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LIKELIHOOD OF CONFUSION SURVEYS: THE EVER-CONSTANT EVEREADY FORMAT; THE EVER-EVOLVING SQUIRT FORMAT

By Jerre B. Swann* and R. Charles Henn Jr.**

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I. INTRODUCTION

It is axiomatic that appreciable trademark confusion cannot arise absent appreciable opportunities for consumers to compare the marks at issue. Likelihood of confusion surveys have thus historically involved searches for real world scenarios (i) where marks simultaneously exist in a consumer’s cognitive workspace (ii) sufficiently for a comparison to occur.

II. THE EVER-CONSTANT (AND LONG-SETTLED) EVEREADY FORMAT

With respect to commercially strong senior marks that are readily accessible in memory, a comparison of marks can take place in the consumer’s mind when a similar junior use is encountered in the marketplace. A readily accessible senior mark can be conceptualized as residing near the surface of a consumer’s memory and potentially reaching any market into which the consumer travels (irrespective of whether the senior user’s product or service is sold therein). Likelihood of confusion with respect to readily accessible senior marks has been historically assessed by the unaided Eveready format: a monadic exposure to a junior use and an open-ended question as to who makes or puts out the junior user’s product or service.

With only the addition (i) of questions to test affiliation and sponsorship and (ii), critically, of a control (primarily to filter for brand dominance), the Eveready format has become the settled darling of courts and the Trademark Office. The proposition that it

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1 A leading expert has equated “ready accessibility in memory” with unaided “top of mind” awareness. Phyllis Welter, Trademark Surveys, § 24.03[1][c] (1999). As the senior author of this article has noted, however, in J. Swann, Eveready and Squirt—Cognitively Updated, 106 TMR 727, 732-35 (2016) (hereinafter Cognitively Updated), whether a senior mark is readily accessible in memory more broadly entails a balancing of commercial strength, similarity of the junior mark, and salience of the product category. Whether a senior mark will be activated by a similar junior mark turns principally on (i) the degree of the senior’s mark’s accessibility prior to exposure to the junior and (ii) the fit between stored knowledge of the senior and the presented stimulus.” E. Tory Higgins, Knowledge Activation: Accessibility, Applicability and Salience, in Social Psychology: Handbook of Basic Principles 135 (E. Tory Higgins & Arie Kruglanski eds. 1996). Commercially “strong [but not top of mind] marks for high-involvement goods that cater to specific and salient consumer preferences and for which there is a not infrequent need (e.g., athletic shoes) are, almost by definition,” readily available when cued by a similar junior mark. Cognitively Updated, 106 TMR at 733.


3 Jerre B. Swann, Likelihood of Confusion Studies and the Straitened Scope of Squirt, 98 TMR 739, 740-43, 745-46 (2008) (hereinafter Straitened Scope of Squirt). In cases where the products at issue compete, the “please name any other products put out by the same company” question in the initial Eveready survey is typically omitted.

measures reasonably frequent opportunities for a mental comparison of marks is supported by two considerations: (i) it produces evidence supporting an inference as to a likelihood of confusion only where a senior mark is sufficiently available in memory to be triggered by a similar junior mark; and (ii) it is conducted among consumers in the category of (and thus likely to encounter) the junior mark. As such, an Eveready study is a reliable measure of the real world as to mark accessibility and similarity, that is, whether the senior use is sufficiently close to the surface of memory and the junior use is sufficiently similar to the senior use so that in the real world the former will be activated (recalled in an Eveready survey) by a monadic exposure to the latter.

III. THE EVER-EVOLVING SQUIRT FORMAT

Relatively few trademarks, however, are readily accessible in memory; and recall from memory is a difficult cognitive exercise.\(^5\) The reach of lesser-known marks (and attendant opportunities for comparison) extends only to similar junior uses that are so proximate in the marketplace that one of the marks at issue is likely still to be in a consumer’s cognitive workspace for activation (recognition in a Squirt survey) when the other is encountered. In Squirtco v. Seven-Up Co.,\(^6\) for example, survey respondents (in an aided format) first heard radio ads for both SQUIRT and QUIRST soft drinks, and were then asked the closed-ended question, “Do you think SQUIRT and QUIRST are put out by the same company or by different companies?”

