

Faulty Universe and Suggestive Stimuli Doom Admissibility of Consumer Survey Evidence

December 14, 2021 – The TMCA

by J. Michael Keyes

Related People

- J. Michael Keyes

Related Capabilities

- Trademark, Copyright
+ Advertising
- Intellectual Property
Litigation



There are two sure-fire ways to maximize the chances that a consumer survey gets bounced out of federal court: (1) surveying the wrong people; and (2) leading them to a desired “correct” answer. Both of these survey maladies were on display in a dispute pending before the U.S. District Court for the Northern District of California in *Kudos Inc. v. Kudoboard, LLC*. The Court’s recent Daubert order tells a cautionary tale that trial counsel and their experts should be mindful of as they work together in designing a consumer survey for use in a Lanham Act case.

The Dispute

Plaintiff operates an internet-based software communication platform that enables users to exchange feedback and recognition with other users and owns registered trademarks for “Kudos” that cover these services. Defendant operates an online greeting card company where consumers can create and send digital or printed greeting cards. Defendant’s service is branded “Kudoboard,” for which Defendant also owns a registered mark covering “a website allowing users to create customized online group greeting cards.”

Plaintiff sued for infringement; Defendant asserted a number of affirmative defenses.

The Survey

Plaintiff offered a consumer survey to show that consumers are likely to be confused by Defendant's use of "Kudoboard." But Plaintiff's survey contained two fatal flaws, both of which independently supported the Court's decision to exclude the survey from evidence.

For starters, Plaintiff selected an "under-inclusive" universe of potential survey respondents. Because Plaintiff alleged claims for forward confusion premised on the theory that consumers of Defendant's services will believe the services originate with or are affiliated in some way with Plaintiff (as opposed to reverse confusion), the proper survey universe is the purchasers of the Defendant's services (the *junior user in the dispute*). Here, Plaintiff's expert surveyed the wrong respondents. Instead of focusing on purchasers of Defendant's e-greeting card services, the survey universe (or population) was composed "exclusively" of "current users of employee recognition software" – a universe that focused on the Plaintiff's customer base. While some of these individuals may have also used Defendant's e-greeting card services, large swaths of potential users were excluded, including "educators, community groups, and casual users." Thus, as the Court observed, the survey universe was "under-inclusive in that it excluded otherwise qualified consumers, arguably some of the most likely consumers to have knowledge of the products at issue." For this reason alone, the Court ruled the survey was inadmissible.

Further, according to the Court, the survey deployed some "leading" language before respondents were shown the various webpage stimuli (which included Defendant's website). After being shown Plaintiff's website (with the Kudos mark), participants were shown three other websites (one of which was Defendant's), each with text categorizing the products as "employee recognition software products" or "employee engagement software." The Court said this "statement constitutes a lead-in that departs from simulated market conditions by substantively describing the products that followed." For this independent reason, the Court excluded the survey.

The Conclusion

Here are three key take-aways from this decision:

1. While some flaws in a consumer survey go to the "weight" of that evidence, an improperly defined survey universe or a leading survey instrument can affect the survey's admissibility in the first instance.
2. Selecting the correct survey universe is an absolute must. Trial counsel and their experts need to lock in on this issue and make sure they are on the same page in terms of whose opinions are relevant based on the legal claims at issue.
3. Any survey stimuli should be presented to respondents without any additional frills or superfluous information that might bias or prime them. There is a meaningful difference between providing respondents with information to help them complete a survey (for example, indicating that they can "zoom in" to make a stimulus larger on the screen), and providing them with substantive information that "plants a seed" as to how they should answer a question or how they should "perceive" the services at issue.

If you want the Court (and your client!) to give your survey kudos, make sure you avoid these rather sizable pitfalls along the way.