

MEASURING SPONSORSHIP MATERIALITY

*Matthew B. Kugler**

The problem of sponsorship confusion is one of the most vexing in trademark law. Mark owners often claim that the use of their marks in movies or on merchandise will lead consumers to believe that their companies have approved these other products, and that they therefore must be able to control these uses lest consumers be misled. But overzealous enforcement of sponsorship rights can chill valuable speech and unnecessarily prevent competition in merchandising domains. In an effort to rein in overzealous trademark owners, several scholars have proposed adding a materiality requirement to the sponsorship confusion analysis. They want to require mark owners to show not only that consumers assume a particular product is sponsored by the mark holder, but also that this assumption materially affects consumer behavior. This paper presents an empirical survey that uses a variety of sponsorship materiality measures to determine how such a materiality requirement would affect the shape of trademark law in the merchandising context. The data show that requiring materiality would alter the treatment of several classes of products, but would not have nearly as broad an effect as many would have expected. The implications of these findings for other proposed limiting doctrines are discussed.

Trademark merchandising rights are a multi-billion dollar business.¹ NFL merchandising alone accounted for 2.1 billion dollars in 2010, and that was actually a decline from the previous year.² Trademark owners now license their logos for use on everything from sports jerseys, to car license plate covers, to souvenirs and memorabilia, to university sweatshirts. But this was not always the case. Up until the 1970s, many of these products were made by unlicensed manufacturers. It was only in the late 1970s and early 1980s that it became common for trademark owners bring cases against such manufacturers, and only when those cases were won that the

* Law Clerk to the Honorable Richard Posner, U.S. Court of Appeals, Seventh Circuit, 2015-2016; JD University of Chicago Law School, 2015; PhD in Psychology, Princeton University, 2010.

Thanks to Omri Ben-Shahar, Paul Crane, Shari Diamond, Lee Fennell, Jonathan Masur, Richard McAdams, Randy Picker, Rachel Sachs, Nicholas Stephanopoulos, and Lior Strahilevitz, for comments on the research design and earlier versions of this manuscript, and to the Coase-Sandor Institute for their generous support.

¹ See, e.g., Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 461 (2005); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1726 (1999).

² Daniel Roberts, *The biggest losers in an NFL lockout? Everyone.* Fortune, Mar. 4, 2011. http://archive.fortune.com/2011/03/03/news/companies/nfl_lockout_losers_labor.fortune/index.htm

modern licensing industry was born.³

At the core of this revolution in merchandise licensing is the problem of sponsorship confusion. Seeing the words “New York Yankees” on a t-shirt leads a meaningful number of people to believe that the Yankees have sponsored or approved that shirt. These people understand that the Yankees are not in the business of garment manufacture, but they still believe that the team was involved. For the past twenty or thirty years, courts and the Trademark Trial Appeal Board have treated this misattribution of sponsorship as legally actionable trademark confusion and generally permitted mark owners to control these uses of their names.⁴

Many scholars are skeptical of this merchandising revolution, believing that it is inconsistent with the primary goals of trademark law. Though their objections are many and varied, the proposed solutions converge: only treat sponsorship confusion as actionable under trademark law if that confusion is *material* to consumers.⁵ Specifically, scholars have proposed that an incorrect attribution of sponsorship should only be actionable if affects the purchase decision or leads consumers to believe that the alleged sponsor is responsible for the quality of the finished product.⁶

But do consumers care whether their sports jerseys are officially licensed, or would they be just as happy if the team had nothing to do with them? This turns out to be a hard question. Many believe that these kinds of attributions of sponsorship are generally immaterial to consumers. They think that no one cares whether the makers of Batman approved his use on a shirt; they just want the image. But others think that consumers are highly sensitive to whether a Bills jersey is “official,” and would be much less willing to buy an unsponsored version.

Despite the extensive discussion of confusion materiality in the literature,

³ See, e.g., Dogan and Lemley, *supra* note 1 at 464 (recounting the history of trademark merchandising). Irene Calboli, *The Case for a Limited Protection of Trademark Merchandising*, U. ILL. L. REV. 865, 877-886 (2011) (giving a somewhat more sympathetic account of that history).

⁴ See Calboli, *supra* note 3 at 892-96.

⁵ See, e.g., Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414-15 (2010); Robert G. Bone, *Taking the Confusion Out of “Likelihood of Confusion”*: *Toward A More Sensible Approach to Trademark Infringement*, 106 NW. U. L. REV. 1307 (2012) (arguing “[t]here is no good reason to prevent consumer confusion when it causes very little harm and involves no morally blameworthy conduct”); Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1352-73 (2011) (drawing on the law of false advertising to propose the addition of a materiality requirement to the confusion analysis).

