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When to Conduct an Eveready Survey: The Importance of Aided Awareness
Dr. Bruce Isaacson and Dr. Keith A. Botner

Expropriation of Intellectual Property Rights: The HAVANA CLUB Trademark
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WHEN TO CONDUCT AN EVEREADY SURVEY: THE IMPORTANCE OF AIDED AWARENESS

By Dr. Bruce Isaacson and Dr. Keith A. Botner***

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I. INTRODUCTION

The Eveready format for surveys that measure likelihood of confusion was first used in U.S. trademark litigation about forty-five years ago.¹ When the Eveready survey format is used to measure forward confusion, respondents are shown only the allegedly infringing mark and are asked questions to measure whether they indicate that the mark shown has a connection to, or affiliation with, the senior mark.² Over the years, many publications, including *The Trademark Reporter* (the “TMR”), have published articles that explain and define the Eveready format,³ and courts in many different venues have relied on surveys that use the Eveready format to evaluate likelihood of confusion.⁴

Despite the importance of the Eveready format to matters that involve likelihood of confusion, and despite the literature devoted to its description, explication, and theoretical foundations, there is little consensus as to what is perhaps the most basic question regarding an Eveready survey: when is it appropriate to use Eveready to measure likelihood of confusion?

Scholars and courts have held conflicting views as to when to use an Eveready survey to measure likelihood of confusion. It is widely accepted that an Eveready survey is appropriate in cases involving senior marks that are well known. The debate about when to use the Eveready format centers on whether the format can be used only to measure confusion relative to well-known marks, or whether Eveready is appropriate for other marks as well.

Many terms are used to denote well-known marks; for example, a single recent article referred to marks that are “accessible in

¹ Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 385-88 (7th Cir. 1976).

² This article discusses surveys measuring forward confusion, but the principles are similar in surveys measuring reverse confusion. Also, the Eveready format is in contrast to the Squirt survey format, in which respondents are shown both parties’ marks in a manner intended to simulate marketplace conditions and are asked about possible relationships or connections between the marks.

³ See, e.g., J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 32:174, at 1 (4th ed. 2021); Jerre B. Swann, *Likelihood of Confusion*, in Trademark and Deceptive Advertising Surveys: Law, Science and Design 56-64 (Shari Seidman Diamond & Jerre B. Swann, eds. 2012); Jerre B. Swann, *Likelihood of Confusion Studies and the Straitened Scope of Squirt*, 98 TMR 739-756 (2008) (“*Straitened Scope of Squirt*”); Jerre B. Swann, *Eveready and Squirt—Cognitively Updated*, 106 TMR 727 (2016) (“*Cognitively Updated*”); Jerre B. Swann & R. Charles Henn Jr., *Likelihood of Confusion Surveys: The Ever-Constant Eveready Format; The Ever-Evolving Squirt Format*, 109 TMR 671 (2019) (“*Ever-Constant Eveready, Ever-Changing Squirt*”).

⁴ See Valador, Inc. v. HTC Corp., 242 F. Supp. 3d 448, 456 n.8 (E.D. Va. 2017) (“[T]he Eveready method is one of the standard, accepted approaches for surveying likelihood of confusion in trademark infringement actions.”); THOIP v. Walt Disney Co., 690 F. Supp. 2d 218, 241 (S.D.N.Y. 2010) (“Dr. Helfgott’s Eveready study, in which respondents were exposed to a single shirt, does approximate [marketplace] conditions . . .”); and National Distillers Prod. v. Refreshment Brands, 198 F. Supp. 2d 474, 483 (S.D.N.Y. 2002) (“While surveys such as these are generally admissible . . .”).

memory,” “top-of-mind,” “generally recognized,” and “well-known.”⁵ Courts and scholars not only disagree over when to use Eveready, but also do not use common standards or terminology to indicate whether a mark is well known. Awareness is often considered as a measure to determine whether a mark is well known, which raises the question of how awareness should be measured. One perspective is that Eveready surveys provide a test of *unaided* awareness,⁶ while another is that Eveready represents a “*partially aided* awareness test,” because showing the alleged infringer’s mark provides a type of aid.⁷

Courts have varied widely concerning their view of Eveready surveys proffered in trademark cases involving marks that are less than very well known, even when the owner of the mark asserts that the mark is well known. For example, in recent years, one of the authors of this article conducted Eveready surveys in two cases involving senior marks that were asserted by the plaintiffs to be well known. One court accepted the plaintiff’s assertion and praised the Eveready survey.⁸ In the other matter, despite the plaintiff’s claim that its mark was well known, the court ruled that the context was not appropriate for an Eveready survey.⁹

Recently, another perspective has emerged, namely that Eveready does not require that a mark is well known, so that awareness does not matter at all. In 2019, *The Trademark Reporter* published “An Empirical Assessment of the Eveready Survey’s Ability to Detect Significant Confusion in Cases of Senior Marks That Are Not Top-of-Mind” (hereinafter, “An Empirical Assessment”). The author, Hal Poret, presented survey research testing the use of the Eveready survey format to measure likelihood of confusion in situations where the senior mark is not “top-of-mind,” as measured by unaided awareness.¹⁰ The surveys presented in “An Empirical Assessment” measured likelihood of confusion relative to marks that the author claimed were not top-of-mind because they had low unaided awareness in their categories,

⁵ Swann, *Cognitively Updated*, *supra* note 3, 106 TMR, at 728, 730, 734, 735-737.

⁶ Phyllis J. Welter, Trademark Surveys § 24.03[1][c] (1999).

