

Evaluating Consumer Perception

The Use of Surveys in Trademark and Unfair Competition Cases

Bobby Ghajar, Partner

Trademark, Copyright & Advertising

Logistically Speaking

Phone Surveys

Mall Intercepts

Online Surveys

Telephone Surveys

Pros:



- Easy to have nationwide universe
- Random sample of respondents
- Cheaper alternative

Cons:

- Cannot see the products/packaging
- Harder to create control/as they appear in the marketplace
- Testing reaction more than confusion during potential purchasing situation
- Fell out of favor with prevalence of caller ID, Do Not Call lists and cell phones



Mall Intercept Surveys



Source: Wikimedia Commons

Mall Intercept Surveys



Mall Intercept Surveys

- Mall was traditional place for shopping for variety of goods – likely to find target consumers
- Direct interaction between the respondent and the products/marks at issue
- Ability to ask probing follow-up questions
- Ability to control what the respondent sees

Online Surveys

Early Criticisms

- Reaching the right universe/verify participant's identities?
- Selection bias/professional survey takers?
- Open-ended questions/probe?
- Reliability/Validation?
- Columbia Univ. v. Columbia/HCA Healthcare Corp., (S.D.N.Y. 1997) ("Internet survey, although evidence of some confusion, is entitled to little if any weight both because of the extremely small numbers involved and because there was **no showing that supported the trustworthiness of the survey methodology.**")

Online versus Mall Intercept

Mall

- Limited to whoever is at the mall those days
- More accurate screening
- Actual shoppers
- Can actually hold products/packaging
- More difficult to test for online shopping
- Interviewers can probe/follow-up
- Accuracy depends on interviewer

Online

- Cast a wider net
- Pre-screened
- Professional survey takers?
- Pictures only/online shopping
- No probing/follow-up
- No supervision
- Actual responses
- Logistical advantages (cheaper, faster, real-time results), but does that eclipse the drawbacks?



What Can Surveys Show?



- Genericness
- Secondary Meaning
- Likelihood of Confusion
- Fame/Strength of a Mark
- Dilution
- Purchasing Intent (what motivates consumers to purchase a product)
- Is the Use Perceived as Trademark? (Fair Use)
- Advertising Materials

Likelihood of Confusion

Post-Sale Confusion?

OraLabs v. Kind Group LLC (D. Colo. 2015)

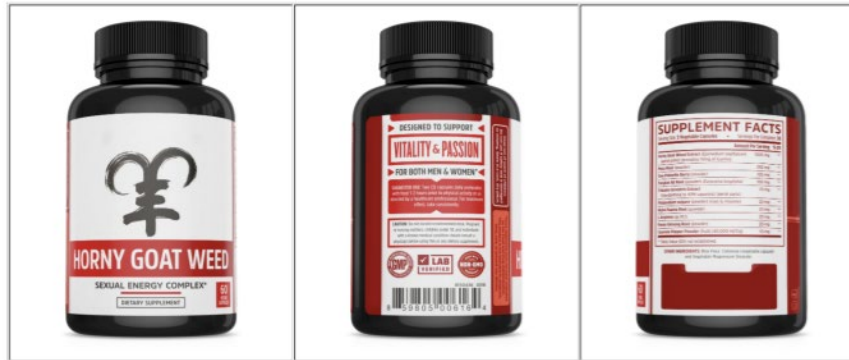
U.S. Trademark Reg. No. 3,788,970	"Smooth Sphere" Lip Balm
	

"Lip Revo" Test Lip Balm	Control Lip Balm
	

Secondary Meaning As of When?

Neutraceutical Co. v. NutriChamps, Inc. (D. Utah 2020)

You may click on each image to see a zoomed in image.



Do you associate the appearance of this dietary supplement's packaging with the dietary supplement of ...

More than one company

Only one company

I do not know or I don't have any opinion

Next

Fame/Strength

Aided/Unaided Awareness

Alzheimer's Ass'n v. Alzheimer's Fdn. Of America (SDNY 2018)

Unaided Awareness:

“Please list the first two health charity organizations that come to mind...”

Aided Awareness:

“Which of the following health charity organizations are you aware of:”

Dilution

Please review the following image



Do you associate this **NAME** with...?