⁶ See notes 26 - 34 and accompanying text. Scholars are divided on what the key question should be, and in Part II.D the consequences of each possibility are considered.

no one has empirically investigated how just how often consumers care about sponsorship. We therefore have little sense of the stakes of this debate. If most or all sponsorship confusion is material then most merchandising cases would come out the same way even were materiality required. This would make the entire doctrinal exercise relatively pointless: that which now needs to be licensed would still need to be licensed. If most sponsorship confusion is irrelevant, as many of these commentators implicitly assume, then a materiality requirement would effectively destroy the multibillion dollar trademark licensing industry.

This paper presents an empirical study designed to determine whether adding a materiality requirement to trademark law would result in meaningfully different outcomes in sponsorship confusion cases. The results show that, across a wide range of products and domains, sponsorship confusion is rarely material to more than half of potential consumers. And, if only material confusion is counted, a number of products that would need to be licensed under current law would instead be unrestricted. Adopting a materiality requirement would therefore change the law of trademark merchandising to a meaningful degree. The requirement would not, however, affect every merchandising domain. Most sports merchandise licensing would remain secure even after discounting for materiality. This is a notable omission: sports merchandising is a huge industry and team products are frequently used as examples by those who hope that a materiality requirement will transform trademark law.

The types of products that are affected, however, suggest that thinking in terms of materiality may allow for an alternative solution to the problem of trademark overreach. Those who support strong defenses to trademark claims – parody exclusions, nominative fair use, and other exclusions – sometimes run afoul of the “gravitational pull” of likelihood of confusion; the exceptions are seen as in conflict with the “normal” rule prohibiting confusing uses.⁷ These materiality results suggest that this conflict may be more imagined than real. Confusion about the sponsorship of public symbols, parody products, and incidental uses of names is not commonly material. Though some consumers are indeed confused, even the majority of them simply don’t care. This provides support from within the likelihood of confusion framework for these limiting doctrines, and

⁷ William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 112 (2008) (commenting on the “gravitational pull of likelihood of confusion” and how it often interferes with the promotion of limiting doctrines in trademark law).

suggests that further research in this area could be illuminating.

Interestingly, the data also show that preference for sponsored products is related to beliefs about fairness rather than impressions of quality assurance. The products with high rates of sponsorship materiality are those for which consumers believe the trademark owner *should* have a right to control their mark, not those for which they assume the mark owner actually monitors the quality of the end good. This finding is an awkward fit for the theories underlying trademark law. In traditional trademark thinking, the whole point of a mark is to indicate a given level of quality.

Part I of the paper reviews the existing discussion of merchandise licensing and explains the various perspectives on sponsorship materiality. Part II presents the empirical study and shows both how often sponsorship is material to consumer decision-making and how different measures of materiality relate to each other. Part III concludes by evaluating how a materiality requirement should work and whether one is useful.

I. THE PROBLEM OF THE MERCHANDISING RIGHT

Efforts to reign in sponsorship confusion have been ubiquitous in recent years. Little league teams named in honor of professional baseball franchises have been threatened with lawsuits and forced to change their names.⁸ TV shows and movies have been forced to obscure logos on real products because manufacturers did not want to be associated with how those products were used on camera.⁹ Parody products and joke apparel have been the subject of hostile demand letters and expensive lawsuits.¹⁰ In the words of two leading trademark scholars “[w]hat unifies all the cases...is that courts found actionable confusion notwithstanding the fact that consumers couldn’t possibly have been confused about the actual source of the defendants’ products.”¹¹

The principal alleged negative consequences of these efforts are a

⁸ See, e.g., Katie Thomas, *In Cape Cod League, It’s Tradition vs. Trademark*, N.Y. TIMES, Oct. 24, 2008 at B11 (discussing a number of such changes), described in Lemley & McKenna, *supra* note 5 at 417.

⁹ See, e.g., Emerson Elec. Co. v. NBC Universal Television Studios Inc., No. 06 Civ. 01454 (E.D. Mo. 2006) (suing the makers of Heroes over a depiction of unsafe operation of a garbage disposal); Caterpillar Inc. v. Walt Disney Co., 287 F. Supp. 2d 913, 917 (C.D. Ill. 2003) (denying an effort by Caterpillar to prevent its equipment from being used in a depiction of deforestation). Also see generally Kai Falkenberg and Elizabeth McNamara, *Using Trademarked Products in Entertainment Programming*, 24 COMM. LAW. 1 (2007) (describing the challenges of such cases).

¹⁰ See, e.g., Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 397 (8th Cir. 1987) (enjoining production of a “Mutant of Omaha” t-shirt with an anti-war message).

