supplementary to that of one of its other experts...Plaintiff has not cited any case law definitively holding that a supplemental report may be prepared by an expert witness other than the one who prepared the initial report. I...find that [Plaintiff’s second expert’s] report cannot be considered a supplemental report...
[Defendant] argues that the [Plaintiff’s expert’s] [s]urvey is inadmissible because of the survey’s methodology and because the survey is not signed under penalty of perjury...

While the docket entry containing the [Plaintiff’s expert’s] [s]urvey lacks authentication, [Plaintiff’s expert] subsequently submitted a declaration authenticating the [Plaintiff’s expert’s] [s]urvey...Accordingly, the Court finds that the [Plaintiff’s expert’s] [s]urvey is admissible...
III. BIBLIOGRAPHY

INTELLECTUAL PROPERTY SURVEYS: Mid 2014-2015
BY CIRCUIT

This appendix contains citations, by circuit, for all identified opinions published from June 2014 through December 2015, in which survey evidence was referenced.

First Circuit

There were no citations from the First Circuit during the time period of this article.

Second Circuit


Church & Dwight Co. v. SPD Swiss Precision Diagnostics, 2015 U.S. Dist. LEXIS 86170 (S.D.N.Y 2015) (False Advertising)

Church & Dwight Co. v. SPD Swiss Precision Diagnostics, 2015 U.S. Dist. LEXIS 113309 (S.D.N.Y 2015) (False Advertising)
Third Circuit


Fourth Circuit


Fifth Circuit


Sixth Circuit


Seventh Circuit


Eighth Circuit


Ninth Circuit

*Elliot & Gillespie v. Google*, 45 F. Supp. 3d 1156 (9th Circuit, 2015) (Genericness)


*Calista Enterprises Ltd. v. Tenza Trading Ltd.*, 2014 U.S. Dist. LEXIS 109509 (D. Colo. 2014) (Daubert) (Genericness)


*Wells Fargo v. ABD Insurance And Financial Services, Inc.*, 2014 U.S. Dist. LEXIS 121444 (N.D. Ca. 2014) (Likelihood of Confusion) (Daubert)

*In re NJOY, Inc. CONSUMER CLASS ACTION LITIGATION*, 2015 U.S. Dist. LEXIS 109133 (D. Ca. 2014) (False Advertising) (Daubert)

**Tenth Circuit**


**Eleventh Circuit**


**District of Columbia Circuit**

There were no citations from the District of Columbia Circuit during the time period of this article.

**Federal Circuit**


**Trademark Trial & Appeal Board**


*In re PC Laptops LLC*, 2014 TTAB LEXIS 474 (TTAB 2014) (Secondary Meaning)


McDonald's Corp. v. McSweet, LLC, 2014 TTAB LEXIS 351 (TTAB 2014) (Likelihood of Confusion) (Dilution)

Abita Brewing Company, LLC v. Mother Earth Brewing, LLC, 2014 TTAB LEXIS 502 (TTAB 2014) (Likelihood of Confusion)


This appendix contains citations, by circuit, for all identified opinions published from June 2014 through December 2015, in which survey evidence was referenced.

Genericness Surveys

Second Circuit

Fifth Circuit

Ninth Circuit
_Elliot & Gillespie v. Google_, 45 F. Supp. 3d 1156 (9th Circuit, 2015) (Genericness)


_Calista Enterprises Ltd. v. Tenza Trading Ltd._, 2014 U.S. Dist. LEXIS 109509 (D. Colo. 2014) (Daubert) (Genericness)

Eleventh Circuit

Federal Circuit

Descriptiveness/Suggestiveness

Second Circuit

Secondary Meaning Surveys

Fourth Circuit
Seventh Circuit

Tenth Circuit

Eleventh Circuit

TTAB


*In re PC Laptops LLC*, 2014 TTAB LEXIS 474 (TTAB 2014) (Secondary Meaning)

**Likelihood of Confusion Surveys**

Second Circuit


Third Circuit
Fourth Circuit

Fifth Circuit

Sixth Circuit


Seventh Circuit


Eighth Circuit

Ninth Circuit


Tenth Circuit

Eleventh Circuit

Trademark Trial & Appeal Board


McDonald's Corp. v. McSweet, LLC, 2014 TTAB LEXIS 351 (TTAB 2014) (Likelihood of Confusion) (Dilution)
Abita Brewing Company, LLC v. Mother Earth Brewing, LLC, 2014 TTAB LEXIS 502 (TTAB 2014) (Likelihood of Confusion)


False Advertising Surveys

Second Circuit
Church & Dwight Co. v. SPD Swiss Precision Diagnostics, 2015 U.S. Dist. LEXIS 86170 (S.D.N.Y 2015) (False Advertising)

Church & Dwight Co. v. SPD Swiss Precision Diagnostics, 2015 U.S. Dist. LEXIS 113309 (S.D.N.Y 2015) (False Advertising)
Third Circuit

Seventh Circuit

Ninth Circuit
*In re NJOY, Inc. CONSUMER CLASS ACTION LITIGATION*, 2015 U.S. Dist. LEXIS 109133 (D. Ca. 2014) (False Advertising) (Daubert)

**Fame Surveys**

Ninth Circuit

**Dilution Surveys**

TTAB

*McDonald's v. McSweet*, 2014 TTAB LEXIS 351 (TTAB 2014) (Dilution) (Likelihood of Confusion)

**Daubert/Admissibility Issues**

Ninth Circuit

*Calista Enterprises Ltd. v. Tenza Trading Ltd.*, 2014 U.S. Dist. LEXIS 109509 (D. Colo. 2014) (Daubert) (Genericness)

*Wells Fargo v. ABD Insurance And Financial Services, Inc.*, 2014 U.S. Dist. LEXIS 121444 (N.D. Ca. 2014) (Daubert) (Likelihood of Confusion)

**Procedural Issues**

Sixth Circuit
Seventh Circuit

Ninth Circuit


Eleventh Circuit

Trademark Trial & Appeal Board

*In re PC Laptops LLC*, 2014 TTAB LEXIS 474 (TTAB 2014) (Secondary Meaning) (Procedural Issues)
V. BIOGRAPHICAL INFORMATION

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Matthew G. Ezell is a partner in the marketing research and consulting firm of Ford Bubala & Associates, located in Huntington Beach, California. As a partner at Ford Bubala & Associates, Matt has been engaged in commercial marketing research and consulting projects in a variety of areas in the consumer product, industrial product, and service sectors of the economy.

For fifteen years, Matt has participated in litigation-related consultancies involving intellectual property matters, including matters pending before U.S. federal courts, the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, and the International Trade Commission. He has also participated in litigation-related consultancies involving intellectual property matters in Canada.

In 2014, Matt coauthored a paper entitled Intellectual Property Surveys: 2013 – Mid 2014, which is a compendium of excerpts from case opinions covering surveys on genericness, descriptiveness/suggestiveness, secondary meaning, likelihood of confusion, false and/or misleading advertising, fame, and dilution. This paper was published by Ford Bubala & Associates and was also published electronically by the INTA.

Matt holds a Bachelor's Degree in Japanese (B.A.) from California State University, Fullerton and a Master's Degree in Linguistics (M.A.) from California State University, Long Beach. Matt is also enrolled in the Graduate Certificate in Survey Research program with the University of Connecticut; the certificate is to be conferred in 2016.

Matt is a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), the Council of American Survey Research Organizations (CASRO), and the International Trademark Association (INTA).

Matt is also a member of the Article Solicitation and Development Sub-Committee of the Trademark Reporter (TMR).