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TRADEMARKING COLOR: THE ROLE OF SURVEY EVIDENCE

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INTRODUCTION

Survey evidence is often adduced in trademark proceedings (Corbin & Gill, 2008) to test for passing off (Hoek & Gendall, 2003; Swann, 2008) and to see whether a name or symbol is generic. This paper focuses on a third area, whether a word, symbol or color acts as a badge of origin for a brand (Jones, 1988 -1989), thus allowing their registration as a trademark. Past papers have reviewed facts with previous studies and given guidelines for the future (Gough, 2008; Hoek & Gendall, 2005; Morgan, 1990; Swann, 2008). However, they often lack crucial implementation details, fail to show how the various elements of the survey interact, do not always specify how the research task or topic is framed for interviewees and suffer from a limitation of testing secondary meaning through measuring various kinds of association, not identification. A specific survey design is proposed that addresses these four issues. It does so in the context of color and champagne, that is, whether a particular color, namely "orange", acts as a trademark for the Veuve Clicquot (VC) brand (Veuve_Clicquot, 2009). This color is registered in Europe (Dickerson, 2006) and Australia (Forno, 1999), though no survey evidence was adduced.

HYPOTHETICAL METHOD TO TEST DISTINCTIVENESS

The paper proposes a detailed survey design to test whether the color "orange" is distinctive of Veuve Clicquot (VC) for US consumers where the color is not a registered trademark. For the purpose of describing a specific design, it is assumed hypothetically that VC applied for registration in 2001. The first design issue is the target population. In the US, imported sparkling wine comprises less than 2% of the total wine consumption (Wine Institute, 2010). In screening for those who buy or drink sparkling wine, a list of wine types previously purchased or consumed would be used to disguise the principal category of interest. Interviewees under 21 in 2001 (thus under 31 in 2011) should be excluded.

The need to show the color directly, under controlled conditions, means that survey interviewers are required, using intercept interviews in shopping malls. Gender, age, climate, race, income, and occupation are also likely to affect the buying and use of wine (Kerr, Greenfield, Bond, Ye, & Rehm, 2004). Climate can be accounted for by choosing several US States, but each center would have age (presumably at least 3 groups) and gender quotas, with some overall survey quotas for ethnicity. Finally, there may be a pattern of times when particular groups buy wine (e.g. on the way home after work). Interview times should be spread through the interviewing period to increase heterogeneity. Interviewers would be positioned where they are not adjacent to any particular liquor outlet. In the US, there are an estimated 1097 liquor outlets for VC (Superpages, 2010). Interviewers would be conducted in two groups of shopping malls, one where there are two or more alcohol outlets, at least one of which sells VC, and the other a demographically matched control group of places without a VC outlet. Twelve centers could be used (3 regions * 2 types of center * main vs. provincial city).

A crucial issue is how the topic should be framed to them when they are asked to participate. The legal nature of the proceedings and the particular interest in color should not be mentioned either to interviewees or interviewers. In terms of seeing whether the color takes the consumer to the brand, various ways of presenting color are possible - a swatch of color on its own or color on the label of a wine bottle. A color without a context may lead consumers down alternative semantic pathways that are irrelevant to the issue. As consumers only see trademarks in context, placing the color on a wine bottle label is appropriate. Two types of wine bottle could be used, a normal white wine bottle and a champagne-style bottle (but not a VC one with its other indicia). In this way, the effect of the bottle type could be assessed. Since screening needs to assess various types of wine buying and consumption, it is suggested that they be told the survey is about wine.

Essentially, what the survey needs to test is whether consumers, when they experience the VC "orange" color, use it to identify that particular brand. One possibility is that interviewees are merely guessing a well-known or well-publicized brand. In order to assess this tendency, a control stimulus (Swann, 2008) that is identical, except for color, needs to be shown. Swann (2008, p. 327) notes the difficulties in choosing an appropriate stimulus, but calls it a "case-by-case conundrum". The control color chosen has to meet two requirements that are possibly contradictory. First, the color needs to be one not in common use in the category, for example, a pale blue. Second, the color needs to be plausible, that is, consumers would
regard it as a possible color used in the category. However, if the color were implausible, consumers might react to the color and judge that no product in the category would use it. This could be considered an incoherent combination (Kayande, Roberts, Lilien, & Fong, 2007). A pale blue solid color is plausible given the colors used by champagne (Libation, 2010), but is not associated with any particular brand. Another color in common use, for example green, could also be used. In addition, champagne bottles usually include a neck label (a registered trademark for Veuve Clicquot in some jurisdictions) and a colored foil wrapping over the neck of the bottle and wire-restrained cork. For the sake of the exercise, it is probably sufficient to have empty bottles with neither foil nor a neck label.