⁷ Swann, *Straitened Scope of Squirt*, *supra* note 3, 98 TMR, at 745, n.40.

⁸ *Akiro LLC v. House of Cheatham, Inc.*, 946 F. Supp. 2d 324, 334 (S.D.N.Y. May 17, 2013) (federal trademark infringement and related state law claims, alleged by owner of natural and curly hair care brand MISS JESSIE’S against defendant’s use of AUNT JACKIE’S mark for competing natural and curly hair care products).

⁹ *Kreation Juicery, Inc. v. Eiman Shekarchi et al.*, No. 14-CV-00658, 2014 U.S. Dist. LEXIS 180710; ECF No. 36, Order on Mot. for Prelim. Inj., at *13 (C.D. Cal. Sept. 17, 2014) (trademark and trade dress infringement suit brought by KREATION brand restaurants in Los Angeles against people who later opened a CREATION GRILL restaurant in Santa Monica).

¹⁰ Hal Poret, *An Empirical Assessment of the Eveready Survey’s Ability to Detect Significant Confusion in Cases of Senior Marks That Are Not Top-of-Mind*, 109 TMR 935 (2019) (“*An Empirical Assessment*”).

including FANTA (in soda), FILA (in athletic shoes), and KIX (in breakfast cereal).

Based on his research, Mr. Poret concluded that Eveready surveys can detect significant levels of confusion in matters involving senior marks that are not top-of-mind: “the proposition that an Eveready survey is appropriate only in the case of senior marks that are top-of-mind is not valid, and the fact that a senior mark is not top-of-mind should not, on its own, be grounds for rejection of an Eveready survey.” Mr. Poret also concluded that awareness is not necessary to conduct an Eveready survey: “the proposition that there must always be consumer awareness of a senior mark for an Eveready survey to accurately assess whether confusion is likely to occur in the actual marketplace is objectively unsupported.”¹¹

We believe that the lack of agreement regarding which marks are appropriate for an Eveready survey arises directly from a lack of agreement about what it means to say that a mark is or is not “well known” or “top-of-mind,” and a lack of definition regarding what awareness is and how to properly measure it. This article describes how marketers and psychologists have defined and used different types of awareness, including unaided awareness, aided awareness, and top-of-mind awareness. After establishing this foundation, we argue that an Eveready survey is most similar to a test of aided awareness rather than unaided awareness, because the Eveready format shows respondents a product or mark, which represents a type of aiding. We also argue that, in the context of trademark surveys, a mark that has top-of-mind awareness is simply a mark that consumers are generally aware of, rather than only the first mark that comes to mind.¹² A mark is top-of-mind if it has appreciable levels of aided awareness, regardless of the order in which the mark is mentioned in an aided awareness measure.

We then use survey data, gathered in a manner similar to the surveys presented in “An Empirical Assessment,” to demonstrate that aided awareness, and not unaided awareness, is the proper measure to use when determining whether to conduct an Eveready survey. Our survey data show that an Eveready survey can detect confusion for marks that have low levels of unaided awareness but will not detect substantial levels of confusion for marks that have low levels of aided awareness.

This is because when an Eveready survey is conducted for a mark that has low levels of aided awareness, the results of the survey are a foregone conclusion, and such a survey will not detect

¹¹ *Id.* at 936, 939.

¹² Although this article adopts the word “consumers,” the same principles for Eveready surveys apply whether the survey is conducted among consumers or among business respondents.

confusion. Awareness is highly relevant to the decision as to when to conduct an Eveready survey, and the Eveready survey can be appropriate for marks with low levels of unaided awareness.

Thus, we agree with Mr. Poret's conclusion that the range of marks appropriate for Eveready is broader than was previously thought, because Eveready is appropriate for surveys measuring confusion relative to marks with low levels of unaided awareness, provided they have sufficient levels of aided awareness. Brands may have sufficient levels of aided awareness to make them suitable for Eveready even if they are not market leaders, or they are older brands, or they serve a specialized niche.

Our research raises the question of how to identify marks that are likely to have sufficient levels of aided awareness to conduct an Eveready survey. In the last section, we describe some indicators that can help identify contexts and marks for which aided awareness makes Eveready appropriate.¹³

II. DEFINING AND MEASURING AWARENESS FOR BRAND MANAGEMENT AND FOR TRADEMARK SURVEYS

“Awareness” refers to the degree to which a brand is recognized and/or recalled by a group of consumers,¹⁴ and is a measure of “the strength of a brand’s presence in the consumer’s mind.”¹⁵ Awareness is one of the most fundamental measures in brand management and provides an important influence on consumer decisions to choose a particular brand.¹⁶

In our experience in corporate marketing, marketers often view awareness as a fundamental element to evaluate brand health, analogous to the manner in which a physician might use blood pressure or heartbeat as fundamental measures to evaluate patient health. For example, one of the most common types of marketing research studies is an “Awareness, Attitudes, and Usage”

¹³ This article builds on prior articles on this topic, including those that have appeared in *The Trademark Reporter*. While we disagree at times with prior authors, we do so with appreciation and respect. *The Trademark Reporter* has an admirable history of articles that present a variety of perspectives on complex issues. For example, on the topic of reading tests versus memory tests, see Jerre B. Swann, *A “Reading” Test or a “Memory” Test: Which Survey Methodology is Correct?*, 95 TMR 826 (2005); a response by Henry D. Ostberg, *Response to the Article Entitled, “A ‘Reading’ Test or a ‘Memory’ Test: Which Survey Methodology Is Correct?”*, 95 TMR 1446 (2005); and a third perspective from Mike Rappeport, *Response to Survey Methodology Articles*, 96 TMR 769 (2006).