¹¹ Lemley & McKenna, *supra* note 5, at 422.

shrinking of the public domain and a chilling effect on lawful trademark use. Even plainly baseless demand letters raise fears of uncertain litigation outcomes and the extreme expense of actually defending a trademark lawsuit.¹² Put in the context of the chronicle of absurdities documented by Stacey Dogan and Mark Lemley in their paper on the merchandising right,¹³ and the numerous articles similarly despairing over the ever-extending reach of trademark law,¹⁴ one rapidly gets the sense that settlement and accommodation are the safest responses when confronted by an angry mark holder. The result is a world in which actors are highly reluctant to explore the legal extent of trademark fair use for fear of litigation from overzealous trademark owners.¹⁵

As a matter of equity, the aggressive efforts by trademark owners to control all possible uses of their marks are not unjustifiable. People only want Ford keychains because they own Ford cars and would prefer to have keychains with matching logos. Allowing anyone other than Ford to produce Ford keychains is permitting a kind of free riding; only from the efforts of Ford does the product have any value. So – in this line of argument – it was right for courts to dismiss attempts to prevent the Reagan administration from naming its Strategic Defense Initiative “Star Wars,”¹⁶ but licensing control over NFL jerseys and car memorabilia is justly the right of those whose labor made the insignia valuable.

Persuasive though some may find this equitable story, it is a poor fit for the accepted rationales of trademark law. The main, perhaps even sole, point of trademark law is to allow consumers to quickly and efficiently determine the origin, and therefore the likely quality, of products.¹⁷ Consistent with this approach, courts have protected a wide variety of product features on the grounds that they are source identifying and non-functional, including product color.¹⁸ The principal test of a trademark is whether it reliably indicates a product’s source. And, consistent with this source-signaling story, it is not enough that one company’s products look

¹² Bone, *supra* note 4, 1336-39; McGeveran, *supra* note 7 at 49-52; Lemley & McKenna, *supra* note 5, at 418.

¹³ Dogan and Lemley, *supra* note 1, at 461-2.

¹⁴ See generally Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999); Litman, *supra* note 1; Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999).

¹⁵ McGeveran, *supra* note 7, at 115-121 (arguing for the creation of simple affirmative defenses to trademark claims because complex fair use doctrines deter legitimate uses).

¹⁶ *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931 (D.D.C. 1985) (granting a motion to dismiss).

¹⁷ William Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268-70 (1987).

¹⁸ See, e.g., *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159 (1995)

similar to those of another. The similarity needs to be such that consumers confuse the source of the products.¹⁹

This is the search costs theory of trademark law.²⁰ When trademark rights are protected, consumers know that a product bearing Alpha's mark will have Alpha's traditional level of quality. They can therefore use the mark as a shortcut, saving them the time and effort needed to investigate each product individually. The principal harm that the law must prevent is the false belief that a product actually made by Beta was instead made by Alpha. When a consumer is confused in this manner, they mistakenly expect Alpha's level of quality from the product, and will blame Alpha if the product falls short. Over time, this leads to two problems. First, it reduces Alpha's incentives to maintain consistent quality in its products because free riders like Beta are exploiting the resultant good will. And, second, consumers need to spend more resources investigating product quality because their proxy, the trademark, loses its predictive value.

As everyone understands, however, neither the University of Chicago nor the Chicago Cubs makes t-shirts. So confusion in the context of merchandising is not about product *origin* but instead about product *sponsorship*. This need not be a problem for trademark law if the mark is still principally a signal of responsibility for quality. When McDonalds franchises a new restaurant is it, fundamentally, sponsoring it. But this sponsorship carries with it a degree of oversight. When one walks into a McDonalds in a random American city, one has a fairly good idea what levels of service and nutrition to expect. So the principal goal of trademark law is still furthered: the mark conveys substantial information about who is responsible for the product's quality.

But many have alleged that the responsibility for quality story does not work for much of trademark merchandising. As one scholar put it, children want the cereal box with the cartoon character on it because they want to have breakfast with Batman.²¹ The added value of Batman's presence is social, aesthetic, and perhaps even emotional, but it implies nothing about the quality or origin of the cereal. This could also be true in the domains of sport and college merchandising. One does not generally pay a premium to buy a Harvard University sweatshirt because one is cold

¹⁹ Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205 (2000).

²⁰ See William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 167-68 (2003).

²¹ See Litman, *supra* note 1, at 1727.

and expects it to be warmer than the competition. Nor is the preference between Harvard and Stanford garments driven by some sort of cost-quality tradeoff. This is instead a matter of social signaling and tribal allegiances.²²

These examples raise the possibility that it may be irrelevant to the consumer whether the product merely bears a socially important mark or is actually sponsored by the mark holder. And it is not obviously the business of trademark law to correct consumer confusion if the feature the consumer is confused about is frankly not important to them. As the Supreme Court observed “[t]he words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers.”²³

It also poses a problem for trademark law if the mark is serving this functional signaling purpose. The Supreme Court has recognized that trademark protections cannot extend to functional product features.²⁴ Design features, whether aesthetic or otherwise, are functional if they are “essential to the use or purpose” of a product, “affect[] [its] cost or quality,” or if the exclusion of them would put competitors at a “significant non-reputation related disadvantage.”²⁵ These marks, then, are arguably functional to the extent that their primary purpose is not to signal quality or origin. And, though Batman is still protected under copyright, Harvard’s name and seal were both established in the 19th century and are therefore outside of even current ever-lengthening copyright terms.

