

**EXHIBIT F**

**Trademark**  
and

**Deceptive  
Advertising  
SURVEYS**

Law, Science, and Design

EDITED BY

Shari Seidman Diamond

and Jerre B. Swann



Section of  
Intellectual Property Law

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# **Trademark and Deceptive Advertising SURVEYS**

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**Shari Seidman Diamond  
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\*The editors' names are in alphabetical order to reflect the genuine collaboration, if not always agreement, between the editors in producing this volume.

 **Section of  
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confusion studies to their early status as substantial contributors to the resolution of infringement actions.<sup>24</sup>

## EVEREADY

### The Questionnaire and Variants

In a typical Eveready format, a respondent is first shown an exemplar,<sup>25</sup> photograph,<sup>26</sup> or advertisement of defendant's trademarked (or "dressed") product<sup>27</sup> and is asked an open-ended "source confusion" question, "Who makes or puts out \_\_\_\_\_?,"<sup>28</sup> followed by

24. See, e.g., *James Burrough, Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 278-79 (7th Cir. 1976) ("The record . . . establishes the consumer survey herein to have been fairly and scientifically conducted by qualified experts . . . [and it] qualifies as a reliable reproduction of prospective consumer reaction. . . . After finding that 15% of the survey respondents referred to Beefeater liquor . . . , when . . . asked who the restaurant sponsor was, the district court found that the survey demonstrated nothing more than a 'small percentage'. . . . We cannot agree that 15% is small [or] de minimis."); *Union Carbide*, 531 F.2d at 385 ("A district judge's determination of evidentiary matters is entitled to great respect. . . . we would hesitate to find his determination that Carbide failed to establish likelihood of confusion was clearly erroneous were it not for the survey evidence presented at trial."). Among cases decided in the past 10 years, however, this author found only 26 where even the results of an Eveready design overtly impacted a court's decision. See, e.g., *Re/Max Int'l, Inc. v. Trendsetter Realty, LLC*, 2009 U.S. Dist. LEXIS 79356 (S.D. Tex. 2009); *Hermes Int'l v. Lederer de Paris Fifth Ave. Inc.*, 50 F. Supp. 2d 212 (S.D. N.Y. 1999); *Pharmacia Corp. v. Alcon Labs., Inc.*, 201 F. Supp. 2d 335 (D.N.J. 2002). This author found only seven where the results of a Squirt design overtly influenced the outcome. See, e.g., *Thane Int'l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894 (9th Cir. 2002); *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964 (10th Cir. 2002); *Gross v. Bare Escentuals Beauty, Inc.*, 641 F. Supp. 2d 175 (S.D.N.Y. 2008). Courts more frequently rely on surveys than reported cases suggest, but mute their reliance fearing reversal as to evidence that, likely, has been sharply criticized by an opposing expert and that they may not fully understand. There clearly is a need to supply courts with tools to promote sound survey practices by: (a) either expressing confidence in professionally executed research; or (b) engendering fear among practitioners that: "a weak survey may actually detract" from a case of infringement or an overblown critique may legitimize a survey. *ConAgra, Inc. v. Geo. A. Hormel & Co.*, 784 F. Supp. 700, 722 (D. Neb. 1992), *aff'd*, 990 F.2d 368 (8th Cir. 1993); see, *Riviana Foods, Inc. v. Societe Des Produits Nestle, S.A.*, 33 U.S.P.Q. 2d 1669, 1671 (S.D. Tex. 1994).

25. The nature of the stimulus may vary depending on whether point-of-sale, post-sale, or initial interest confusion is at issue. Context at the point of purchase can convey information that consumers use in making source determinations, and "the closer the survey context comes to marketplace conditions, the greater the evidentiary weight it has," MCCARTHY, *supra* note 6 at § 32:163, which often requires displaying actual products, packaging, or other source indicia that consumers would encounter at the point of sale.

26. With post-sale confusion, the purchasing context is often irrelevant and would give the respondent information not available in a post-sale encounter. See *Gateway, Inc. v. Companion Products, Inc.*, 68 U.S.P.Q. 2d 1407, 1420 (D.S.D. 2003) ("Post-sale confusion is particularly relevant in this case because . . . [a]fter Cody Cow is purchased, the point of sale materials are removed by the purchaser, and [have] no 'confusion obviating effect'"). Accordingly, photographs or videos that fairly reproduce what a respondent would see in a post-sale environment are easier to control (and afford greater certainty as to what respondents see) than actual displays that a field service may not faithfully execute in a shopping center interviewing booth. See *Hermes*, 50 F. Supp. 2d at 222 approving a post-sale stimulus showing a "Kelly bag (as carried by a woman walking at a distance of four feet)."