¹⁴ Kevin Lane Keller, *Strategic Brand Management: Building, Measuring, and Managing Brand Equity* 54 (4th ed. 2008). See also Paul W. Farris, Neil T. Bendle, Phillip E. Pfeifer, & David J. Reibstein, *Marketing Metrics: the Definitive Guide to Measuring Marketing Performance* 51 (2d ed. 2010).

¹⁵ David A. Aaker, *Building Strong Brands* 10 (1st ed. 1995).

¹⁶ Wayne D. Hoyer and Deborah J. MacInnis, *Consumer Behavior* 55 (5th ed. 2008).

(“AA&U”)¹⁷ study, which is often conducted at regular intervals to measure “changes in consumer attitudes, awareness, and usage levels for a product category or specific brand.”¹⁸ The AA&U study provides a benchmark against which to measure brand progress over time, and measures brand awareness as well as other types of consumer attitudes and behaviors.

Awareness is important to marketers because brands that achieve greater levels of awareness than competing brands are more likely to be recalled and recognized by consumers, which can lead to higher levels of consideration by purchasers and ultimately a greater likelihood that consumers will choose that brand instead of competing brands.¹⁹ Consumers often prefer to purchase brands that they are already aware of.²⁰

Awareness allows consumers to form an image about a brand that tells them what to expect when they experience that brand’s products or services. Awareness provides a foundation for consumer interest and action, enabling brands to cut through the clutter of companies vying for consumers’ attention and to stand out among the competition. When a consumer eats at a MCDONALD’S restaurant, stays at a MARRIOTT hotel, or rides a HARLEY-DAVIDSON motorcycle, brand awareness helps set expectations. Without brand awareness, the decision-making involved in selecting groceries from among the tens of thousands of items in a typical U.S. supermarket might take all day or longer.²¹

For decades, marketers have conceptualized consumer purchase decisions in a model called the “hierarchy of decision-making” or the “hierarchy of effects.”²² In this model (referred to as “A-I-D-A”), consumers progress through stages, from:

- Awareness of a brand, to
- Interest in the brand, to the
- Decision to purchase the brand, to the

¹⁷ This type of study is also referred to as an “Attitudes and Usage” (“A&U”), or “Usage and Attitudes” (“U&A”), study.

¹⁸ Attitude, Awareness, & Usage (“AAU”) Study, <https://www.insightsassociation.org/issues-policies/glossary/attitude-awareness-usage-aa-u-study> (last visited June 21, 2021). See also Farris et al., *supra* note 14, at 51.

¹⁹ Keller, *supra* note 14, at 54-55.

²⁰ “. . . when a brand choice is made—even when the decision involves products like computers or advertising agencies—the familiar brand will have an edge.” Aaker, *supra* note 15, at 10-11.

²¹ In 2019, supermarkets carried an average of 28,112 items. The Food Industry Association, Supermarket Facts, <https://www.fmi.org/our-research/supermarket-facts> (last visited Sept. 14, 2020).

²² Robert J. Lavidge & Gary A. Steiner, *A Model for Predictive Measurements of Advertising Effectiveness*, 25 J. Mktg. 59-62 (1961).

- Action to purchase the brand.²³

Generations of marketers, including these authors, learned the “A-I-D-A” model in business school and applied it in corporate marketing activities. Since the models posit that these are progressive stages, a brand with low awareness is less likely to move consumers through subsequent stages to purchase.²⁴

Awareness is typically measured as the percentage of consumers who recall, recognize, or name a mark or brand.²⁵ Depending on the context, the method for measuring awareness may differ regarding the prompts or cues that are provided:

- “Unaided Awareness”²⁶ refers to the percentage of respondents who spontaneously name a mark or brand when the researcher provides the category as a cue. For example, an unaided awareness question might ask respondents to “name all the brands of [soft drinks, sneakers, etc.] you can think of.”
- “Aided awareness” refers to the percentage of respondents who indicate that they are aware of a mark or brand when prompted by the name of that mark or brand, typically in the context of the product category. Aided awareness might be measured by a question phrased in a format such as, “Have you ever heard of a soft drink called ‘Coca-Cola?’” Alternatively, respondents may be presented with a list of brands and asked to select which brands, if any, they have heard of or have seen before.²⁷

III. THE MEANING OF “TOP-OF-MIND”

The term “top-of-mind awareness” is often mentioned regarding trademark surveys but is used inconsistently and without general agreement on what it means or how to measure it. The lack of clarity is exacerbated because marketers typically use the phrase in a manner different from that of those who conduct or evaluate likelihood of confusion surveys.

²³ Terrence O’Brien, *Stages of Consumer Decision Making*, 8 J. Mktg. Res. 283-289 (1971).

²⁴ In recent years, this model has been updated to reflect the way some consumers progress from one stage to the next, while others skip stages or move across stages in forward or reverse directions. See the discussion of the “consumer decision journey” in David C. Edelman, *Branding in the Digital Age: You’re Spending Your Money in All the Wrong Places*, Harv. Bus. Rev. (December 2010).

²⁵ Farris et al., *supra* note 14, at 52-53.

²⁶ “Unaided awareness” is sometimes called “spontaneous awareness.” Gilles Laurent, Jean-Noël Kapferer, & Françoise Roussel, *The Underlying Structure of Brand Awareness Scores*, 14 Mktg. Sci. G170-G179 (1995).