Many scholars faced with this Batman problem have called for adding a materiality requirement to the trademark confusion analysis.²⁶ Under this revised doctrine, Beta’s use of Alpha’s mark would only be actionable if 1.) some meaningful percentage of consumers believed that Alpha sponsored Beta’s product; and 2.) those consumers actually cared whether Alpha had sponsored Beta’s product. So sponsorship confusion would be

²² See *id.* at 1375 (discussing the interplay between consumers and producers in giving marks subjective value).

²³ *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 26-27, 32-33 (2003).

²⁴ See *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33 (2001).

²⁵ *TrafFix*, 532 U.S. at 33-35.

²⁶ See, e.g., Lemley & McKenna, *supra* note 5, at 414 (arguing that trademark law should be refocused away from “sponsorship and affiliation confusion . . . that do[es] not affect consumers’ decisionmaking process” and back to “confusion that is actually relevant to purchasing decisions”); Tushnet, *supra* note 5, at 1365 (arguing that trademark should mirror false advertising law’s materiality requirement); Bone, *supra* note 5, at 1310 (requiring a showing a trademark-related harm that would effectively add a materiality requirement or a showing of morally blameworthy intent).

legally irrelevant if the only added value of the mark on a product is the ability to signal that one's child goes to Harvard. Implicit in these various proposals is the belief that most consumers merely want the words "Harvard University" on a shirt and do not care whether Harvard is connected to the product.

Even the scholars calling for a materiality requirement are divided on exactly what should count as material. Lemley and McKenna focus on responsibility for quality. When "consumers believe the brand owner guarantees the quality of the product [it] leads to consumer harm if their belief is misguided."²⁷ They "therefore would define the category of trademark infringement to include cases involving confusion as to whether the plaintiff is responsible for the quality of the defendant's goods or services in addition to those involving actual source confusion."²⁸ Responsibility for quality confusion, then, is presumptively material. Other kinds of sponsorship confusion should be dealt with under the law of false advertising.²⁹

Taking a contrasting view, Robert Bone views the materiality of sponsorship confusion in merchandising style cases through a wide lens of trademark-related harm.³⁰ Though he does not rule out any potential type of harm, one of his major concerns is the risk of negative feedback – known as relation-back – between a low quality piece of merchandise and the overall reputation of the trademark holder.³¹ Though some have questioned whether such relation-back actually occurs, Bone himself is unconvinced by that work and believes it to be a major risk even in cases where consumers do not believe the mark-holder is responsible for quality.³² For Bone, therefore, confusion is material when it leads the consumer to blame the mark holder for negative experiences with the product or affects the purchase decision.

Consistent with the broader perspective advocated by Bone, Rebecca Tushnet defines materiality in terms of anything that would change

²⁷ Lemley & McKenna, *supra* note 5, at 415; 428.

²⁸ *Id.*

²⁹ *Id.* at 415-16.

³⁰ Bone, *supra* note 5, at 1365-71 (describing his test for non-competing goods. Bone would presume harm in cases with directly competing goods).

³¹ *Id.* at 1367 (Moreover, if consumers have a bad experience with the defendant's products, they might transfer some of the blame to the plaintiff and thus discount the reliability of the mark in the plaintiff's market as well).

³² *Id.* at 1367-77.

consumer behavior.³³ Her support for adding a materiality requirement comes from a comparison between trademark law and false advertising and, thus, is more concerned with purchasing behavior.³⁴ Notably, Lemley and McKenna do not disagree with the broad consumer behavior framing advocated by Bone and Tushnet.³⁵ They merely believe that responsibility for quality should be at the core of sponsorship materiality.

There are therefore at least three different ways of viewing confusion materiality. Rebecca Tushnet speaks broadly of whether consumer behavior is affected. And, though neither Bone nor the Lemley-McKenna team would disagree with Tushnet's expansive framing, each has their own particular focus. According to Lemley and McKenna, the concern is that consumers will believe that the sponsor is responsible for the quality of the junior good. According to Robert Bone, the responsibility for quality test is insufficiently protective because consumers may still blame a senior mark holder if they believe it has licensed its good name to a foolish junior firm, even if they do not think that quality is being monitored.

Though there is a strong intuition that much merchandising confusion is not material under any of these definitions, this has never been tested and may be questionable in some contexts. Perhaps those buying university or team shirts really want their money to go to the alleged sponsor and would feel meaningfully misled if it did not. Or perhaps consumers believe that official NFL jerseys are higher quality than unofficial ones and are willing to pay a premium for that. One might easily imagine that organizations such as the Yankees, Harvard University, and Porsche have a strong motivation to monitor the quality of all products bearing their brand, and actually do ensure that low-quality products do not appear in the market. Scholars have strong and reasonable intuitions about whether consumers care about sponsorship in this or that merchandising case, but they could easily be mistaken in any or all domains. Thus, as this debate occurs, no party actually knows the stakes. If trademark law begins to require material confusion, what changes on the ground?