27. Stimulus exposure may occur in a shopping center interviewing booth, by mail in a call/mail/call study, with Internet assistance in a telephone study, or exclusively via the Internet.

28. Open-ended questions "require the respondent to . . . express an answer in his or her own words [and] give the respondent fewer hints about expected or preferred answers." Diamond, *supra* note 9 at 391-92. The "puts out" phraseology in the original questionnaire is out-of-date and is supplemented with who "makes" or like terminology in current Eveready versions.



“Why do you say that?”<sup>29</sup> “Sponsorship” and “affiliation” confusion questions<sup>30</sup> often follow,<sup>31</sup> frequently in closed-ended form:<sup>32</sup>

Do you believe that whoever makes or puts out \_\_\_\_\_:  
 ONE, is sponsored or approved by another company?  
 TWO, is not sponsored or approved by any other company? or  
 THREE, you don't know or have no opinion?<sup>33</sup>  
 [If ONE] What other company? [and] Why do you say that?

and/or

Do you believe that whoever makes or puts out \_\_\_\_\_:

29. With the advent of experimental designs, and the acknowledged difficulty that consumers can have in expressing “higher order processes,” Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know; Verbal Reports on Mental Processes*, 84 *PSYCHOLOGICAL REV.* 231 (1977), the editors of this book are of the opinion that “why” questions may no longer be necessary, particularly to demonstrate causation. Courts, however, often like to play with the “clarifying” information that “why” questions produce. *Cumberland Packing Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 572–73, 576 (E.D. N.Y. 1999); some courts reject studies without “why” questions, *Pep Boys Manny, Moe & Jack of Cal. v. Goodyear Tire & Rubber Co.*, 2002 U.S. Dist. LEXIS 5925 \*30–33 (E.D. Pa. 2002); and information developed from “why” questions may be helpful to counsel in analyzing both consumer perceptions and the efficacy of the control stimulus, *H-D Mich., Inc. v. Top Quality Serv., Inc.*, 496 F.3d 755, 758 (7th Cir. 2007); *24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC*, 447 F. Supp. 2d 266, 280–81 (S.D. N.Y. 2006). Survey experts should thus continue to ask “why” questions and report the responses thereto, but control cells, not “why” questions, are critical for a scientific causality assessment.

30. Just as confusion may occur at three different points, it may take three different forms: Section 43 (a) of the Lanham Act proscribes conduct that is “likely to cause confusion . . . as to [i] affiliation . . . , or as to [ii] origin, [or as to iii] sponsorship, or approval. . . .” Forward and reverse confusion further complicate the variants and combinations potentially to be tested. 15 U.S.C. § 1125 (d)(1)(A).

31. This author has advocated that in dilution cases, an “association” question—“what other brand or brands, if any, does \_\_\_\_\_ bring to mind”—may also follow, not for likelihood of confusion purposes, but to obviate the expense of doing a separate dilution study. *See Nike, Inc. v. NikePal Int'l Inc.*, 2007 U.S. Dist. LEXIS 66686 (E.D. Cal. 2007). However, the universes differ for likelihood of confusion and dilution studies. In addition, for reasons of added questionnaire length, sufficing, or the like, it may be that an added “association” question will not produce the level of association response as would a separate association study.

32. *See, e.g., Starbucks U.S. Brands, LLC v. Ruben*, 2006 TTAB LEXIS 54, \*35–37 (T.T.A.B. 2006).

33. “[P]resentation of an explicit ‘don’t know’ or ‘no opinion’ alternative [reduces demand effects and] commonly leads to a 20% to 25% increase in the proportion giving that response.” *Diamond, supra* note 9, at 390. The benefits of “don’t know” alternatives are debated in Michael Rapoport, *Litigation Surveys—Social “Science” as Evidence*, 92 *TRADEMARK REP.* 957 (2002) and Jacob Jacoby, *A Critique of Rapoport’s ‘Litigation Surveys—Social “Science” as Evidence’*, 92 *TRADEMARK REP.* 1480 (2002). Courts, to date, have typically favored explicit “don’t know” alternatives. *See, e.g., Cumberland Packing Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 572 (E.D. N.Y. 1999); *Procter & Gamble Pharms., Inc. v. Hoffmann-La Roche Inc.*, 2006 WL 2588002 \*22–25 (S.D. N.Y. 2006). Choices in closed-ended questions *must* “cover all possible answers a respondent might give to the question [and “don’t know” is arguably always one possible answer]. If the list . . . is incomplete, a respondent may be forced to choose one that does not express his or her opinion.” *Diamond, supra* note 9 at 393, *citing Am. Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 581 (S.D.N.Y. 1987).