For the similar marks and the very proximate (directly competitive/advertised in the same media) goods in Squirtco, it was likely that one of the marks would still be in a consumer’s cognitive workspace for a comparison when the other was encountered. The aiding in the format (exposing respondents to QUIRST, which they could not otherwise recall,\(^7\) as well as to SQUIRT) likely reflected real world encounters by consumers in the marketplace. Apart, however, from aiding (which is necessary as to lesser-known marks and continues to differentiate a Squirt study from an Eveready study), virtually all other characteristics of the Squirt format have experienced evolution far beyond the mere addition of affiliation/sponsorship questions and a control (in a Squirt study, primarily to filter guessing).

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\(^6\) 628 F.2d 1086, 1089 n.4 (8th Cir. 1980).

\(^7\) Few, if any, respondents, e.g., could have answered “Quirst” if asked the open-ended question “What other, if any, soft drink brands are put out by the company that puts out the Squirt brand?”
Immediate juxtaposition, for example, as in "Squirtco", has been substantially replaced by a sequential “two-room” or “line-up” format\(^8\) that in McCarthy’s view “is an attempt to replicate the marketplace process of advertising exposure to a brand or trade dress, followed by being confronted in the market with both similar and differing brands or trade dresses.”\(^9\) The use of only two stimuli has been universally replaced by the use of four or five stimuli in a “second room” to “remove[] the spotlight from the products of the plaintiff and defendant, help[] avoid making obvious what the survey is about, and make[] the survey more realistic and less leading.”\(^10\) The suggestive same company/different company question\(^11\) is now more balanced and includes a “don’t know” option and an overriding instruction not to guess.\(^12\)

Modifications of the Squirt format to make it more reliable in supporting (or not) an inference as to likelihood of confusion have not all been upward. It has been appreciated virtually from the introduction of the Squirt format, for example, that “in cases where two parties’ products do not share the same market or distribution channels, a likelihood of confusion is reduced by the fact that no consumer would ever be exposed to both products.”\(^13\) Because, however, the Eveready format is principally limited to the comparatively small number of readily accessible marks, some survey experts have stretched the physical proximity requirement—necessary to support the aiding in the Squirt format as to lesser-known marks—beyond reasonably foreseeable marketplace contexts:

**Simon Prop. Group LP v. mySimon, Inc.**\(^14\)

Plaintiff owned and operated shopping malls throughout the nation and defendant operated a comparative shopping information service on the internet. Both thus provided shopping information over the internet and in a pretrial motion, plaintiff sought permission to conduct a Squirt study: (i) first showing respondents a card depicting defendant’s mySimon home page and asking whether it offered services of interest; (ii) next showing a card depicting

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9. 5 McCarthy, at § 32:177.


the Simon Property Group home page and asking the same question; and (iii) finally asking the Squirt same/different/related company questions. The court rejected the proposal as grossly distorting marketplace conditions under which internet users would likely encounter the two web pages and as designed to create demand effects.


Plaintiff distributed online content to wireless devices and defendant launched CARGO magazine targeting males 20-45. Some overlap thus existed in the demographic makeup of the parties’ ultimate audiences, but “Kargo’s wireless services and Advance’s men’s shopping magazine engaged in different businesses. . . . [T]he back-to-back, or seriatim, display of the Cargo and Kargo marks did not approximate conditions that consumers would encounter in the marketplace. Kargo . . . offered no data or other evidence to support the proposition that prospective customers were likely to encounter Kargo’s trademark [for software or have it in mind] a short time after seeing Cargo magazine. *** Under such circumstances, the respondents who later said that they believed that there was a connection between Cargo and Kargo due to the similarity of the names, and were thus tallied as ‘confused,’ were demonstrating merely that they had read the names . . . in artificially close proximity.”

In Straitened Scope of Squirt, the senior author of this article stressed, therefore, that the Squirt format needs to be strictly tethered to its roots of physical or temporal proximity, as critical to the testing of (and necessary to support the aiding with respect to) lesser-known marks.