To answer this question, I conducted a survey modeled after the types of consumer confusion studies that are often conducted in trademark

³³ Tushnet, *supra* note 4, at 1353.

³⁴ *Id.* 1352-73.

³⁵ Lemley & McKenna, *supra* note 5, at 452 (“the law should require that trademark owners claiming infringement based on confusion regarding anything other than source or responsibility for quality must demonstrate the materiality of that confusion to consumer purchasing decisions.”)

litigation. The study tested consumer impressions of a variety of goods that are within the scope of the merchandising right. In addition to the standard product origin and sponsorship questions that are part of traditional trademark surveys, participants were also asked a series of questions intended to assess the importance of product sponsorship. The primary goal of the study was to determine how the imposition of a materiality requirement would affect the shape of trademark merchandising law.

II. THE NATURE AND EFFECTS OF A MATERIALITY REQUIREMENT

Consumer confusion surveys in trademark law currently operate under a relatively simple mathematical formula. The percentage of consumers who believe that the plaintiff made the defendant's products is added to the percentage who believe that the plaintiff has not made the products but has instead endorsed, approved, or sponsored them. If the resulting percentage is greater than some threshold number – conventionally 15%³⁶ – then there is an actionable degree of consumer confusion.

$$\text{Plaintiff Makes} + \text{Plaintiff Sponsors} > \text{Threshold}$$

The proposed revision to trademark law slightly modifies this formula. Rather than counting all those who believe that the plaintiff sponsors the product, the revised approach counts only those who believe that the plaintiff sponsors the product and for whom this belief is material.

$$\text{Plaintiff Makes} + (\text{Plaintiff Sponsors} * \text{Percent Material}) > \text{Threshold}$$

Though there is a strong intuition that confusion is entirely irrelevant some of the time, there is no clear understanding of how extensive, or how limited, this category of cases might be. One might imagine, for example, that movie-goers have little interest in whether or not Dairy Queen has endorsed a particular film.³⁷ But many cases are not so clear. In the all-important domain of sports merchandising, one could easily imagine fans being just as happy with products that are not endorsed by the team; the whole point is to wear the team colors, not buy Yankees-quality jerseys.³⁸ But those same fans do feel loyalty to the team, and buying unauthorized products may be seen as cheating a respected organization. We simply do

³⁶ See notes 100 through 102 and accompanying text.

³⁷ Bone, *supra* note 5, at 1367 (“confusion about whether the Dairy Queen company licensed use of its mark in a film about a Midwestern beauty contest called Dairy Queens is not likely to affect viewers’ decisions about whether to watch the film and thus not likely to satisfy the materiality requirement”).

³⁸ Litman, *supra* note 1, at 1717.

not know which narrative dominates; both accounts are plausible. To the best of the author's knowledge, there is no prior empirical data on this question.

Some research from psychology should lead scholars to be skeptical of the claim that sponsorship is not normally relevant. Work from Francesca Gino and colleagues has shown that people wearing what they believe to be fake rather than authentic designer sunglasses view themselves as less authentic.³⁹ Such participants are also more likely to cheat in real-money laboratory games, and to expect unethical treatment by others.⁴⁰ Similarly, the actual effectiveness of a placebo medication varies substantially depending on whether the medication is cheap or expensive.⁴¹ These types of expectation effects suggest that the power of an authentic and expensive mark may extend far beyond any of the quantifiable product features, making sponsorship attributions highly relevant.

Therefore the question of whether materiality is ever absent to a meaningful degree is very much open even if one grants the theoretical premise that trademark law should only concern itself with material confusion. If materiality is generally present, then the two formulas will yield approximately the same result. If only half or fewer of those who are confused are actually materially affected, however, then there can be a substantial divergence between the two approaches.

There are also multiple methods of defining materiality. As describe in the introduction, different theorists favor different formulations of the question.⁴² Beliefs about sponsorship are arguably material when they lead the consumer:

1. To expect that the sponsor is partially responsible for the quality of the product.
2. To blame the sponsor if they are disappointed by the product.

³⁹ Francesca Gino, Michael I. Norton, and Dan Ariely, *The Counterfeit Self: The Deceptive Costs of Faking It*, 21 PSYCH. SCI. 712 (2010). The sunglasses were actually genuine in all conditions.

⁴⁰ *Id.* at 714-18.