“Recent research[, however,] shows that [‘don’t know’] quasi-filters as well as full filters may discourage a respondent who would be able to provide a meaningful answer from expressing it[, by providing] a cue that it is acceptable to avoid the work of trying to provide a more substantive response. One solution . . . is to provide respondents with a general instruction not to guess at the beginning of an interview, rather than supplying [explicit ‘don’t know’ options] to each question.” *Diamond, supra* note 9 at 391. Another solution would be to use an explicit “don’t know” to obtain a conservative estimate of respondents holding an opinion when seeking to prove a likelihood of confusion, and using only a “don’t know” introductory admonition when seeking to disprove such a likelihood.

ONE, has a business affiliation or connection with another company?  
 TWO, does not have a business affiliation or connection with any other company?  
 or THREE, you don't know or have no opinion?  
 [If ONE] With what other company? [and] Why do you say that?<sup>34</sup>

Eveready has been so often approved that material variants are rarely encountered.<sup>35</sup> The follow-on questions, of course, may be phrased in a more open-ended fashion and, under particular circumstances, a follow-on question may become the lead inquiry.<sup>36</sup> Radical alterations, however, often suggest a departure from the requirement that a design be objective. For example, the full filter question, "Based on what you just saw, do you or don't you know who or what brand or company makes or puts out \_\_\_\_\_?," containing an "admonishment" to respondents to answer only if they "know the correct answer," was rejected as "tortured" and calculated to "produce a low response rate."<sup>37</sup>

Nonetheless, variant approaches from the now-standard format delineated above, one of them stemming from *Union Carbide* itself, do exist, both in the case law and literature:

- a. Where the owner of the senior mark is substantially anonymous and the defendant's goods are in a different category, the respondent may be asked: "Please name any other products put out by the same company that puts out \_\_\_\_\_."<sup>38</sup>

34. In Eveready designs, follow-ons are considered as the "standard type and format of questions used to gauge confusion. . . ." *Pharmacia Corp. v. Alcon Labs., Inc.*, 201 F. Supp. 2d 335, 365-66 (D.N.J. 2002). Failure by a defendant, seeking to disprove likelihood of confusion, to test for "sponsorship or affiliation" may lead to rejection of its study. *Bear U.S.A., Inc. v. Kim*, 71 F. Supp. 2d 237, 252 n.106 (S.D. N.Y. 1999), *aff'd*, 216 F.3d 1071 (2d Cir 2000). With Squirt designs, courts have expressed concern with the cumulative impact of closed-ended questions as to "same company," "affiliated company," and "sponsorship." *See U.S. West, Inc. v. Hatten Comm'n's Holding Co., Inc.*, 2002 TTAB LEXIS 620 \*15-\*20 (T.T.A.B. 2002) ("we have accorded no weight to opposer's survey. . . . [A] respondent merely had to give a 'wrong' answer to one of the pertinent [suggestive] questions in order to be counted as part of the 22.9% of the respondents who were 'confused.'"). The "wrong answer" concern is alleviated in Eveready designs where respondents are required to identify the "other company," and this author is unaware of any instance where a makes/sponsors/affiliated trilogy in an Eveready test has engendered the strong demand-effects that can surface in a Squirt design. *See, e.g., Kargo Global*, 2007 U.S. Dist. LEXIS 57320, at \*17, a traditional Squirt in which 80% of respondents in both the test and the control gave answers reflecting confusion.

35. The most bizarre is reported in *Arche, Inc. v. Azaleia, U.S.A.*, 882 F. Supp. 334, 335 (S.D.N.Y. 1995):

Plaintiff's counsel designed a questionnaire and sent one of their employees, . . . a part-time typist, drama student and actress, into Washington Square Park, which is located within blocks of one of plaintiff's retail stores. Over a two day period, she approached a number of people who, she said, looked as if they could afford plaintiff's shoes, which sell at prices considerably higher than defendants'. [S]hod in defendants' shoes, [she] asked the well-to-do passersby whether they could identify the shoes she was wearing.

36. *In, e.g., James Burrough*, 540 F.2d at 278, the lead inquiry was an open-ended sponsorship question: "Who do you believe is sponsoring or promoting this restaurant?" Because respondents, prompted by considerations of sufficing or otherwise, do not typically repeat answers, and follow-on questions thus rarely add more than a few percentage points to the likelihood of confusion assessment, it may be important to select the lead question that is most likely to elicit the type of confusion at issue, which, in *James Burrough*, was sponsorship.

