

In-N-Out Burger Trade Dress Dispute Part II: Where's The Beef?

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by J. Michael Keyes

Last week we introduced our readers to the imbroglio featuring the burger behemoth In-N-Out, who accused upstart Doll N' Burgers of infringing In-N-Out's registered and unregistered trade dress. Typical of these sorts of savory squabbles, both sides retained consumer survey experts, both experts took broadsides from the opposing party, and the Court was left to assess the damage. In our previous [post](#), we discussed how the Court's analysis of [Plaintiff's secondary meaning survey](#) provides some useful sustenance. This week's special features a discussion of [Defendant's secondary meaning survey](#) and how the claimed deficiencies left the Court asking Plaintiff, "Where's the Beef?"

Here's how the Court [disposed](#) of the issues raised regarding Defendant's secondary meaning survey:

1. [No Trade Dress Secondary Meaning Experience](#). Plaintiff first alleged the Court should bounce Defendant's expert because he only had experience designing surveys in trademark disputes, *not* trade dress disputes. The Court quickly (and correctly) rejected this claim because "[w]hile trade dress involves some unique factors, the legal standards utilized are closely aligned, and the consumer survey methodology used for trademark and trade dress are largely interchangeable."
2. [Excluding Other "Indicator of Source" Elements](#). As we observed in our [previous post](#), when testing for secondary meaning of trade dress, it is customary to obscure the "brand and company name and other source-identifying indicia" so that the expert can isolate the trade dress at issue and measure consumer reactions to it. Accordingly, Defendant's expert used various pictures of In-N-Out joints, but removed the "source-identifying indicia" from them, including the trademarked palm trees, the In-N-Out logo, and the fluorescent yellow sign. The Court was not persuaded that this was a fundamental flaw (or even a flaw of any kind). It indicated that this design choice was a "judgment call" and that Plaintiff was free to criticize this approach at trial if it desired to do so.
3. [Control Images Were Not "Blatantly Improper"](#). Plaintiff also took aim at Defendant's expert's decision regarding the control stimulus. For the control design, Defendant's expert simply used the same test stimulus images, but swapped in a "blue and grey" color scheme instead of the red and white color scheme of Plaintiff's alleged trade dress. The Plaintiff argued that the expert's control images were "so distinctive" that it

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pushed survey respondents in a totally different direction towards a rival burger joint altogether, White Castle. While the Court questioned whether Defendant's expert used a control that would "lean towards" Defendant's desired outcome, it ultimately concluded that the expert's decision was not "blatantly improper."

4. No "Freeloader" Phenomenon in the Survey Universe. Lastly, Plaintiff claimed Defendant's expert's survey universe was faulty. In defining who qualified for the survey, Defendant's expert required respondents to be adults who had recently "personally purchased" a burger from a fast-food restaurant. Plaintiff claimed this universe was too narrow because it excluded "freeloaders" (the Court's word) who would have dined at a burger joint but on someone else's dime. In rejecting this argument, the Court observed that it was "highly skeptical that the inclusion of the word 'personally' caused any material change in the survey's population or led to bias in its results."

All in all, none of these alleged flaws were sufficient to keep Defendant's expert out. So now you know "the rest of the story" with regards to the secondary meaning surveys in this case. Stay tuned for our final installment where we discuss both parties' likelihood of confusion studies and whether they will be In-N-Then-Out of Court.



One of Defendant's Expert's "test" stimuli photos that excluded palm trees (from the cup and the fries holder) because they were other "source-identifying indicia."



Two of Defendant's Expert's "control" stimuli photos that used a "blue and grey" color scheme. While expressing some skepticism over this design choice, the Court noted the decision was not "blatantly improper."