²⁷ This format can be adapted for trade dress as well, by showing the trade dress in question and asking respondents whether they have ever seen it before.

When some marketers refer to top-of-mind awareness, they may (but do not always) use it to refer to the brand that is named first on an unaided basis²⁸ or is among the first brands mentioned on an unaided basis. For example, if consumers are asked to name all brands of soft drinks they can think of, those marketers might think of top-of-mind awareness for COCA-COLA as measuring the percentage of consumers who mention COCA-COLA first, before mentioning any other brand, or as measuring the percentage who mention COCA-COLA among the first brands they mention.

In the context of trademark surveys, top-of-mind awareness has been conceptualized either as referring to (i) the brand or brands that are mentioned first, or (ii) any brand of which consumers are generally aware. In the latter usage, the term is synonymous with “well known,” meaning that it refers to marks that consumers recognize or can recall, regardless of whether any mark was the first recalled, or was among those first recalled.²⁹ In this usage, top-of-mind awareness refers to whether a brand is “at least one of any number of brands that come to mind on an unaided basis.”³⁰ Consistent with this approach, “An Empirical Assessment” also views top-of-mind awareness as a measure of unaided awareness.³¹

We are not aware of any article, precedent, or decision indicating that top-of-mind awareness in trademark surveys should mean only the mark that comes to mind first, nor do we believe that this should be the case. A measure for top-of-mind awareness confined only to the first brand mentioned is too limiting to reflect the conditions of trademark surveys.

The relevant question to determine whether an Eveready survey is appropriate is whether a mark is available or accessible in memory; whether the mark is mentioned first or last is irrelevant to the question of whether the mark is stored in memory. An allegedly similar mark can trigger the memory of a reference mark only if the reference mark is “readily accessible” and “can be conceptualized as residing near the surface of a consumer’s memory.”³² As described in the next section, marks that reside “near the surface” of memory have significant aided recall, even if they have low unaided recall.

²⁸ Laurent, Kapferer & Roussel, *supra* note 26. See also Aaker, *supra* note 15 (“the first brand recalled”). See also Farris et al., *supra* note 14.

²⁹ E.g., “‘Top-of-mind’ refers to marks that are readily accessible in memory.” Swann, *Cognitively Updated*, *supra* note 3, at 733.

³⁰ *An Empirical Assessment*, *supra* note 10, 109 TMR, at 942.

³¹ “[T]op-of-mind awareness is a reflection of the frequency with which a mark ‘comes to mind’ on an unaided basis, as opposed to the extent to which a mark is recognized when the mark is supplied to the consumer on an aided basis.” *An Empirical Assessment*, 109 TMR 942.

³² Swann & Henn, *Ever-Constant Eveready, Ever-Changing Squirt*, *supra* note 3, 109 TMR 671, 672, n.1.

IV. AIDED OR UNAIDED AWARENESS?

We now address the question of whether the measure to evaluate whether a brand is sufficiently well known for an Eveready survey should be aided or unaided awareness. For any mark, the measure for aided awareness is almost always equal to or higher than unaided awareness.³³ The authors have never encountered a brand that has higher levels of unaided awareness than of aided awareness, nor can we think of a situation where this might occur.

This is because of the different memory tasks involved in unaided and aided awareness. A survey question measuring unaided awareness might ask respondents to name all the brands they can think of that fit a particular context, such as all the soft drink brands that come to mind. When asked such open-ended questions, respondents tend to provide a limited number of answers and typically do not exhaustively list all responses that might come to mind if they were to take sufficient time to think of every brand they know.³⁴

Unaided recall also presents a more demanding memory task than aided recall.³⁵ Memory is fallible, and certain responses may not come to mind until the respondent is reminded of them. Even the most well-meaning and enthusiastic respondent—one who wishes to name all the responses they know on an unaided basis—may not mention certain brands that they know but that do not immediately come to mind, such as brands that they encounter infrequently.

To determine whether a mark is sufficiently well known to conduct an Eveready survey, we believe that the proper measure is aided awareness. An Eveready survey presents respondents with a junior mark that is allegedly infringing, or possibly confusingly similar to, a senior or reference mark that is not shown to the respondent.³⁶ The awareness measure that most closely reflects this process is aided awareness. In the Eveready format, the allegedly

³³ “[O]pen-ended questions typically fail to capture all pertinent information respondents actually have in mind.” Jacob Jacoby, *Are Closed-Ended Questions Leading Questions?* in Trademark and Deceptive Advertising Surveys: Law, Science and Design 271 (Shari Seidman Diamond & Jerre B. Swann, eds. 2012).

³⁴ For marketers who define top-of-mind awareness as the brand or brands that are mentioned first, there is no such thing as top-of-mind awareness on an aided basis, because the brands in an aided awareness survey are typically presented in random order to avoid order bias. Pamela L. Alreck & Robert B. Settle, *The Survey Research Handbook* 103 (1995).

³⁵ Kevin Lane Keller, *Measuring Brand Equity*, in *The Handbook of Marketing Research* 551 (Rajiv Grover & Marco Virens, eds., 2006).

³⁶ See Swann, *Likelihood of Confusion*, *supra* note 3, at 62, n.62. (“In the author’s view, however, the format more closely resembles a partially aided awareness test.”) *But see* Phyllis J. Welter, *Trademark Surveys* § 24.03[1][c] (1999) (postulating that the Eveready format requires “unaided awareness” of the senior brand).

infringing mark provides the “aid” for possible recall of the senior mark.