Experience has confirmed, however, fears that physical proximity alone does not assure that lesser-known marks will be “attended to.” Resuming the evolution of the Squirt format’s reliability in a positive direction, courts have thus increasingly

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15 Plaintiff’s proposed “Simon and shopping” search terms, e.g., produced plaintiff’s and defendant’s websites among 56 million responsive sites using one search engine, but did not produce both mySimon and Simon Property Group using another. Id. at 1041-42.

16 Demand effects are particularly acute when a respondent is shown two stimuli, back-to-back, that do not normally appear adjacently in the marketplace, prompting a distorted level of “same company” responses. See Itamar Simonson and Ran Kivetz, Demand Effects in Likelihood of Confusion Surveys: the Importance of Marketplace Conditions, in Trademark and Deceptive Advertising Surveys 243-59.


18 Straitened Scope of Squirt, 98 TMR at 751.

19 Id. at 754.
incorporated a requirement of direct competition in an overall proximity construct—enhancing the likelihood that lesser-known marks will be attended to and will coexist in a consumer’s cognitive workspace (consistent with Squirt aiding) sufficiently to permit a likelihood of confusion comparison.

The need for an overall proximity concept to incorporate physical and competitive elements is particularly acute under conditions of marketplace clutter and the enhanced likelihood that market “stimuli [will] fail to register on [a] consumer’s consciousness.” A recent case in point is *Sazerac Co. v. Fetzer Vineyards, Inc.* where the plaintiff alleged that the (commercially weak) trade dress of (i) its BUFFALO TRACE bourbon in (ii) squat, dark bottles bearing its (iii) Buffalo Logo was infringed by the defendant’s (i) 1000 STORIES “Bourbon Barrel-Aged” zinfandel in (ii) tall, clear bottles bearing (iii) a buffalo (nickel) image.

Although of different alcoholic content and for use on different occasions, both products were sold (albeit not adjacently) in liquor and grocery stores. The plaintiff’s expert utilized a Squirt format two-room survey. In the first room, he exposed respondents to BUFFALO TRACE bourbon for (a forced) five seconds and in the second room, showed “an array featuring [five] zinfandels including 1000 Stories,” “creat[ing] a situation that’s ‘not terribly likely’ to happen” in the liquor and grocery store marketplace, where consumers encounter “literally thousands of different types of alcoholic beverages.” The court thus disregarded the 69% confusion level that the survey produced.

20 Jacob Jacoby, Trademark Surveys § 3.12.1 (ABA 2013) (“While proximity encompasses physical . . . proximity, numerous cases [in the Second Circuit] make it abundantly clear that the concept primarily refers to competitive proximity”); see Strange Music, Inc. v. Strange Music, Inc., 326 F. Supp. 2d 481, 491 (S.D.N.Y. 2004) (discussing proximity in a non-survey context) (“In considering the proximity of the products, a court examines the extent to which the products compete with each other. . . . While plaintiffs contend that they have established [physical] proximity in the marketplace because their recordings and defendants’ recording are within the music industry . . ., the fact that both parties’ products exist within the same industry is not enough. [Citations omitted].”

21 The existence of two marks “in cluttered grocery venues does not establish that their aided comparison is reflective of market reality, and just as ‘different store’ evidence does not negate the propriety of the Squirt format, ‘same store’ evidence does not alone satisfy the proximity imperative.” Cognitively Updated, 106 TMR at 744.


24 *Id.* at 1021.

25 *Id.* at 1026.

26 The survey’s results were clearly a product of both artificial proximity and demand effects.
The defendant’s expert, in contrast, conducted an aided Eveready study. Respondents (i) for comparison purposes (ii) were first exposed to an aided stimulus including the plaintiff’s labelled bourbon bottle, a 1000 STORIES bottle, and a control bottle among thirteen “bottles that a shopper might see in a grocery or liquor store” (iii) before being asked who put out a sequentially displayed 1000 STORIES bottle. Finding that the defendant’s survey stimulus more closely approximated conditions of sale—the unlikelihood, given the cluttered marketplace, that two not-directly-competing or adjacent brands would simultaneously be in a consumer’s cognitive workspace for a comparison—the court adopted the defendant’s expert’s finding of “absolutely no confusion.”