⁴¹ Rebecca Waber, Baba Shiv, Ziv Carmon, and Dan Ariely, *Commercial Features of Placebo and Therapeutic Efficacy*, 299 JAMA 1016 (2008) (participants in the high-value pill condition reported experiencing less pain following electric shocks than participants in the low-value pill condition). *See also*, Baba Shiv, Ziv Carmon, and Dan Ariely, *Placebo Effects of Marketing Actions: Consumers May Get What They Pay For*, 42 J. MKT. RES. 383 (2005) (describing similar results for performance on experimental games).

⁴² See notes 27-35 and accompanying text.

3. To be more interested in the product.
4. To pay more for the product.

Though which framing is best is a normative question, there is no existing data on whether the framings are functionally equivalent or fundamentally different.

Not knowing the prevalence of materiality and the consequences of adopting each of the several meanings of materiality should give advocates of reform some pause. Adding a new factor to the trademark confusion analysis is costly. It makes the jobs of judges, litigants, and survey consultants more complicated. It increases uncertainty, making it more difficult for parties to decide whether to litigate or settle. And it increases legal fees, as both difficulty and uncertainty will lead to a greater need to consult with experienced practitioners and experts. These transaction costs matter.⁴³ If confusion materiality would rarely be outcome determinative, it would be hard to justify incurring these costs to get slightly “better” trademark outcomes.⁴⁴ Those advocating for a materiality requirement therefore have the burden of showing that such a requirement would affect outcomes in a meaningful number of cases.

What is needed, then, is a sense of how many consumers think sponsorship matters in various trademark domains and how consumers view each of the meanings of materiality. An empirical study was therefore conducted to answer that question. The study was intended to mirror standard consumer confusion studies to the extent feasible. Consumers were recruited by a professional survey firm for a study of marketing attitudes. After being screened to ensure that they were in the market for the relevant classes of product, they were then presented with product advertisements that were very closely modeled on actual Amazon.com ads. Accompanying each ad were the traditional product origin and sponsorship questions, as well as a novel battery of questions aimed at assessing the materiality of sponsorship confusion. Results show that the materiality of confusion varies substantially across product classes, but rarely exceeds 50% on the critical willingness to pay measure.

⁴³ McGeeveran, *supra* note 7, at 61-65. Also, *see generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

⁴⁴ Robert Bone has expressed this concern about adding a materiality requirement. *See* Bone, *supra* note 5, at 1376.

A. Participants

Participants were recruited by Toluna Online, a professional survey firm with a large established panel. Toluna is an industry leader in online survey administration and surveys conducted through it have previously been used in trademark confusion expert reports.⁴⁵ To ensure the quality of its panel, Toluna checks the location and identity information reported by its respondents against third party data sources, including postal service records and telephone directories. It also regularly examines its panel for respondents who appear to be “cheaters.” These participants, who give straight-line responses or repeatedly miss attention checks, are banned from the panel and prevented from rejoining if they receive three complaints.⁴⁶ Toluna distributed the survey to a targeted segment of its panel, aiming to contact a subsample that was demographically weighted to match US census distributions.

The legally relevant universe for a traditional consumer confusion study consists of potential purchasers of the allegedly infringing product.⁴⁷ For some categories of products, it is quite difficult to correctly define this universe. Big-ticket items are sometimes purchased infrequently and unpredictably, and someone who has recently bought a washing machine, for example, is unlikely to soon be in the market for another. But this task is greatly simplified for most non-durable goods such as clothing, food, and other consumables. For these, past purchase behavior is often an excellent predictor of future purchase behavior, and one can safely include in the survey universe both those who have recently purchased similar items as well as those who expect to be purchasing them in the near future.⁴⁸ Most of the items sold under the merchandising right fall into the nondurable good category. They are basic pieces of clothing, small ornaments, and minor household goods. This survey therefore screened participants by asking whether they had purchased items of a given type in

⁴⁵ Expert Report of Hal Poret at 26, *GoSMiLE, Inc. v. Dr. Jonathan Levine, D.M.D. P.C.*, 769 F. Supp. 2d 630, 643 (S.D.N.Y. 2011) (No. 10CV08663). This survey was found to be credible. *GoSMiLE*, 769 F. Supp. 2d at 643.

⁴⁶ Personal communication, Toluna Online (April 15, 2015), available from author.

⁴⁷ *Amstar Corp. v. Domino's Pizza, Inc.* 615 F.2d 252, 264 (5th Cir. 1980) (“The appropriate universe should include a fair sampling of those purchasers most likely to partake of the alleged infringer’s goods or services”). See also William G. Barber, *The Universe*, in *TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN* 27, 29 (Shari Seidman Diamond & Jerre Swann eds., 2012); Jacob Jacoby, *TRADEMARK SURVEYS* 289-90, 314-18, 327-28 (1st ed. 2013) (citing cases). This is, appropriately, reversed in a reverse confusion case. There it is the prospective customers of the senior user (usually the plaintiff) who must be surveyed. *Id.* at 291-92.