As we demonstrate below, marks that are not category leaders can be appropriate for Eveready, as long as they have sufficient levels of aided awareness. For example, in the category of soft drinks, consumers may have had recent experience with COKE and PEPSI, but may recall brands that they have not seen or consumed recently or as often, such as FANTA, TAB, or FRESCA, only after prompting. Because consumers are less likely to have recent experience with these three smaller brands, they may be less likely to mention them on an unaided basis.³⁷ However, the long histories of FANTA, TAB, and FRESCA may mean that consumers may still remember them when prompted or aided.

V. SUMMARY OF OUR HYPOTHESES, AND TWO SURVEYS TO TEST THOSE HYPOTHESES

So far, we have offered the following hypotheses relating to Eveready surveys:

1. The key measure for deciding whether a mark is sufficiently well known to use the Eveready format is aided awareness. The Eveready format can detect confusion only when used in contexts involving marks that have appreciable levels of aided awareness. If an Eveready survey is used to measure confusion relative to a mark that does not have appreciable levels of aided awareness, the survey will not detect substantial levels of confusion.
2. Unaided awareness is also relevant for Eveready surveys, but only because marks with high levels of unaided awareness tend to have high levels of aided awareness. Low levels of unaided awareness should not be taken as an indication that Eveready is not appropriate.
3. For litigation surveys, “top-of-mind” should be viewed as synonymous with “well known,” i.e., frequently recalled on an aided basis, without regard to the order in which a mark is recalled. In determining whether to conduct an Eveready survey, whether a given mark is mentioned first or is among the first brands mentioned is not relevant.

In “An Empirical Assessment,” Mr. Poret conducted two sets of surveys. First, he surveyed respondents to measure unaided awareness of brands in three categories: soda/pop, breakfast cereal, and athletic sneakers. Next, Mr. Poret selected one mark from each category that had some degree of unaided awareness but was not

³⁷ The “Saturation Index” takes into account the prominence of leading brands in a category and is measured as the average aided awareness of the two leading brands in a given category. Laurent, Kapferer & Roussel, *supra* note 26, at 14.

among the brands most often mentioned. Mr. Poret then conducted Eveready surveys measuring likelihood of confusion relative to the following marks:

1. FANTA for juice, measured for confusion with FANTA for soda/pop. The article described this scenario as an *identical* mark in a *different* product category.
2. KIXX for snack bars, measured for confusion with KIX for breakfast cereal. The article described this scenario as a *similar but non-identical* mark in a *different* product category.
3. PHEELA for athletic sneakers, measured for confusion with FILA for athletic sneakers. The article described this scenario as a *similar but non-identical* mark in the *same* product category.

We have also conducted awareness surveys and Eveready surveys to test our hypotheses relating to unaided and aided awareness. Our surveys explain the results of the surveys in “An Empirical Assessment” by considering a factor not evaluated in that article, namely aided awareness.

Our surveys used methods as similar as reasonably possible to the survey methods that Mr. Poret described in “An Empirical Assessment.” For example, our surveys used the same product categories, the same stimuli, and the same question types, and did not include a control cell.

Our first survey measured unaided awareness and aided awareness for brands in the three product categories, including the three brands selected for Mr. Poret’s confusion survey (FANTA, KIX, and FILA). Our awareness survey shows that while each of these brands has a low level of unaided awareness, they all have high levels of aided awareness.

In “An Empirical Assessment,” Mr. Poret concluded that awareness is not necessary to conduct an Eveready survey. This conclusion is based on his Eveready survey, which showed confusion relative to three brands that he characterized as having low levels of awareness. We believe this conclusion is too broad, because it is based solely on unaided awareness and does not consider aided awareness.

To measure whether aided awareness matters, we conducted an Eveready survey to measure likelihood of confusion for brands that we selected because they have low levels of aided awareness. Data from this second survey supports our hypothesis that an Eveready survey will not detect confusion in contexts involving brands that do not have high levels of aided awareness. Our research shows that, when evaluating whether a mark is appropriate for an Eveready survey, courts and survey researchers should focus on aided awareness rather than unaided awareness.

VI. DESIGN AND RESULTS FOR OUR SURVEY TO MEASURE UNAIDED AND AIDED AWARENESS

For our awareness survey, we recruited prospective respondents from an online survey panel in a manner representative of the U.S. population on gender, age, and geography.³⁸ Prospective respondents were qualified as indicating that they had purchased in the past month, or are likely to purchase in the next month, products in one of three product categories, namely soda/pop, breakfast cereal, and athletic sneakers. Respondents who qualified for more than one product category were assigned to the single category that was least full.

After answering the qualification questions and a standard battery of quality control questions, respondents entered the main part of the awareness survey. After instructions, they were asked the first question, which measured unaided awareness. For respondents in the soda/pop category, this question was preceded by this instruction:

Now you will be asked a few questions about soda/pop. As before, please do not guess. If you do not know the answer to a question or do not have an opinion, please indicate that you do not know.

Please take a few moments to think about any brands of soda/pop that you have ever seen or heard of. Take as long as you like to think.

When you are ready to proceed, click the “Next” button, which will appear after a brief pause.

After a delay of 15 seconds, respondents were asked, “Please type all brands of soda/pop that you have ever seen or heard of. Please be as complete as possible. Please enter each brand in a separate box below.” Respondents could enter up to twenty brand names, each in a separate text field.

After they answered, respondents were provided instructions for questions that measured aided awareness:

We'd appreciate your assistance with one more task.