Tokidoki v. Fortune Dynamic, Inc. explained the Squirt format evolution as to showing respondents a line-up of four or five brands in the second room as designed to remove “the spotlight from the products of the plaintiff and the defendant.” Following Sazerac, in the context of cluttered retail markets (particularly where the products at issue do not directly compete), it may become standard to utilize a larger number of stimuli to fairly reflect that clutter (either in a Squirt or an aided Eveready format) to make “the survey more realistic.”

The (as now evolved) Squirt format, under conditions of competitive proximity, more nearly reflects the reality of the marketplace (approaching the Eveready format in reliability). Where goods or services directly compete in physical proximity (particularly if they are comparatively shopped), it is likely that a mark for one will still exist in memory for comparison purposes when the other is encountered. The need for a high degree of competitive proximity is thus on a par with the need for a control as a prerequisite for a Squirt’s validity. Complementary products

An aided Eveready is essentially a Squirt with Eveready open-ended questions. See Cognitively Updated, 106 TMR at 730 n.13 (“Another variant—used where the [senior mark is not top-of-mind, but] the two marks are typically seen in the marketplace side-by-side [or in close proximity, and] the researcher desires to use the open-ended Eveready questions—is an aided Eveready. ‘A researcher might present respondents with a store display that includes the products sold side-by-side (the two at issue as well as representative others); after allowing respondents to evaluate the products on display, the allegedly infringing product . . . is placed in front of the respondent; and the sequence then follows the Eveready question protocol. . . . Such a methodology, which might be called [a] side-by-side Eveready, maintains the marketplace reality without asking potentially leading questions.’ Itamar Simonson and Ran Kivetz, Demand Effects in Likelihood of Confusion Surveys, in Trademark and Deceptive Advertising Surveys at 249, n.25” (emphasis added)).

265 F. Supp. 3d at 1026.


Id.

A new trial was granted in Black & Decker Corp. v. Positec USA Inc., 2017 U.S. Dist. LEXIS 147463 (N.D. Ill. 2017) as a result of the prejudice generated by a “Squirt-like” survey where: (1) the expert conceded that it did not establish causation (the function of
(shaving gel/razor blades) may suffice to support a Squirt survey, but not-directly-competing and non-complementary products, even if they inhabit the same category and/or store, may no longer suffice to assure that the aiding in a Squirt format replicates what takes place in the real world—that, momentarily at least, two brands exist in a consumer’s cognitive workspace for a “fit” assessment.

The marketplace, however, continues to evolve and the Squirt format must keep pace in measuring whether “an allegedly infringing [competitive] use [is] sufficiently close in time or space to a senior use so that both are sufficiently in (non-degraded) memory so as to permit their comparison.” \(^\text{32}\) A case in point is \textit{Joules Ltd. v. Macy’s Merchandising Group, Inc.},\(^\text{33}\) where the plaintiff offered young women’s dressy/casual clothing under the JOULES mark through: (i) large national and smaller independent retailers; (ii) its website; and (iii) a few online retailers; and the defendant vended private label MAISON JULES clothing of the same style, price, and quality at Macy’s and on macys.com.

As to competition, the district court acknowledged that both brands “target[ed] women in their twenties.” \(^\text{34}\) As to physical proximity, however, it noted that the “products [were] not sold in . . . the same brick-and-mortar stores,” \(^\text{35}\) and held that the plaintiff’s Squirt line-up methodology did not:

accurately reflect the circumstances in which consumers encounter the JOULES and MAISON JULES marks in the marketplace, \textit{i.e.}, in the same store or even on the same shelf. See \textit{THOIP}, 690 F. Supp. 2d at 235 (“[A] sequential presentation of the two marks at issue . . . is appropriate only if it reflects a significant number of real world situations in which both marks at issue are likely to be evaluated sequentially or side-by-side.”).\(^\text{36}\)

