



Measuring Likelihood of Confusion: The Eveready Survey Format

By Kimberly White, Senior Director of Research Operations

There are two commonly accepted survey formats used to measure likelihood of confusion: the Eveready format and the Squirt format. This article addresses the Eveready survey format. Explore the Squirt survey format [here](#).

Origin of the Eveready Survey Format

The name “Eveready” comes from a 1976 survey in *Union Carbide Corp. v. Ever-Ready, Inc.* In that case, the plaintiff, Union Carbide Corporation, sought action over the defendants’ use of the mark “Ever-Ready”. Union Carbide had been selling batteries, flashlights, and miniature bulbs under its trademark EVEREADY when the defendant began selling similar products, including miniature light bulbs. Union Carbide requested “an injunction against Ever-Ready’s use of the term Ever-Ready on or in connection with the advertising or sale of electrical products.”¹

To examine this issue and “to establish likelihood of confusion between the defendant’s lamps and the plaintiff’s products, [the] plaintiff submitted a survey in which the respondents were shown a picture of the defendant’s lamp.”² Respondents were asked who they think puts out the product shown. The survey results indicated an appreciable likelihood of confusion between EVEREADY and Ever-Ready.

How the Eveready Format Measures Likelihood of Confusion

In an Eveready survey format, respondents are shown a single product, mark, or advertisement and then asked a series of questions about who makes or puts it out, has endorsed it, or is affiliated with it. The format is designed to test whether the accused mark (here, Ever-Ready)

calls to mind the accusing user (here, EVEREADY) without showing respondents both parties' marks side by side. For that reason, it is often used when the senior mark is well-known and already established in consumers' minds.

In contrast, the Squirt survey format presents marks or products from both parties, either simultaneously or sequentially, because it is designed to reflect situations in which consumers may encounter allegedly similar products in a real marketplace situation.

When to Use the Eveready Format

The Eveready survey method is most often used in matters involving well-known marks, so that "...the senior mark is...highly accessible (internally available) in memory, enhancing the likelihood that it will be cognitively cued by a similar junior use."³

In "forward confusion" cases, the Eveready survey format typically exposes respondents to a junior mark to determine whether it evokes a senior user that is already in consumers' minds. In other words, the survey tests whether consumers mistakenly believe the junior user's product or service comes from, is endorsed by, or is affiliated with the senior user. In "reverse confusion" cases, the Eveready survey format may expose respondents to a senior user's mark to determine whether that mark calls to consumers' minds a well-known junior user. In that setting, the issue is whether consumers mistakenly believe the senior mark comes from, is endorsed by, or is affiliated with the junior user.



In other words, the survey tests whether consumers mistakenly believe the junior user's product or service comes from, is endorsed by, or is affiliated with the senior user.

Because likelihood of confusion is a central issue in many trademark and trade dress disputes, a well-designed Eveready survey can provide courts with evidence of consumer perception. When the facts fit the format, the Eveready approach is widely accepted by courts and is a "gold standard" for demonstrating that confusion is likely.

Eveready Survey Format Example

Voice of America (VOA) is a news source funded by the United States government and owned by the Broadcasting Board of Governors (BBG) that has provided news and other information since 1942. Robert Namer, an individual, used "Voice of America" as the name of his company, radio program, and website domain, *thevoiceofamerica.com*. Both VOA, operated by the BBG, and Mr. Namer used "Voice of America" to provide news.

In 2000, the BBG sent Mr. Namer a letter demanding that he cease use of the name. Several months later, the BBG submitted a complaint, and Mr. Namer was ordered to transfer the domain name *thevoiceofamerica.com* to the BBG.⁴ Mr. Namer then filed a lawsuit against the BBG and VOA.

In the matter of *Robert Namer v. Broadcasting Board of Governors and Voice of America*, each of the parties argued that they should be able to use the name “Voice of America” to represent their services. The BBG claimed that Mr. Namer’s audience members could be confused by the similarities between Mr. Namer’s use of the domain *thevoiceofamerica.com* and the BBG’s “Voice of America” service mark.

Eveready Survey Evidence in the VOA Case

IMS Senior Managing Director of Litigation Surveys and Consumer Science Bruce Isaacson, DBA, conducted an Eveready survey to measure likelihood of confusion between the two marks.

Dr. Isaacson’s survey interviewed respondents ages 18 and older who had visited a website to read political or economic news or commentary in the past month. The study was conducted online. Respondents were shown one of two images: either Mr. Namer’s *thevoiceofamerica.com* website (the test version) or a website that replaced *thevoiceofamerica.com* with a different name (the control version). They were never shown any website or images from the Voice of America website operated by the BBG.

Respondents were asked several questions to measure the likelihood of confusion in accordance with the Eveready survey format. For example, respondents were asked what company, organization, or person operates the website they were shown. A notable percentage of respondents said they believed that Mr. Namer’s website was operated by, affiliated with, or connected to the BBG’s Voice of America. These results indicated there was a likelihood of confusion between the junior user, *thevoiceofamerica.com*, and the senior user, Voice of America.



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As a result of Dr. Isaacson’s likelihood of confusion Eveready survey, along with other evidence, the court granted BBG’s request for a permanent injunction, barring Mr. Namer from using “Voice of America.”

IMS Likelihood of Confusion Surveys

The Litigation Surveys and Consumer Science team at IMS Legal Strategies designs and conducts likelihood of confusion surveys for high-stakes intellectual property disputes, helping courts determine whether consumers are likely to be confused about the source or affiliation of a product or service. Our experts use accepted methodologies—including the Eveready format, when the facts support its use—to produce case-specific evidence backed by credible testimony.

References

¹ “Union Carbide Corporation, Plaintiff-appellant, v. Ever-ready Incorporated, a Corporation, and Mark Gilbert, An individual, Defendants-appellees, 531 F.2d 366 (7th Cir. 1976).” Justia Law. N.p., n.d. Web. 17 July 2017. <http://law.justia.com/cases/federal/appellate-courts/F2/531/366/203240/>.

² Handelman, Jeffery A. Guide to TTAB Practice. New York: Wolters Kluwer Law & Business/Aspen, 2017. 18-20. Print.

³ Jerre B. Swann, Likelihood of Confusion, in Trademark and Deceptive Advertising Surveys: Law, Science, and Design (2012) at 53, American Bar Association.

⁴ Beise, Cheryl, J.D. “Website Operator Barred from Using “Voice of America” Mark.” Law News | Law Daily Reporting Suite — Wolters Kluwer Law & Business. Intellectual Property Law Daily, 7 Nov. 2014. Web. 18 July 2017.

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