37. *McNeil-PPC, Inc. v. Merisant Co.*, 2004 U.S. Dist. LEXIS 2773, \*59-60 (D.P.R. 2004) (the expert "testified that he was guided by the . . . survey in *Eveready*. . . . The actual question asked in *Eveready* was much simpler. . . . The differences . . . are material, and likely influenced the responses.").

38. *Union Carbide*, 531 F.2d at 385 n.11. Only .6% of respondents identified the essentially anonymous Union Carbide as the maker of defendant's Eveready lamp; 54.6% answered, however, that the same

- b. Either separately, or in a follow-on question, a respondent may be tested as to an alternative form of "sponsorship confusion": whether "the company that puts out \_\_\_\_\_" either "needed to get" or "did get" permission and, if so, from whom.<sup>39</sup>
- c. To replicate the phenomenon that, as to "frequently bought household goods . . . , [consumers] make quick decisions based on the 'gestalt' of the product":<sup>40</sup> (i) respondents may be shown a notebook with several pages reflecting such "experience" brands grouped in different product categories (one of which will include the allegedly infringing junior brand); (ii) they will then be asked to list the brands they recall having seen; and (iii) their measure of "confusion" will be the percentage of respondents reporting having seen the senior brand.<sup>41</sup>

concern that put out Eveready lamps also put out batteries, leading the court properly to conclude that the survey not only supported a finding of likelihood of confusion, but was evidence of secondary meaning of Eveready as well. *Id.* at 381. The "batteries" responses were particularly telling, given that the products were not so related that respondents would have likely guessed that a lamp maker would also make batteries.

39. *See, e.g.,* Cairns v. Franklin Mint Co., 107 F. Supp. 2d 1212, 1219 (C.D. Cal. 2000). Critics of the "need to get" wording insist that it calls for a legal conclusion. Nat'l Football League Props., Inc. v. Prostyle, Inc., 57 F. Supp. 2d 665 (E.D. Wis. 1999). Critics of the "did get" wording insist that a respondent can have no way of knowing whether permission was obtained, and is thus inherently asked to guess. Jacob Jacoby, *Sense and Nonsense in Measuring Sponsorship Confusion*, 24 CARDOZO ARTS & ENTMT'L L. J. 63 (2006). This author regards the debate largely as a waste of judicial resources. Swann on U.S. Trademark Surveys, in CORBIN & GILL, SURVEY EVIDENCE AND THE LAW WORLDWIDE, 333-34. Consumers understand that using another's property generally requires permission, and are likely to evaluate the similarity of the stimuli and respond affirmatively or negatively in that pragmatic context, whether the "need to" or "did get" wording is used.

40. ZEISEL & KAYE, *supra* note 15, at 158. Courts split as to how long a respondent should be exposed to a stimulus. Hurried consumers do not typically study items, and stimuli reflecting such items should not be left with respondents during the administration of a questionnaire. *See* Am. Home Prods. Corp. v. Procter & Gamble Co., 871 F. Supp. 739, 748 (D. N.J. 1994) ("consumers do not normally meditate . . . over details for an appreciable length of time"). As to many items, however, consumers do study packages. *See* Cumberland Packaging Corp. v. Monsanto Co., 32 F. Supp. 2d 561, 578 (E.D. N.Y. 1999) ("In an actual market situation, the product would not disappear from the consumer's eye just as he or she is about to make a purchase."). *See* Jerre B. Swann, A "Reading" Test or a "Memory" Test: Which Survey Methodology Is Correct?, 95 TRADEMARK REP. 876 (2005) and Mike Rappeport, *Response to Survey Methodology Articles*, 96 TRADEMARK REP. 769 (2006), advocating the view that the stimulus, in most circumstances, be left with the respondent. *See* Henry D. Ostberg, *Response to an Article Entitled, "A 'Reading' Test or a 'Memory' Test: Which Survey Methodology Is Correct?,"* 95 TRADEMARK REP. 1446 (2005), advocating the obverse.