On the screen that follows, you will see a list of brands that may or may not be used by companies that make or sell soda/pop. For each brand, you will be asked to select one answer that reflects whether or not you have seen or heard of that brand of soda/pop before today, or that you don't know.

³⁸ U.S. Census Bureau, County Population by Characteristics: 2010–2019, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-counties-detail.html> (last visited June 3, 2021).

As before, please do not guess. If you do not know the answer to a question or do not have an opinion, please indicate that you do not know. Please press ‘Next’ when you are ready to proceed.

On the next screen, respondents saw a list of brands specific to the product category, including popular and niche brands for the assigned product category, presented in random order. For each brand in the soda/pop category, respondents were asked to select, “Yes, I have seen or heard of this brand of soda/pop before today,” “No, I have not seen or heard of this brand of soda/pop before today,” or “I don’t know.”³⁹

Respondents then answered a few concluding quality-control questions.

In total, 571 respondents completed the awareness survey, including 200 respondents for soda/pop, 205 for breakfast cereal, and 166 for athletic sneakers. Table 1 provides the results of the survey and also provides the confusion rate as measured by the survey in “An Empirical Assessment.”

Table 1 shows that, for unaided awareness, respondents assigned to soda/pop mentioned an average of 6.0 brands, compared with 5.0 for those assigned to breakfast cereal and 4.8 for those assigned to athletic sneakers.⁴⁰

Table 1: Summary of Unaided Awareness and Aided Awareness Measures

Category	Focal Brand	Sample Size	Number of Brands Mentioned Unaided	Unaided Awareness of Focal Brand	Aided Awareness of Focal Brand	Confusion Rate from “An Empirical Assessment” ⁴¹
Soda/pop	FANTA	200	6.0	27.5%	93.0%	56.0%
Breakfast cereal	KIX	205	5.0	3.9%	79.5%	25.0%
Athletic sneakers	FILA	166	4.8	8.4%	78.9%	30.5%

³⁹ Responses were presented in reversed order, meaning that responses were ordered as “Yes,” “No,” and “I don’t know,” or ordered as “No,” “Yes,” and “I don’t know.”

⁴⁰ As expected, respondents selected more brands on an aided basis than they mentioned on an unaided basis. On an aided basis, respondents assigned to soda/pop selected an average of 6.4 brands, those assigned to breakfast cereal selected an average of 6.9, and those assigned to athletic sneakers selected an average of 5.3.

⁴¹ *An Empirical Assessment*, supra note 10, 109 TMR, at 953.

Table 1 also shows that unaided awareness was 27.5% for FANTA, 3.9% for KIX, and 8.4% for FILA.⁴² Aided awareness was much higher than unaided awareness for each focal brand, with aided awareness measures of 93.0% for FANTA, 78.9% for FILA, and 79.5% for KIX. The data show that each of the three brands has substantial measures for aided awareness, but much lower measures for unaided awareness.⁴³ An observer is likely to reach a different conclusion about whether each brand is well known, depending on whether they focus on aided or unaided awareness.

The last column of Table 1 presents the confusion measures from “An Empirical Assessment.” FANTA, which had the highest aided awareness in our survey, had the highest measured confusion rate. KIX and FILA, which had similar levels of aided awareness in our survey, had likelihood of confusion measures in a similar range.

VII. SURVEY MEASURING LIKELIHOOD OF CONFUSION

After conducting the awareness survey, we next used an Eveready survey to measure likelihood of confusion, using a format as similar as possible to the Eveready survey described in “An Empirical Assessment.” Given our hypotheses about the importance of aided awareness, our Eveready survey measured confusion with respect to brands with lower levels of aided awareness than the brands that were selected in “An Empirical Assessment”:

- i. For soda/pop, we measured JONES juice, alleged to create confusion with JONES soda. This is a test of the *same* mark in a *different* category. In our awareness survey, JONES soda had unaided awareness of 3.0% and aided awareness of 35.5%.
- ii. For breakfast cereal, we measured MAEPOE snack bars, alleged to create confusion with MAYPO breakfast cereal. This is a test of a *similar but non-identical* mark in a *different* product category. In our awareness survey, in breakfast cereal, MAYPO had 0% unaided awareness and 19% aided awareness.

⁴² As a comparison, the survey in “An Empirical Assessment” (954) provides unaided awareness measures of 6.3% for FANTA, 5.3% for FILA, and 3.0% for KIX. We are uncertain as to the reasons for the difference in the measures for FANTA, but we do not have certain information about the other survey, such as the demographic composition of the survey universe.

⁴³ The aided awareness survey included two fictitious brands as a survey control measure. For a survey in a legal proceeding, we would subtract the measures for the fictitious brand from the measures for each brand of interest. After accounting for the control, aided awareness is 93.7% for FANTA, 81.1% for KIX, and 79.7% for FILA. Because this survey is meant only for illustrative purposes, we report all data before adjusting for the control.

- iii. For athletic sneakers, we measured PF PHLYERS, alleged to create confusion with PF FLYERS athletic sneakers. This tests a *similar but non-identical* mark in the *same* product category. In our awareness survey, the PF FLYERS brand had 0.6% unaided awareness and 30% aided awareness.

For our confusion survey, we recruited prospective respondents through an online survey panel and qualified respondents as having purchased in the past month, or being likely to purchase in the next month, products from the product category of interest.