While agreeing that the survey’s sequential presentation of the stimuli was “artificial,” particularly as to clothing (a significant percentage of the plaintiff’s sales through brick-and-mortar outlets were of rainwear), the Second Circuit—combining considerations of competition and physical proximity (and tacitly evoking salience/involvement)—disagreed with the district court’s assessment that the proximity factor in a Polaroid analysis weighed “clearly” in the defendant’s favor: “[b]oth product lines target and

\(^\text{32}\) \textit{Cognitively Updated}, 106 TMR at 744.
\(^\text{34}\) \textit{Id.} at *8.
\(^\text{35}\) \textit{Id.}
\(^\text{36}\) \textit{Id.} at *9.
are sold to young women who seek work- and weekend-appropriate clothing and who are likely to visit both sets of sales locations [Joules retail stores and website and Macy’s retail stores]."^37 The substantial shift in retail marketing from brick-and-mortar stores to the Internet may thus come to have a more dramatic impact on the Squirt format than has any prior marketplace evolution. Determinations as to whether aiding in the format reflects a marketplace reality that two lesser-known marks are likely to be in a consumer’s cognitive workspace for a comparison have embarked on an entirely new journey.

IV. MEASURING LIKELIHOOD OF CONFUSION ON THE INTERNET

Many Internet sites (e.g., Amazon) are cluttered, as are the results of many queries on search engines (e.g., Google), which can result in literally millions of listings. On the Internet, therefore, compliance with guiding principles as to competitive proximity must be stringently applied in replicating marketplace reality as to whether marks are likely simultaneously to exist sufficiently for a comparison in a consumer’s cognitive workspace. The mere fact that a senior and junior user’s marks both appear somewhere on the Internet is, by itself, insufficient to justify use of a Squirt format.\(^{38}\)

Similarly, cluttered retail mega-sites like Amazon or eBay are unlikely to produce appreciable proximity except as to closely competitive goods. In *Moroccanoil, Inc. v. Zotos International, Inc.*,\(^{39}\) for example, the court gave “less weight” to a Squirt format survey despite the fact that “consumers may encounter both marks in close proximity (i.e., on the same (physical) or serially-visited (temporal) web pages) on the same websites, such as Amazon, eBay, Sears, Wal-Mart and Sleekhair Beauty . . . [because] it is unclear if a significant number of consumers would encounter the marks in close proximity.”\(^{40}\) Put another way, where products are not competitively proximate, it is unlikely in the extremely cluttered environment of many retail websites that a “significant number” of shoppers would encounter the products in physical or temporal proximity and, thus, the Squirt methodology would not fairly replicate the real-world marketplace.

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38 Particularly disturbing, therefore, is the TTAB’s indirect finding in one proceeding that a Squirt format survey was “probative” because the parties’ marks “may appear in close proximity . . . on the internet” without any showing that, in fact, they did so. Merchant & Gould P.C. v. MG-IP Law, P.C., 2017 WL 3446801, *14 (T.T.A.B. July 14, 2017) (emphasis added).
40 *Moroccanoil*, 230 F. Supp. 3d at 1175 (emphasis added).
To demonstrate sufficient competitive proximity for a Squirt format as to products sold on the Internet: (a) the underlying products or information about them should commonly be sought on the Internet and (b) both sites (or products) typically should be accessed by commonly used search terminology that produces both the senior and junior users within a manageable number of hits. And, under those circumstances, the Squirt format must utilize stimuli that carefully replicate the real-world Internet marketplace,

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41 As noted, courts properly have criticized Squirt format surveys in circumstances where products may occasionally appear proximately on the Internet, but the expert fails to demonstrate that such circumstances are sufficiently common or typical. See, e.g., id. Kargo Global, Inc. v. Advance Magazine Publishers, Inc., No. 06-civ-550(JFK), 2007 WL 2258688, *7 (Aug. 6, 2007) (“Kargo has offered no data or other evidence to support the proposition that prospective consumers were likely to encounter Kargo’s trademark a short time after seeing Cargo magazine. Despite Jacoby’s speculation at his deposition that ‘under some circumstances there is this opportunity for people to see the two marks in close temporal proximity,’ the Court doubts that a non-negligible number of prospective consumers . . . would see Cargo magazine followed a minute or less later, by the KARGO logo.”).