⁴⁸ Jacoby, *supra* note 47, at 314. See also J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 32:161 (4th).

the last year, or were planning to do so in the next six months.⁴⁹ Participants qualified for the survey if they either had or were planning to purchase a product from one or more of the listed categories.

A trademark survey prepared for use in litigation will often have an extremely refined definition of the survey universe. Beyond the mere propensity to purchase similar products, prospective participants may also be screened based on their geographic locations, their willingness to buy products of a particular value, and their preferred shopping venues.⁵⁰ The goal is to ensure that all of those included are prospective customers of the allegedly infringing product and that no substantial subclass of prospective customers is excluded.⁵¹

The products chosen for this survey were all available on Amazon.com. The only limit on Amazon's reach within the United States is technological: the consumer must have internet access. Therefore every internet-capable American is a prospective Amazon customer. Further, no item in this survey retailed for more than one hundred dollars on Amazon, and many were comparatively cheap.⁵² These are not prestige products in the way a Louis Vuitton handbag would be. A survey targeting a diverse cross-section of internet capable American adults is therefore appropriate.

Courts have generally been accepting of internet samples in trademark surveys.⁵³ The principal insight here is that all survey methods have shortcomings and, as more and more people have internet access and fewer and fewer answer phone calls from unknown numbers, the

⁴⁹ The categories, presented in random order, were:

1. Clothing that has the name or logo of a sports team on it.
2. Sports-related merchandise other than clothing.
3. Clothing that has the name or logo of a school, college, or university on it.
4. A souvenir mug, shirt, keychain, pen, or similar product.
5. Pet accessories, such as pet beds or pet toys.
6. Automobile accessories, such as floor mats, keychains, and similar products.
7. Ticket to a comedy movie, or a copy (DVD, Blu-ray, etc.) of such a movie.

⁵⁰ See Barber, *supra* note 47, at 39-40. See also Jacoby, *supra* note 47, at 318-33. Particularly, consider the importance of merchandise outlet. See *id.* at 329. Were a third party to sell knock-off MLB or NFL gear, the natural venue would be an online retailer, and the largest online retailer is Amazon. Therefore consumers seeing such products would likely be doing so in the shopping context of an Amazon.com product page.

⁵¹ See Jacoby, *supra* note 47, at 318-33; Barber, *supra* note 47, at 48.

⁵² The sports jerseys interestingly retailed for substantially more than one hundred dollars on other websites, but were under one hundred on Amazon itself.

⁵³ See Jacoby, *supra* note 47, at 836-839 (reviewing 20 cases in which internet surveys were considered by courts); Roger Tourangeau and Shari Seidman Diamond, *Internet Surveys For Evaluating Trademark Infringement and Deceptive Advertising*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS, *supra* note 47, 287, 291-292 (also reviewing cases and concluding that courts have "generally been open to online surveys" and "their criticisms [of such surveys] focused primarily on methodological characteristics unrelated to the fact that data were collected online").

shortcomings of internet surveys have become fewer and less worrisome than those of the alternatives.⁵⁴ Mail surveys often have low response rates and limited surveyor control. Telephone surveys cannot include visual stimuli, often exclude cellphones, and have had lower and lower response rates in recent years. And the sample in a classic mall-intercept survey is arguably even more non-random than the one in an internet survey.⁵⁵ It is estimated that 40% of all marketing surveys were done online in 2010.⁵⁶

The survey included several safeguards to assure attentive respondents. First, an attention check was built into the market-screening questions. This question, which was intermixed with the others, asked respondents to select the negative response option for its line. Prior research has shown that this type of attention check works well to screen out participants who are not reading the questions and actually serves to increase the attentiveness of those who do notice it.⁵⁷ Second, the survey contained numerous free response questions. Those few participants who gave gibberish or nonsensical answers to these questions were eliminated from the sample.⁵⁸

Because survey participants could qualify for participation if they were in the relevant universe for any of several products, most participants who began the survey qualified to continue. Of the 1513 participants to begin the survey, 1147 qualified based on their responses to the product screener questions and the initial attention check. Of these, 98 gave nonsensical responses to at least some of the free response questions. Since these were only a small fraction of the broader sample, they were discarded. This left 1049 cases for final analysis.⁵⁹

⁵⁴ Jacoby, *supra* note 47, at 418-24, 472-73. See generally Tourangeau and Diamond, *supra* note 53.

⁵⁵ See generally Tourangeau and Diamond, *supra* note 53 (outlining the costs and benefits of internet surveys).

⁵⁶ Jacoby, *supra* note 47, at 425.

⁵⁷ See generally Daniel Oppenheimer, Tom Meyvis, and Nicolas Davidenko, *Instructional Manipulation Checks: Detecting Satisficing to Increase Statistical Power*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 867 (2009).

⁵⁸ Importantly, it was not necessary that participant responses be *correct* for the participant to be included; that would have biased the sample. The standard was merely *responsive*. Sadly the problem of insufficiently detailed or attentive responses to free response questions is an inherent risk of self-administered studies and very hard to avoid in the online context. See Jacoby, *supra* note 47, at 848.