Using a protocol similar to that used in “An Empirical Assessment,” our Eveready survey showed the junior mark in plain text and referenced the product category of interest. The screenshots that follow show each mark as it was displayed in the Eveready survey, which replicated the format in “An Empirical Assessment.”⁴⁴

Please imagine that you were shopping for **juice** and saw a juice product with the following brand name:

JONES

[Next](#)

Please imagine that you were shopping for **snack bars** and saw a snack bar product with the following brand name:

MAEPOE

[Next](#)

Please imagine that you were shopping for **athletic sneakers** and saw an athletic sneaker product with the following brand name:

PF PHLYERS

[Next](#)

⁴⁴ Our choice of a survey protocol that showed the mark in plain words does not necessarily reflect how we would conduct an Eveready survey in other contexts.

Our Eveready survey asked two series of questions to measure confusion. In the first series, respondents were asked whether they are aware of any other products made or put out by the company or brand that makes or puts out the product they just saw. Those answering affirmatively were asked to indicate, in their own words, what other product or products are made or put out by the company or brand that makes or puts out the product they just saw.⁴⁵

The second series asked respondents whether they think that whoever makes or puts out the product they just saw is or is not sponsored or approved by another company or brand, or that they don't know. Respondents who answered affirmatively were asked to indicate what other company or brand they believe sponsored or approved whoever makes or puts out the product they just saw.

A total of 300 respondents completed the Eveready survey, including 100 respondents for each product category. Table 2 shows the results. As a reminder, these three marks were selected for the Eveready survey as examples of marks that have low levels of aided awareness.

Table 2: Summary of Awareness and Confusion Rates for Brands Used in Likelihood of Confusion Study

Junior Mark	Junior Mark Category	Senior Mark	Senior Mark Category	Unaided Awareness	Aided Awareness ⁴⁶	Likelihood of Confusion
JONES	Juice	JONES	Soda/pop	3.0%	35.5%	18.0%
MAEPOE	Snack bars	MAYPO	Breakfast cereal	0.0%	19.0%	0.0%
PF PHLIERS	Athletic sneakers	PF FLYERS	Athletic sneakers	0.6%	30.1%	5.0%

The results shown in Table 2 support our hypothesis that an Eveready survey will not show appreciable levels of confusion if the senior mark does not have substantial levels of aided awareness. The confusion measures are 18.0% for JONES, 0% for MAEPOE, and 5.0% for PF PHLIERS.⁴⁷ For all three brands, the confusion

⁴⁵ Often, Eveready surveys include additional questions. To more closely compare our results with those of Mr. Poret, we included only those questions that were tested in "An Empirical Assessment."

⁴⁶ After adjusting for two fictitious control brands in our awareness survey, aided awareness is 33.9% for JONES, 17.8% for MAYPO, and 29.0% for PF FLYERS. As described earlier, in a legal proceeding, we would rely on the measures that reflect the control.

⁴⁷ The 18.0% confusion rate for JONES includes any reference to Jones and/or soda, and the 5.0% confusion rate for PF PHLIERS includes references to footwear, socks, or apparel. Limiting confusion to explicit references to PF FLYERS reduces the confusion

measures are lower than the aided awareness measures, which were 35.5% for JONES, 19.0% for MAEPOE, and 30.1% for PF PHLIERS.

VIII. CONCLUSIONS AND IMPLICATIONS

Based on our surveys and analysis, we conclude that aided awareness is the key measure for deciding whether a mark is appropriate for the Eveready survey format. If an Eveready survey is used to measure confusion relative to a mark that does not have appreciable levels of aided awareness, the survey will not show substantial levels of confusion. Aided awareness is key for establishing suitability for an Eveready survey because very low levels of aided awareness impede the “pattern matching”⁴⁸ that is at the heart of the Eveready format. When aided awareness is low, respondents do not have the reference mark in mind to compare against the mark they are shown.

Our conclusions are generally consistent with two perspectives that previously seemed to conflict. We agree with prior scholars who have argued that Eveready surveys are appropriate only for brands that are “widely recognized,”⁴⁹ and that using an Eveready survey for a mark that is not readily available in the memory of consumers may underestimate confusion.⁵⁰ We also agree with “An Empirical Assessment” that a wider range of brands may be appropriate for Eveready surveys than was previously appreciated.

These positions are not mutually exclusive if aided awareness is the measure to evaluate whether a brand is widely recognized, with the applicability of the Eveready format to any mark evaluated according to that mark’s level of aided awareness. On the one hand, to be suitable for Eveready, a mark must be widely recognized or well known, as measured by aided awareness. On the other hand, many brands—even those that are not market leaders or may not be recalled on an unaided basis—can have levels of aided awareness sufficiently high to make them appropriate for an Eveready survey.

For example, consumers may be aware of brands that they used to purchase in the past but do not purchase any more.⁵¹ Such brands

measure for PF PHLIERS to 0.0%. This article does not opine on whether any specific percentage represents a substantial likelihood of confusion.

⁴⁸ Swann, *Cognitively Updated*, *supra* note 3, at 742.

⁴⁹ McCarthy, *supra* note 3, § 32:173.50, n.2 (citations omitted).

⁵⁰ Itamar Simonson, *Trademark Infringement from the Buyer Perspective: Conceptual Analysis and Measurement Implications*, 13 J. Pub. Pol’y & Mktg. 183 (1994).