42 Contrived or overly broad search queries were among the reasons the court in MySimon rejected the proposed survey. See MySimon, 104 F. Supp. 2d at 1043-44. We do not suggest that a Squirt survey is appropriate only where search terminology uses generic or highly descriptive terms of the product category. Indeed, an Internet user in a particular product or service category may use brand-specific search terminology rather than generic product-category terminology—based either on familiarity with a known brand or recent exposure (through, e.g., advertising) to a new brand. As long as that searching and shopping behavior can be demonstrated to be reasonably common, and not contrived by the expert for the purpose of artificially manufacturing competitive proximity, a Squirt format may be appropriate. Relatively straightforward evidence of competitive proximity in the Internet context are keywords (e.g., Google AdWords) on which the parties bid to generate search-engine advertisements. If, for example, the defendant bids on the trademark(s) or name of the plaintiff or on descriptive phrases specific to both of their products (which would be normal for direct competitors engaged in search-engine marketing) the marks should both appear regularly to a significant number of online searchers/shoppers. See, e.g., Elisa V. Mariscal & David S. Evans, The Role of Keyword Advertising in Competition among Rival Brands (Coase-Sandor Institute for Law & Economics Working Paper No. 619, 2012) at 7-8. Accessed at https://chicagounbound.uchicago.edu/law_and_economics/570/.

43 This is not to suggest that a Squirt format survey is appropriate only where both users appear within a manageable number of hits resulting from a single search. Indeed, as discussed below, it is common with regard to certain product categories for consumers to engage in multiple search queries and review multiple sites before making a purchase decision. Contrast MySimon, for example, where the court rejected the proposed survey that artificially attempted to make proximate two websites that rarely would occur in response to normal online search behavior, noting that the survey “removes entirely the confusion one encounters with scores, hundreds, or thousands of responsive websites, and it removes the inevitable need for some effort on the part of the Internet user to sort through the responses.” MySimon, 104 F. Supp. 2d at 1044. The critical determinant is, as with non-Internet-based Squirt format surveys, whether consumers in the real-world marketplace are likely to be exposed to both users within a reasonably short period of time.
such as screenshots of actual\textsuperscript{44} search-result listings or screenshots of webpages.\textsuperscript{45}

Competitive proximity on the Internet is driven by marketplace reality; thus, what constitutes a manageable number of hits is marketplace dependent. For some categories of goods (household cleaning supplies, for example), an Internet user is unlikely to perform more than one or two searches and is unlikely to view more than a single page of results. Indeed, social science research has shown that only a small minority (less than 10\%) of online shoppers will go beyond the first page of search results and, indeed, more than one-third of shoppers will not even look beyond the first three search results (i.e., the top of the first page).\textsuperscript{46}

For other, more highly involved categories, such as those involving more expensive, complicated, or self-expressive products (automobiles, for example), an Internet user may perform numerous searches across numerous platforms and view many sites and many pages within those sites in a single online shopping session. Or, the user may conduct multiple searches as part of the “information

\textsuperscript{44} See, e.g., Componentone, LLC v. Componentart, Inc., No. 02:05cv1122, 2008 WL 4790661, *24 (W.D. Pa. Oct. 27, 2008) (affording survey “extremely minimal weight” where survey’s stimuli did not replicate the parties’ marks as they would be encountered by a potential purchaser) (“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. . . .”); M.D. On-Line, Inc. v. WebMD Corp., No. 05-cv-4081, 2005 WL 2469668, at *7 (D.N.J., Oct. 6, 2005) (“Plaintiff’s survey does not mirror the ‘real world setting.’ The marks in question identify the sources of web-based programs. And yet, this survey was done over the telephone, participants were not shown the marks, nor were they directed to websites that contained the marks.”); Government Employees Ins. Co. v. Google, Inc., No. 1:04CV507, 2005 WL 1903128, at *6 (E.D. Va., Aug. 8, 2005) (holding survey stimuli “give the Court serious doubts about the accuracy of the survey results’ reflection of actual users’ experiences with and reactions to the Sponsored Links” because the survey included in a mock-up of Google results “more Sponsored Links than the average Google results page,” and re-ordered the page so “Sponsored Links were closer on the page to the organic listings than on Google’s actual search results pages.”).