41. ZEISEL & KAYE, *supra* note 15 at 158-59. Dr. Zeisel's approach, for point-of-sale confusion, may arguably be inappropriate where the junior and senior brands are shelved adjacent to one another so that respondents have the context of the senior brand to make judgments as to the junior. Winner Int'l LLC v. Omori Enter's, Inc., 60 F. Supp. 2d 62, 71 (E.D.N.Y. 1999). The author has criticized, however, cases like Conopco, Inc. v. May Dep't Stores Co., 46 F.3d 1556 (Fed. Cir. 1994) that overly focus on context and labeling with respect to inexpensive, frequently (and rapidly) purchased "experience" goods of the type encompassed by Dr. Zeisel's "notebook" design. Jerre B. Swann, *An Interdisciplinary Approach to Brand Strength*, 96 TRADEMARK REP. 943, 970-71 (2006).



### Categorization and Pattern Matching in an Eveready Format

To appreciate fully Eveready's benefits, it is necessary to review current conditions of commercial clutter. Even half a century ago, there was a "babel of brands,"<sup>42</sup> and the "number of choices has [since] grown dramatically."<sup>43</sup> Books tout there is "Too Much Choice."<sup>44</sup> Consumers are bombarded by brand stimuli and cannot "attend" to all they see;<sup>45</sup> of necessity, they "are highly selective."<sup>46</sup>

Even when a stimulus registers on their consciousness, consumers "rarely . . . consider all [of its] features";<sup>47</sup> rather, given their attention constraints amid clutter, they use shortcuts to "label, identify, and classify" information.<sup>48</sup> If, for example, they see a small creature with the salient features of feathers and wings, they "categorize" it as a bird without stopping to test for all avian characteristics.<sup>49</sup>

In memory,<sup>50</sup> top-of-mind brands function as antidotes to clutter; they exist as schemas: "clusters"<sup>51</sup> of information: (a) with source identifying (reputational) nodes at their center; (b) very strongly linked to the product(s) or service(s) in connection with which they are used; and (c) also linked to multiple other associations that have been engrafted on the schema by advertising, word of mouth, or experience.<sup>52</sup> Cognitively, "a unique brand name and cohesive brand identity are probably the most powerful pieces of information for consumers . . . , enabling [them] to efficiently organize, store, and retrieve information from memory."<sup>53</sup> Strong brands operate,

42. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1197 (1948).

43. AMA MARKETING MGMT. (Spring 2000).

44. STEVEN M. CRISTOL & PETER SEALEY, SIMPLICITY MARKETING 7 (2000).

45. WAYNE D. HOYER & DEBORAH J. MACINNIS, CONSUMER BEHAVIOR 115 (3d ed. 2004) ("Shoppers in a supermarket are exposed to numerous products, brands, ads, displays, signs, prices, logos, and packages [and] are generally unable to examine all those marketing stimuli simultaneously."); Jacob Jacoby, *The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution*, 91 TRADEMARK REP. 1013, 1022, 1034 (2001) ("the vast majority of stimuli fail to register upon the consumer's consciousness").

46. PHILIP KOTLER & KEVIN LANE KELLER, MARKETING MANAGEMENT 186 (12th ed. 2006) ("the average person may be exposed to over 1,500 ads or brand communications a day. . . . [M]ost stimuli will be screened out. . . ."). See *Toro Co. v. ToroHead, Inc.*, 61 U.S.P.Q. 2d 1164, 1180 (T.T.A.B. 2001) ("Every day consumers are bombarded with hundreds, if not thousands, of advertisements. . . . [M]any . . . do not make a significant impression. . . .").

47. Jacoby, *supra* note 45 at 1035, 1037.

48. HOYER & MACINNIS, *supra* note 45 at 115.

49. Jerre B. Swann & Michael J. Tarr, *Configuration Protection Harmonized*, 94 TRADEMARK REP. 1182, 1192 (2004).

50. Little information can be held (and attended to) in active consciousness ("cognitive workspace"), but is stored in memory where accessibility ranges from instantaneous to "virtually unavailable." Jacoby, *supra* note 45 at 1015-16.

51. Jacoby, *supra* note 45 at 1024-25; Swann, *supra* note 41 at 943, 946 (2006).

52. For a discussion and depiction of the Nike brand schema, see J. PAUL PETER & JERRY C. OLSON, CONSUMER BEHAVIOR & MARKETING STRATEGY (7th ed. 2005) at 58-61 (noting at 74-81 that a brand is a "bundle" of functional and psychosocial attributes, benefits, and "value satisfiers"). For diagrams as to how schemas help "interpret the outside world," see Jacoby, *supra* note 45 at 1069-70.