- ☐ One company or brand
 - ☐ More than one company or brand
 - ☐ No company or brand
 - ☐ Don't know / no opinion
-

Purchasing Intent

Thermolife International LLC, v. Gaspari Nutrition Inc. (9th Cir. 2013)

Q29<p>Please read the following and click on the continue button when you have finished:

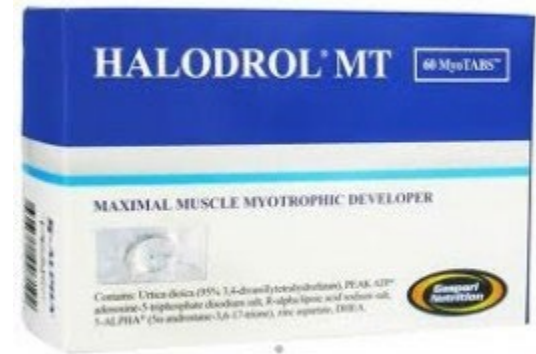
</p><p>
</p><p>
</p><p>
</p><p></p><p>In a news
release dated January 15, 2010, MuscleMaster.com announced a voluntary nationwide recall of
17 dietary supplements sold between June 1, 2009, and November 17, 2009, including Gaspari
Novedex XT and Gaspari Haladrol Liquigels. As reason for the voluntary national recall,
MuscleMaster.com cited information from the U.S. Food and Drug Administration (FDA) that the
recalled products may contain ingredients that are steroids. Acute liver injury is known to be a
possible harmful effect of using steroid-containing products. In addition, steroids may cause
other serious long-term adverse health consequences in men, women, and children. These
include shrinkage of the testes and male infertility, masculinization of women, breast
enlargement in males, short stature in children, a higher predilection to misuse other drugs and
alcohol, adverse effects on blood lipid levels, and increased risk of heart attack, stroke, and
death.</p>

Q30 Where you aware of this report about the potential side effects of Haladrol MT?

- ☐ Yes (1)
- ☐ No (2)

Q31 If you were using Haladrol MT at the time of this announcement, what would be your reaction:

- ☐ I would stop using the product immediately and not use any other testosterone boosting supplement. (1)
- ☐ I would stop using the product and seek out another product that promised same benefits as Haladrol MT through the use of natural ingredients. (2)
- ☐ I would continue using the product. (3)



Advertising Materials

Pepaj v. Paris Ultra Club, LLC (D. Ariz. 2021)

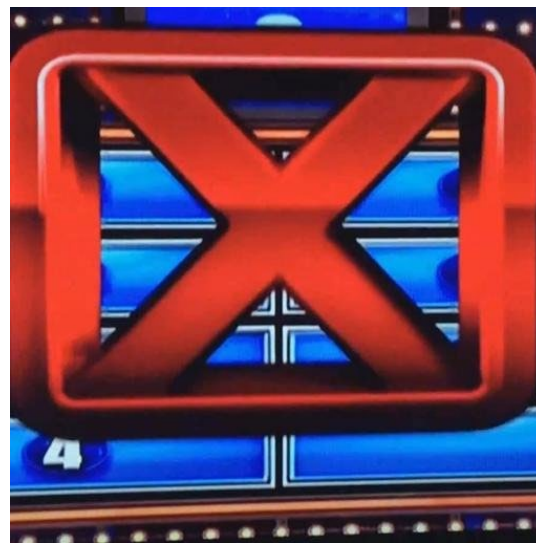
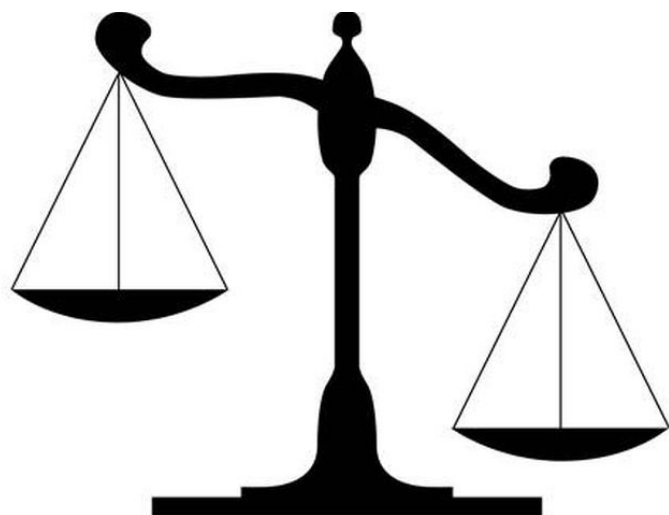


Considering that these are actually real women shown in these ads and not just fictitious drawings, please indicate using your strongest impression for each pair of opposing statements, the one you think is true based on your personal feelings. Remember, we want your response based only on these ads you are seeing, and nothing else which you might have seen or heard previously.

- ☐ All of the women shown in these ads have some affiliation, connection or association with those clubs in whose ad they appear
- ☐ All of the women shown in these ads do not have any affiliation, connection or association with those clubs in whose ad they appear
- ☐ All of the women shown have agreed to sponsor, endorse, or promote the club represented in these ads
- ☐ All of the women shown have not agreed to sponsor, endorse, or promote the club represented in these ads
- ☐ All of the women in these ads approve of the use of their image in those club advertisements in which they appear
- ☐ All of the women in these ads do not approve of the use of their image in those club advertisements in which they appear
- ☐ All of the women in these ads probably enjoy a lifestyle like that reflected in those club advertisements in which they appear
- ☐ All of the women in these ads probably do not enjoy a lifestyle like that reflected in those club advertisements in which they appear
- ☐ All of the women in these ads probably do participate in the events or activities which take place in the club, and as reflected in the ads in which they appear
- ☐ All of the women in these ads probably do not participate in the events or activities which take place in the club, and as reflected in the ads in which they appear
- ☐ All of these women were not paid to be in the ads in which they appear
- ☐ All of these women were paid to be in the ads in which they appear

Bad Surveys?