\textsuperscript{45} Webpage stimuli in such surveys should be static (i.e., a screenshot), rather than dynamic (i.e., visiting the website “live”), in order to control what each respondent in the survey is viewing. Having a respondent visit Google.com and perform a search as a part of the survey, for example, would likely to result in widely variable stimuli across the respondent population, based on factors such as geolocation, prior search history, preferred browser, and numerous other uncontrollable factors.

search” stage of consumer decision making and shortly thereafter visit a brick-and-mortar location (e.g., a mall or a store) to make a purchase. As long as the expert can demonstrate that the product category commonly prompts this multiple-search, multiple-site shopping behavior, a Squirt format survey may well be appropriate even when both brands would rarely appear on the first page of a single online search query.

To iterate, the fundamental question as to the propriety of a Squirt survey in the Internet context is, as with the brick-and-mortar marketplace, whether the two brands are likely to exist simultaneously with appreciable frequency in a consumer’s cognitive workspace. While this article does not purport to outline all possible scenarios for sufficient competitive proximity on the Internet, we believe a Squirt format is most likely appropriate in online situations in which it is typical under normal marketplace conditions for:

(a) a single common search query for the relevant category of products—either on a search engine or on a marketplace site like Amazon or eBay—to produce results in which both sites or products appear on the first page;

(b) the use of more than one common search query for the relevant category of products to reveal each of the sites or products on the first page of results for at least one such query, so that a shopper attempting multiple common queries is likely to encounter both sites or products within a single shopping session;

(c) a consumer to engage in online searching that would expose the consumer to one party’s mark and then, shortly in time thereafter, the consumer would physically shop a brick-and-mortar store in a manner exposing the shopper to the other party’s mark; or

(d) where the parties’ products are so directly competitive or overlapping that consumers would be reasonably likely to go directly to the website of the alleged infringer in the course


48 Under these circumstances, “competitive proximity” may exist between a product solely advertised or sold online and a product solely offered for sale at a brick-and-mortar location. The appropriateness of the Squirt methodology will hinge, as discussed above, on whether evidence shows that common or typical shopping behavior would expose a shopper to the online product and the brick-and-mortar product in reasonably temporal proximity. In Daily Harvest, Inc. v. Imperial Frozen Foods Op Co LLC, No. 1:18-cv-05838(ALC), 2018 WL 3642633 (S.D.N.Y., July 31, 2018), the court denied a preliminary injunction in part because the parties did not present “more information regarding consumer behavior and perception” sufficient to deem a product sold only at retail stores competitively proximate to a product sold “online only.” Id. at *6. In Joules, on the other hand, the Second Circuit effectively held, as noted above (n.20), that young women were likely “to visit” plaintiff’s website and Macy’s stores.
of a shopping process that also involves searching the Internet for other existing sources of the product type (during which the senior user could be encountered).

V. CONCLUSION

With an unaided Eveready survey, conducted among a junior user’s consumers, as to a senior mark that is readily accessible in memory, a researcher can be confident that a result supporting a conclusion as to a likelihood of confusion reflects appreciable opportunities for a comparison of the marks at issue. With an aided Squirt format, conducted among consumers in the category of interest, a similar level of confidence can be derived as to competitively proximate marks—that is, it is likely under real world conditions that both marks will exist simultaneously in a consumer’s cognitive workspace with sufficient frequency for fit assessments to occur.49

In a real-world marketplace, consumers in a category are likely to attend to adjacent competitive marks; involved consumers, indeed, may be likely to attend to competing marks in multiple marketplaces. Because it is a pure measure of marketplace reality, an Eveready format can test claims of commercial strength and/or mark similarity, as well as claims as to a likelihood of confusion. To the extent, however, that opportunities for mark comparisons do not appreciably exist under real world conditions (the marks are neither readily accessible nor competitively proximate), neither an Eveready nor a Squirt may be used to support a conclusion as to a likelihood of confusion.

49 With marks that are both readily accessible and competitively proximate, either an Eveready survey or a Squirt survey can be run with comparable confidence that its results represent realistic comparison opportunities.