53. Jacoby, *supra* note 45 at 1025; see, Hoyer & MacInnis, *supra* note 45 at 183.

moreover, much in the manner of the picture of a celebrity on the cover of a magazine in a sidewalk kiosk—they attract attention in an otherwise hurried environment.<sup>54</sup>

As an example, the adidas schema<sup>55</sup> has, for many consumers in the athletic footwear category: (a) the marks (adidas, three stripes) and other indicia (shell toe/Superstar design) at its core (b) strongly linked to athletic shoes and sportswear and (c) also linked to a high-quality perception, soccer, Olympics sponsorship, and the like. When presented with a post-sale photograph of an athletic shoe with four parallel stripes on the side and with a shell toe, and asked the question, “Who makes or puts out [this],” respondents do not meticulously review each feature of the stimulus (they rarely count stripes) but engage in “pattern matching” with respect to its salient characteristics.<sup>56</sup> Respondents search their memory and identify the stimulus “based on its similarity to what [they] already know,”<sup>57</sup> and “[w]hen stimulus information offers a sufficient match to a schema possessed by the perceiver, the schema is called up from memory and used . . . to guide inferences.”<sup>58</sup> As to the four stripe/shell toe example, 40 percent of test cell respondents typically draw the inference that the stimulus is adidas.<sup>59</sup>

### The Confusion Factors Tested by Eveready

The Eveready format thus primarily addresses three confusion factors: similarity of marks, similarity of products, and commercial strength (expressed as top-of-mind awareness). Strength is the key: (i) if a schema is easily accessible in memory, it can be cued by a similar mark even where there is little or no similarity in products;<sup>60</sup> and (ii) if a brand is dominant in the mind (COKE), its schema may be cued by another top-of-mind brand in the category (PEPSI), even where there is no similarity of marks.<sup>61</sup> If, however, the senior mark is not accessible, it obviously cannot be cued irrespective of mark and product similarity: when an “open-end [Eveready] question [is] used [in connection with] a mark that is not particularly well-known, it needs to

54. Peter & Olson, *supra* note 52 at 118–19.

55. For purposes of full disclosure, this author states that he has appeared as counsel for Adidas A.G. in numerous cases.

56. Jacoby, *supra* note 45 at 1035, 1037.

57. HOYER & MACINNIS, *supra* note 45 at 102, 115–16 (“The cognitive networks in one’s memory . . . play a fundamental and often decisive role in interpreting incoming information from the outside world.”).

58. Donal E. Carlston & Eliot R. Smith, *Principles of Mental Representation*, in *SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES* 196 (E. Tory Higgins & Arie W. Kruglanski eds., 2007).

59. Expectation may drive perception, JUDITH L. ZAICHOWSKY, *THE PSYCHOLOGY BEHIND TRADEMARK INFRINGEMENT* 74 (2006), and respondents may overwrite stimuli to conform to memory (e.g., they may convert four stripes to three).

60. An Eveready survey can thus measure the “reach” of a strong mark. “A mark that is strong . . . is more likely to be remembered and more likely to be associated in the public mind with [or triggered by] a greater breadth of products . . . , than is a mark that is weak because it is relatively unknown. . . .” *James Burrough*, 540 F.2d at 276.

61. William G. Barber discusses this phenomenon in a dilution context in *How to Do a Trademark Dilution Survey (or Perhaps How Not to Do One)*, 89 TRADEMARK REP. 616 (1999).

be understood that the . . . 'top-of-mind' awareness of the brand . . . required [by the format] may significantly underestimate [the likelihood of] confusion."<sup>62</sup>

### The Need for a Control Cell

Through the early 1990s, many survey experts opined that, because of its open-ended design, an Eveready did not lend itself to guessing and did not require a control cell. The mere posing of a question, however, often suggests that there is a correct answer that the respondent should know, and to be helpful (or avoid appearing unintelligent), some respondents will "guess," e.g., they will search their memory, often for what they consider the leading brand (sometimes irrespective of similarity).<sup>63</sup> Control cells are thus necessary to confirm causality—to filter out market share and other effects in both likelihood of confusion and dilution studies.<sup>64</sup> This author can recall and, indeed, has recently experienced, a control cell in a dominant brand case that produced market share noise exceeding 40 percent.