⁵¹ Over time, the market position of certain brands fades, sometimes due to “. . . the failure of companies to stay atop their industries when they confront certain types of market and technological change.” Even well-managed brands that listen attentively to their customers may fail to keep up with “disruptive” changes in competitive product offerings. Clayton M. Christensen, *The Innovator’s Dilemma: When New Technologies Cause Great Firms to Fail* ix, xv (1st ed. 1997).

may come to mind only with the prompting in an aided awareness question. For soft drinks, consumers may frequently see or regularly purchase market leaders such as COKE or PEPSI, but they may also be aware of many other soda brands that they do not drink as often, such as FANTA or FRESCA. In other contexts, consumers may similarly have aided awareness of brands that serve niche segments of the market, but those niche brands may not come to mind on an unaided basis as easily as mainstream brands.

This discussion raises the question of how to recognize the contexts where a mark is likely to have sufficient levels of unaided awareness for Eveready. There are a few indicators that courts, attorneys, and experts can use to determine whether a mark has sufficient levels of unaided awareness to make Eveready an appropriate format.⁵²

One indicator is an awareness survey, such as the awareness surveys that the authors conducted for this article. An awareness survey to evaluate whether a mark is appropriate for Eveready would measure whether respondents are aware of that mark, on an aided basis. The awareness survey described in this article is not the only valid format for an awareness survey; an awareness survey can measure words, phrases, or trade dress, and should include other elements of reliable survey design, such as survey controls.⁵³

If an awareness survey measures both unaided and aided awareness, the key measure for considering whether to conduct an Eveready survey is aided awareness. If an awareness survey measures only unaided awareness, the survey can still be relevant because, as discussed earlier, unaided awareness provides a floor, or minimum, for aided awareness. A low measure of unaided awareness is not valid cause to decline an Eveready survey, because aided awareness can be much higher than unaided awareness in any given context.

It is not always necessary to conduct an awareness survey to evaluate whether the context is appropriate for Eveready, because indicators other than an awareness survey can identify whether a mark is well known.

One such indicator is the mark's history or longevity with consumers. Many brands that are ubiquitous in American

⁵² Given that standards to evaluate percentage measures from likelihood of confusion surveys vary across venues and courts, this article does not provide guidance for the specific percentage of unaided awareness that would justify an Eveready survey.

⁵³ For example, in a matter involving trade dress for bottles containing alcoholic beverages, a survey conducted by one of the authors showed pictures of the bottles with brand names removed, and asked, "Even though the picture of the product has been altered, have you ever seen the product shown in this picture before? You may answer 'yes,' 'no,' or that you 'don't know.'" Respondents who answered affirmatively were also asked, "What do you think is the brand name of this product? If you don't know or are not sure, you may simply say that you don't know." See *Globefill, Inc. v. Elements Spirits, Inc.*, No. 2:10-CV-02034, 2016 WL 8944644, at 9 (C.D. Cal. Sept. 20, 2016).

households, such as COCA-COLA, PEPSI-COLA, IVORY, QUAKER, FORD, or GENERAL MOTORS, have become well known by marketplace activities that were conducted over a long period of time. For example, around the time of the turn of the twentieth century, innovations such as the telegraph, railroads, and mass production, along with modern marketing techniques, made possible some of the first brands of household consumer products oriented for the mass markets. Many marks introduced and developed long ago, sometimes as far back as the turn of the prior century, are still well known today.⁵⁴

Although history can help a mark become well known, it is, of course, possible that a mark with a long history is not well known, or that a mark can become well known over a relatively short period of time. Another indicator to evaluate whether a mark is well known is provided by the mark's marketplace success, evaluated by measures such as sales or market share, or the level of marketplace activities related to the mark in areas such as marketing, advertising, public relations, and social media. Due to marketplace success and high levels of marketplace activities, companies such as Apple, Nike, Amazon, Tesla, and Google have become well known.⁵⁵

An awareness survey is not always necessary to determine whether a mark is appropriate for an Eveready survey, but our research sheds light on the importance of aided awareness. Where it is otherwise difficult to evaluate whether a mark is readily recalled by consumers, the evaluation can be conducted by a survey, or it can be conducted by looking at other measures, such as marketplace success, the level of marketplace activities, or other similar considerations.

⁵⁴ For example, COCA-COLA was invented in 1886 and PEPSI-COLA was invented in the 1890s. The Ford Motor Company was incorporated in 1903; General Motors was founded in 1908, and by the 1920s was operating brands such as OLDSMOBILE, BUICK, and CADILLAC. Richard S. Tedlow, *New and Improved: The Story of Mass Marketing in America* 22-23, 120, 147, 150 (1990). In the 1880s, innovation in packaging, distribution, manufacturing, and marketing made possible such brands as PILLSBURY, QUAKER, HEINZ, IVORY, COLGATE, SHERWIN WILLIAMS, SWIFT, ARMOUR, and ANHEUSER. Alfred D. Chandler, Jr., *Scale and Scope: the Dynamics of Industrial Capitalism* 63-65 (1990).

⁵⁵ The company now known as Nike adopted its name in 1971; Apple was founded in 1976; Amazon was founded in 1994; Tesla was founded in 2003; and Google was founded in 1998. Phil Knight, *Shoe Dog: A Memoir by the Creator of Nike* (2016). Apple History, <http://www.applemuseum.com/en/apple-history> (last visited Sept. 8, 2020). Encyclopedia Britannica: Amazon.com, <https://www.britannica.com/topic/Amazoncom> (last visited Sept. 8, 2020). About Tesla, <https://www.tesla.com/about> (last visited Sept. 8, 2020). From the Garage to the Googleplex, <https://about.google/our-story/> (last visited Sept. 8, 2020).