

Down the Hatch: Jägermeister Douses Impaired Survey Evidence in Trademark Victory

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FIND A KÜHL SPOT

Drink it ice kühl. Experience the perfekt shot of
Jägermeister at precisely -18°C.



Jägermeister: it's no longer for "pukey frat guys." Or, at least according to Jägermeister's recent adversary, that was the sordid reputation Jägermeister wanted to shed in a PR blitz launched in 2016. Instead of being associated with "Jägerbombs" and spring break ragers, Jäger sought a more sophisticated, hip, and "KÜHL" vibe. Billboards, commercials, and digital media were suddenly soaked with ads featuring phrases like "DRINK IT ICE KÜHL," "ICE KÜHL," and "RUN TO A KÜHL PLACE." All was going well until Jäger got popped for alleged trademark infringement and dilution by Alfwear, a Utah-based rugged clothing manufacturer who claimed Jäger was piggy-backing on its wholesome reputation. Alfwear owns a federal registration for "KÜHL" and uses it in connection with a variety of products and on its website. The case proceeded through discovery, and the court ultimately awarded Jägermeister summary judgment due to a number of evidentiary shortcomings with Alfwear's case. We focus here on the problems with Alfwear's consumer survey evidence.

Survey evidence needs to replicate marketplace conditions to be probative of a consumer's state of mind. Alfwear's proffered survey deviated from this principle. The

expert's report was filed under seal, so we don't have access to the questionnaire and the stimuli. But we can glean what the problems were from the court's opinion. To show confusion, Alfwear's expert first showed respondents a screenshot of an Alfwear KÜHL ad on Facebook. The expert then showed respondents one of two Jäger KÜHL ads on Instagram "as each appeared individually side-by-side with the KÜHL Facebook ad." Based on the data gathered, Alfwear's expert concluded that Jäger's ads created "net confusion" rates of over 30%.

It appears the court correctly observed that this study design "does not prove actual confusion in the marketplace." Just because two ads appear on social media platforms does not mean that consumers will view them in close succession or juxtaposed for any extended period of time. Having respondents focus on two ads that both contain the prominent use of "KÜHL" could bias them to draw connections and conclusions that they would not necessarily draw in a real-world context.

When designing consumer surveys in Lanham Act cases, experts and their counsel need to avoid creating their own special concoctions. A survey will only be useful if it approximates marketplace conditions. This principle does not call for exactness down to the last detail of recreating the marketplace, but it does require careful attention and consideration. If products are not sold side-by-side in the marketplace, they should not be presented that way in a consumer survey. While a survey design with loose connections to the marketplace may gin up a more "favorable" result, that high will most certainly recede. In this regard, one should think of designing an improper survey as akin to having one too many Jägerbombs: they both may be pleasing in the moment, but may lead to foggy, hazy, and, ultimately, painful results.