### The Scope of Eveready

In cases involving top-of-mind marks,<sup>65</sup> the Eveready format is, to repeat, the gold standard<sup>66</sup> for fundamental cognitive and marketing reasons:

- a. An Eveready study (a) used among prospective consumers of the alleged infringer's goods; (b) in face-to-face interviews; and (c) with the stimulus left in the respondent's view, engenders respondent "attention" approximating that of an "involved" consumer and thus produces, coupled with a control cell to filter market share and other effects, a conservative ("reliable") estimate of likelihood of confusion;<sup>67</sup>
- b. Reviews of "why" answers often reveal that senior mark responses to a "who makes or puts out" question have occurred because: (a)

62. PHYLLIS J. WELTER, TRADEMARK SURVEYS § 24.03[1][c] (1999); *Simon & Schuster v. Dove Audio, Inc.*, 970 F. Supp. 279, 292 (S.D.N.Y. 1997). Welter postulates that the Eveready format requires "unaided awareness" of the senior brand. In the author's view, however, the format more closely resembles a partially aided awareness test: it assesses whether the junior user's mark and product cues are similar enough to those of an accessible senior brand to trigger the latter's schema in response to a source (or sponsorship or affiliation) confusion question.

63. *Winner Int'l, LLC v. Omori Enters., Inc.*, 60 F. Supp. 2d 62, 70–71 (E.D.N.Y. 1999) ("There is no way to tell whether those who answered 'The Club' . . . simply guessed at the name because it is a famous brand. . ."). While four-stripe athletic shoes produce appreciable adidas responses, they also trigger a modicum of Nike mentions.

64. See Jerre B. Swann, *Dilution Redefined for the Year 2002*, 92 TRADEMARK REP. 585, 619–20 (2002).

65. Or where there is no physical or temporal proximity between the junior and senior uses so that the only possible comparison can occur in the mind.

66. Or, under the circumstances of note 65, *supra*, the only marketplace replicating standard.

67. Jerre B. Swann, *Sophistication and the Sciences*, 97 TRADEMARK REP. 1309 (2007). In the author's view, net confusion from an Eveready of less than 10% may suffice to support a conclusion as to likelihood of confusion (and, because of an elevated degree of noise discussed below, a net level above 10% may be required from a Squirt variant). See MCCARTHY, *supra* note 6 at § 32:189, discussing a 10% threshold. A separate chapter is devoted herein to the relevance of various percentage levels.



“stored knowledge” of the senior mark is “accessible” in a respondent’s memory;<sup>68</sup> and (b) there is a “fit between the stored knowledge and the [junior] stimulus.”<sup>69</sup> Accordingly, an expert’s conclusion as to a “likelihood of confusion,” based on an appreciable percentage of senior mark responses, has cognitively sound underpinnings;<sup>70</sup>

- c. Because a strong mark is more likely to be attended to in the market than a weak mark,<sup>71</sup> it is reasonable to assume that a stimulus that “fits” the strong mark’s schema will be attended to, and that an Eveready survey thus measures probable assessments in the marketplace, not artificially created or forced opportunities; and
- d. The only hypothetical is the degree to which a respondent would be likely to encounter the junior use in the marketplace, and any concern as to the real-world basis for that likelihood is alleviated by limiting the universe to consumers and prospective consumers of goods in the category of the alleged infringer.<sup>72</sup>

With respect to commercially strong marks, therefore, the Eveready format is a relevant, reliable, and objective test of likelihood of confusion. It satisfies critical *Daubert* criteria as interpreted in the 2000 advisory committee’s notes to Federal Rule of Evidence 702: it is a “tested” rather than a subjective approach; it has been peer reviewed; with a control cell, it has a known error rate; and it has been generally accepted in the scientific community.<sup>73</sup>

As to its acceptance, scientists may have adopted Eveready because they know that Eveready has been embraced by the courts (i.e., they are driven by legal rather

68. See, e.g., *Re/Max Int’l, Inc. v. Trendsetter Realty, LLC.*, 655 F. Supp. 2d 679, 705 (S.D. Tex. 2009) (“The survey showed that many of the participants based their responses specifically on the red, white, and blue colors and arrangement of the [defendant’s] sign [that mimicked plaintiff’s arrangement].”). In *Re/Max*, indeed, expectation drove perception: “Some respondents thought they saw the name ‘RE/MAX’ on the Trend Setter sign, despite the presence of the words ‘Trend Setter’ in bold face across the middle.” *Id.*

69. See E. Tory Higgins, *Knowledge Activation: Accessibility, Applicability, and Salience*, in *SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES*, *supra* note 58 at 135; Michel Tuan Pham & Gita V. Johar, *Contingent Processes of Source Identification*, 24 *J. OF CONSUMER RESEARCH* 249, 250 (1997) (“The probability of source identification through cued retrieval depends essentially on [a.] the strength of the semantic link between the source and content that is formed at encoding, and [b.] the overlap between the cues that are available at retrieval, and the to-be-recalled material. . . .”).