Consideration should also be given to the shape and size of the label. Given that rectangular labels are common to the category, a rectangular label but in a different size to that used by Veuve Clicquot could be used. VC labels are solid color, with only some text written in black and red. While the trademark application is for the color alone, the color itself always appears in the context of other marks, signs or symbols. A relevant question, therefore, is whether the color needs to be tested singly or in combination. In the case of VC, labels with and without text could be tested. Although the trademark application is for the single color, stronger evidence may exist if packs that use the predominant color with a minor use of other colors also produce the identification response.

Essentially, the guiding design is a double-blind medical trial with neither interviewers nor interviewees briefed as to the purpose of the research or which treatment contains the active ingredient. A full factorial design with just 2 bottle types, 2 colors, bottles with and without text and two predominances of color (total and majority) could be used. Given these 2x2x2x2 treatment groups and 3 age and 2 gender categories, multiples of 96 interviews are needed in each center. Ideally, at least 2 interviews in each category would be conducted giving 192 interviews in each center, or 2304 interviews overall. Given the difficulties of recruiting a narrow category of consumers, costs would be very high. However, such a design ensures at least 150 people per treatment condition. While a conjoint design (Hoek & Gendall, 2006) could be used to reduce the number of combinations to be tested, courts are also likely to be interested in the interactions between main color, bottle shape and predominance of orange. Within centers, interviewees within quota groups should be randomly assigned to treatment groups. Each interviewee should only see one stimulus, to avoid order effects. The stimuli should be numbered in a random manner, e.g., 997, 625 etc., so that the number is not correlated with any feature, meaning interviewers are given no cues.

Swann (2008) asserts that wherever possible, open-ended questions should be used to avoid leading questions that suggest responses either to interviewers or interviewees. While he details two standard formats for trademark questions, the "Eveready" and "Squirt" tests, neither are suitable as they deal with possible confusion, not with the badge of origin question. One formulation in secondary meaning cases was suggested by (Jones, 1988 -1989). He proposed that the indicia (such as a color) be "printed on a display board ... removing all other indicia of source from the packaging" (p.484) and then asking a question such as, "Do you associate [brand name product] with the [generic product name] of one, or more than one, company?" or "Does [brand name product] connote one, or more than one, source of [generic product name]?" (p. 484). These questions would translate as follows, "Do you associate Veuve Clicquot with the champagne of one, or more than one, company?" or "Does Veuve Clicquot connote one, or more than one, source of champagne?"

These proposed questions raise several issues. The first is about mentioning the brand Veuve Clicquot, which is the very outcome to be assessed. Presumably, Jones actually intended the question to be more like, "Do you associate what is on this card with the champagne of one, or more than one, company?" This has the virtue of taking the interviewee from the indicia to the source (brand or company). This direction is critical. It is not enough to say that Veuve Clicquot leads to nominating its orange color. Rather, to serve as a badge of origin, the color has to lead to its origin. Another key issue is the use of the word "associate". Just because a particular indicium is strongly associated with brand does not mean that it serves to identify the source. For example, red is strongly associated with Ferrari sports cars but seeing a red sports car is not enough to identify it as a Ferrari. In principle then a word such as "identify" is necessary. This assumes that consumers would understand the word "identify" in the sense intended. It is clearly a more common word than "connote" which Jones suggested. However, should there be any doubt, pre-testing using cognitive interviewing principles (Willis, 2005) would help establish the validity of this question. Thus, a question such as, "Here is a bottle of wine. Does this bottle identify any particular companies, products or brands to you? Any others?" would be suitable. It places no emphasis on color and does not suggest that any single answer is expected. For those saying "Yes", the follow-up question is, "Which companies, products or brands?" For each one listed, a further follow-up, "Why do you say that?" allows a more direct assessment of the reasons for the response. Open-ended questions then require a coding frame that is carefully developed without instruction from the survey designer and coding by at least two independent coders.
The final issue is whether any VC identification uncovered in the survey applies to the 2001 application date at which VC hypothetically asserted that the color already acted as a trademark. Questions can be asked about the length of time the consumer has held the identification, but these are subject to errors of estimation including backwards and forwards telescoping (Auriat, 1993). While it may be possible to see whether landmark events (Gaskell, Wright, & O'Muircheartaigh, 2000), such as a wedding or special birthday, could be linked to the identification, this approach relies on those events being of high incidence and memorable. Preferably, the survey should instead be conducted at or near the filing date.

In terms of analysis, the key issue is whether at least a majority of consumers or buyers of champagne use the color orange to identify VC. A second test may be expressed as a high signal-to-noise ratio. That is, the ratio of people identifying VC in response to orange should be far higher than for any other brand. Finally, these results need to be projected back to 2001.

CONCLUSIONS AND IMPLICATIONS FOR THEORY AND PRACTICE

This paper has demonstrated that a detailed, specific design to test whether a particular brand symbol has acquired secondary meaning necessarily involves the resolution of key legal, design and cost issues. Necessarily these interact. Three key issues - framing the survey purpose, measuring identification rather than association and projecting outcomes back in time are shown to be critical. The paper thus gives specific guidance to future trademark studies.

REFERENCES


