

In-N-Out Trade Dress Dispute Part III: To Squirt, or Not to Squirt?

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by J. Michael Keyes



Welcome to the final chapter of our Burger War Trilogy. In our earlier installments, [Part I](#) and [Part II](#), we discussed the secondary meaning surveys proffered by both parties in this trade dress dispute. We now turn to In-N-Out's likelihood of confusion study in this case as it provides the perfect opportunity to discuss a decision that trial counsel and their consumer survey experts routinely grapple with: To Squirt, or Not to Squirt, that is the question.

Before discussing that question in the context of this dispute, a slight

detour is in order.

Broadly speaking, there are two types of generally accepted consumer survey formats when testing for "likelihood of confusion" in trade dress and trademark cases. There is the "Eveready" format, and the "Squirt" format.

The Eveready format has been referred to as the "gold standard" when the senior user's trade dress or trademark is a commercially strong mark. In an Eveready survey design, the senior user's mark or trade dress is not shown to survey respondents as part of the survey and is assumed to be known to most of the relevant consumers and thus already in mind. Instead, respondents are just shown the (allegedly) offending trademark or trade dress and asked a series of questions regarding who they believe makes or puts out the product or service at issue or who the product or service might be affiliated with. By contrast, the Squirt design shows both parties' trademarks (either juxtaposed together at

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once or separately seriatim) and asks a series of questions as to whether the survey respondents believe there is an affiliation or connection between the products or the companies that put them out.

Neither format is necessarily a panacea in all cases. Some courts criticize the use of the Eveready format in cases where the senior user's mark is not commercially strong because it artificially deflates confusion on the theory that not enough respondents are familiar with the senior user's mark to draw a connection with the junior user's mark. See e.g., Vineyard House, LLC v. Constellation Brands United States Operations, Inc., 515 F. Supp. 3d 1061, 1072 (N.D. Cal. 2021) (noting the "[w]here the query concerns marks for everyday products, used by vast majority of consumers, such as Apple, Coca-Cola, or EverReady, the short simple survey can provide some insights. That is not, and never was, this case."); *but see* Hal Poret's study in the Trademark Reporter where he concludes that "the research described herein empirically demonstrates that Eveready surveys may be appropriate for senior marks that are not top-of-mind."

The Squirt format can create "demand effects" by suggesting to consumers that there must be a connection between the two companies whose products they have just been shown. A number of courts have suggested that unless the two products are actually sold or marketed in close proximity in the marketplace, a Squirt design should not be used. See e.g., Down the Hatch: Jägermeister Douses Impaired Survey Evidence in Trademark Victory.

In the present case, In-N-Out's expert used the Squirt design in which images of the In-N-Out and Doll N' Burger restaurants were shown seriatim, and her survey took a bit of grilling from the opposing party for doing so. The primary argument advanced by Doll N' Burger's expert (who used an Eveready format for his own defensive likelihood of confusion survey) is that the parties' goods are not sold in the same geographic markets. Thus, because consumers are not likely to encounter them in close proximity in the marketplace, the Squirt design should not be used, or so went the argument.

Notwithstanding these and other alleged deficiencies, the Court ultimately ruled that Plaintiff's expert's decision to use Squirt was a "judgment call" and that the wisdom of that call is for the fact finder. Also, the Court observed that Doll N' Burger's expert had used a similar Squirt design in a recent case where the two companies "d[id] not serve the same geographic regions." In non-judicial parlance, what's good for the goose is good for the gander.

Here are some final thoughts on this burger bonanza:

1. Use of either the Squirt or Eveready survey designs should be carefully considered by trial counsel and their experts and the pluses and minuses of both designs should be weighed and assessed based on the marketplace context of the dispute.
2. Trial counsel should be mindful of statements being advanced by an expert in your case vs. what the expert may have said or survey designs chosen by the expert in prior cases. Having a thorough, detailed discussion of the rebuttal points being advanced by the expert will be important. Don't rule out reviewing prior reports and declarations of the expert - although it could be a bit time consuming, it could prove to

be illuminating and prepare the expert for anticipated cross-examination or critiques.

3. Lastly, the Court's decision is a whopper of a Daubert order. The discussion of survey evidence was over 30 pages long. We did not cover all of the issues set forth in the decision in this three-part series. If you are dealing with survey evidence in a trade dress dispute, you should spend a bit of time devouring this decision along with our prior blog posts. You will leave satisfied!