70. See, e.g., *Jacoby*, *supra* note 45 at 1028, 1034.

71. See Swann, *supra* note 41 at 955. “[F]amiliar brands are selectively given more exposure, attention, comprehension and retention by consumers,” Steve Hoeffler & Kevin Lane Keller, *The Marketing Advantages of Strong Brands*, 10 *BRAND MGMT.* 421, 424 (2003), and owners of strong brands thus get “dramatically more impact from the same communications budget.” DAVID A. AAKER, *MANAGING BRAND EQUITY* 186 (1991).

72. Such a universe definition is thus a “relevancy” requirement. See, e.g., *Jacob Zimmerman v. Nat’l Ass’n of Realtors*, 2004 TTAB LEXIS 180 (T.T.A.B. 2004). Likewise, where the junior user’s operations are geographically confined, the study should be confined to the area where there are respondents with the opportunity to come into contact with the junior mark. See, e.g., *James Burroughs.*, 549 F.2d at 277; *Jacoby*, *SURVEY AND FIELD EXPERIMENTAL EVIDENCE, IN THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 181 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985).

73. See FED. R. EVID. 702 advisory committee’s notes (2000).



than by scientific considerations<sup>74</sup>), but it is not necessary here to resolve such chicken/egg conundrums. Based on case law and the literature, Eveready (updated with a control cell) should be regarded as the "model" for testing likelihood of confusion as to top-of-mind marks.

## SQUIRT

As befits current conditions of marketplace clutter, almost two million marks are federally registered. Comparatively few have (or can hope to develop) sufficiently strong memory traces so as to be cued by pattern matching engendered by a monadic exposure to a similar junior use. The *internal search* of memory for a strong brand's schema that exists at the core of an Eveready study is thus hostile to the general run of marks; for weak marks, an Eveready format will consistently produce negligible estimates of likelihood of confusion. *Ergo* the aided Squirt format, with an *external review* of the marks at issue that flows from their side-by-side or sequential exposure inherent in the administration of a Squirt survey.<sup>75</sup>

## The Questionnaire and Variants

In *Squirtco*,<sup>76</sup> respondents heard radio ads for SQUIRT and QUIRST and were then asked "Do you think SQUIRT and QUIRST are put out by the same company or by different companies?," followed by "What makes you think that?" Currently, questions as to "sponsorship" and "affiliation" confusion usually follow.<sup>77</sup>

74. SAMUEL J. BEST & BENJAMIN RADCLIFF, POLLING AMERICA, AN ENCYCLOPEDIA OF PUBLIC OPINION 435 (2005) ("Innovative questioning techniques tend to be less common in legal surveys than in nonlitigation contexts because generally it is preferable to ask questions of the sort that have garnered court approval.").

75. Where weak brands are externally available for comparison, the results of an Eveready format (with its requirement of internal accessibility) may still be relevant, *e.g.*, as bearing on the strength (or allegations of strength) of the senior brand, but should not be used alone to "disprove" a likelihood of confusion. *See Gosmile, Inc. v. Dr. Jonathan Levine, D.M.D.P.C.*, 769 F. Supp. 2d 630 (S.D. N.Y. 2011). Many courts, however, permit defendants to do so, *see, e.g.*, *Nat'l Distillers Prods. Co., LLC v. Refreshment Brands, Inc.*, 198 F. Supp. 2d 474, 482-84 (S.D.N.Y. 2002); *GMA Accessories, Inc. v. Croscill, Inc.*, 2008 U.S. Dist. LEXIS 16052, \*27 (S.D.N.Y. 2008). The better view is expressed in *Louis Vuitton v. Dooney & Bourke*, 525 F. Supp. 2d at 633 (S.D.N.Y. 2007): because "in the marketplace, consumers [had] a reasonable likelihood of encountering the marks at issue one after the other," the defendant should have also conducted a two-room Squirt "to take account of the possibility of a sequential viewing."

76. 628 F.2d at 1089 n.4. As an interesting side-note, SQUIRT was deemed a strong mark; in *Union Carbide*, the District Court (erroneously) found that Eveready was descriptive and did not merit protection. The use of Eveready for strong marks and Squirt for weak marks thus represents a role reversal wrought by history.

77. *E.g.*, "Do you think the first ad you just heard: (a) comes from a company that has a business connection with the company that put out the second ad you just heard; or (b) comes from a company that does not have a business connection with the company that put out the second ad." *See Kargo Global*, 2007 U.S. Dist. LEXIS 57320, at \*14. As noted *supra* at n.34, some courts have expressed concern with the cumulative impact of a series of closed-ended questions in a traditional Squirt format as to "same company," "affiliated company," and "authorization or sponsorship."