Weight/Admissibility Dichotomy



Bad Surveys?

Generally, flaws in a survey design go to its weight, not admissibility

Bad Surveys?

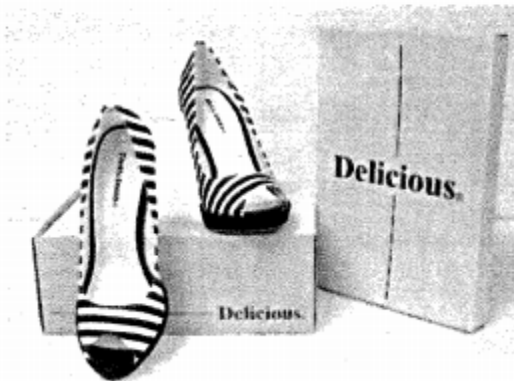
Tokidoki, LLC v. Fortune Dynamic, Inc., (C.D. Cal. 2009)



Bad Surveys?

Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc., (9th Cir. 2010)

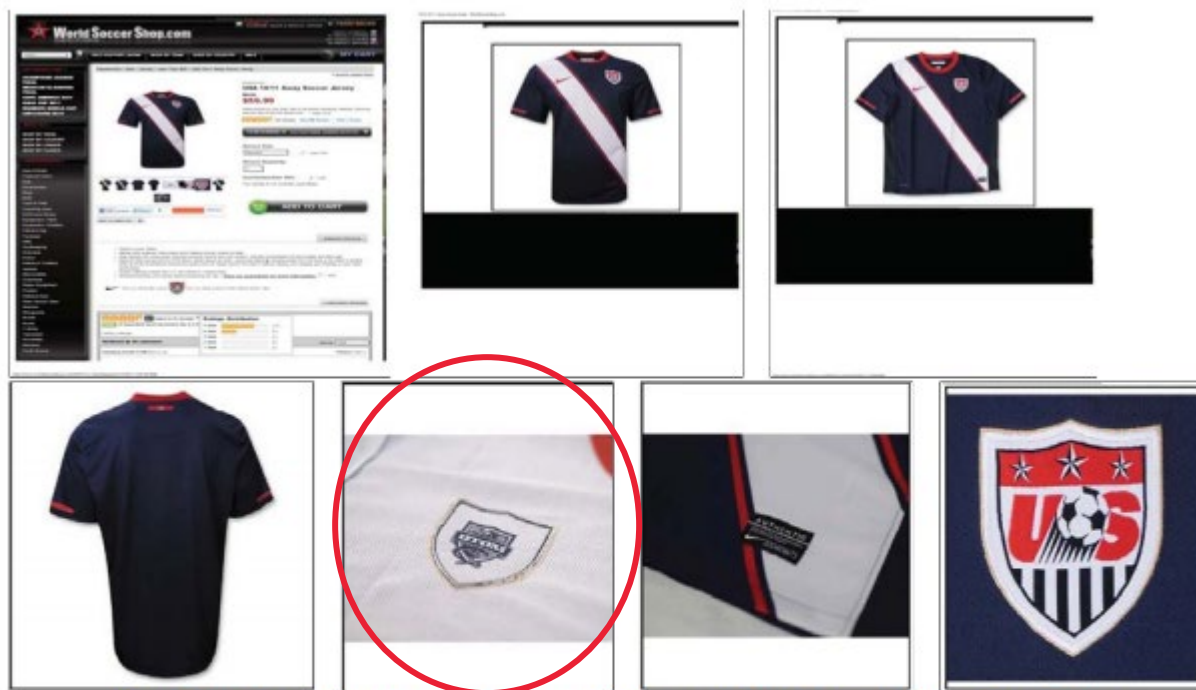
Please look at these shoes as if you were shopping for shoes. Take as long as you would like. Then click the ">>" button when you are done.



Please look at this tank top as if you were shopping for tank tops. Take as long as you would like. Then click the ">>" button when you are done.



Excluding Surveys in Litigation? You Make the Call



(Press 'Ctrl' and the plus symbol (CTRL+) one or more times as you wish to continue to enlarge the image; (CTRL-) to return to normal size).

Do you see any branding(s)/trademark(s) on any images of this shirt? (It does not have to be a brand/trademark you are familiar with.)
(Use the PREV button for another look at the large images.) (Please press the CTRL+ command one or more times to zoom the image to normal web page size.)

☐ Yes ☐ No

Please indicate any branding(s)/trademark(s) you see on any images of the shirt.

(Identify a particular branding/trademark only once.)

(Note: It does not have to be a brand/trademark you are familiar with.)