⁵⁹ Toluna oversampled females and the excess data was included in the analyses rather than discarded to maintain statistical power. The final sample included 440 males, 602 females, 1 person who identified as “trans,” and 6 participants who did not report their gender. 83.9% of the sample identified as White, 10.5% as Black, 1.5% as Native American, and 2.9% as South or East Asian. On a separate question, 9.9% reported identifying as Hispanic or Latino. The median age was 52 (range 18-89, M = 49.49, SD = 17.32). 12.2% had graduate degrees, 26.3% had four year college degrees, 25.1% had two year degrees, 34.4% had high school

B. Products

Trademark merchandising occurs across a wide range of brand types, and there is little *ex ante* justification for assuming that results found for one brand type, or even one product type within a brand type, will generalize to others. It is therefore necessary to cast a wide net if one wants to draw generalizable conclusions. Multiple product domains must be tested and, ideally, multiple products within a domain should be included.⁶⁰ A review of the existing case law, the academic literature, and popular news reports suggested that the major merchandising domains are: sports apparel, college and university apparel, souvenir apparel and trinkets, automobile apparel and trinkets, and parody apparel and trinkets. These are therefore the target domains of the study.

It is necessary to present the products in as normal an environment as possible to accurately gauge a consumer's degree of confusion.⁶¹ All of the products used in this study were selected from those available on Amazon.com, and so the ad format used in the survey mirrored Amazon's. Amazon has a fairly standardized product presentation format that lists the title of product at the top of the screen, a maker or distributor directly under the title, and a product image next to several brief bullet points about the product underneath the distributor. For example, a baseball jersey might be titled "MLB New York Yankees Home Replica Jersey" and be listed as "By Majestic." Bullet points might include "100% Polyester Double Knit," "Official Team Fonts," "Full or left chest official logo," and "Officially licensed by Major League Baseball." 86.3% of participants had either bought products on Amazon in the last year or were planning to do so in the next six months, so they were familiar with this format and accustomed to making purchase decisions based on these types of descriptions and product images.

degrees, and 2.0% had not completed high school. This is approximately what one would expect from a general population sample. According to the US Census Bureau, 12.7% of those 35–39 have graduate degrees, a further 22.6% have four year degrees, 10.8% have two year degrees, 42.8% have a high school degree but have not completed any college degree, and 11.2% do not have a high school degree. See United States Census Bureau, Educational Attainment in the United States: 2012 – Detailed Tables, online at <http://www.census.gov/hhes/socdemo/education/data/cps/2012/tables.html>.

⁶⁰ Jacoby, *supra* note 47, at 360-61 (discussing the selection of product stimuli from the universe of all disputed products).

⁶¹ Jerre Swann, *Likelihood of Confusion*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS, *supra* note 47, 53, 76-77.

Figure 1: Actual Amazon Ad Compared to Study Ad



Roll over image to zoom in

MLB Philadelphia Phillies Home Replica Jersey, White

by Majestic

★★★★☆ 11 customer reviews

List Price: \$79.99

Price: \$59.98 Prime & Free Returns. Details

You Save: \$20.01 (25%)

i Earn 3% Back (worth \$1.79 when redeemed) with your Amazon.com Rewards Visa Card. Learn more

Only 5 left in stock.

Sold by EagleSun Source and Fulfilled by Amazon. Gift-wrap available.

Size:

Medium

- 100% Polyester
- Imported
- 100% Polyester Double Knit
- Official Team Fonts
- Team Specific Locker Tag
- Full or left chest official logo

MLB Philadelphia Phillies Home Jersey By National Sportswear

- 100% Polyester Double Knit
- Team Fonts
- Team Specific Locker Tag
- Full or left chest official logo



The product advertisements were modified so as to allow readers to draw their own conclusions about product sponsorship. Direct claims of sponsorship or affiliation were removed, as were any non-ornamental product tags. For example, baseball jerseys generally have a MLB tag below the beltline and Majestic tags on the right shoulder and on the inside of the collar. These were removed, as was the bullet point “Officially licensed by Major League Baseball.” Figure 1 shows the actual and modified ads for one product. When the product maker listed on Amazon was likely to be recognized by respondents (particularly a problem given the ubiquity of several manufacturers of sports merchandise), it was changed to something novel and generic-sounding (i.e. “National Sportswear”). All product advertisements are presented in Appendix A.

1. Sports Merchandise

Sports is one of the most pervasive of the merchandising domains and sports merchandising is often credited, or blamed, with starting a revolution in how courts viewed trademark merchandise claims.⁶² Sports merchandising classically focuses on attire, but team logos also appear on mugs, pennants, and a wide variety of other products.⁶³

Five sports products were included in the survey. Participants were eligible to view these products if they responded positively to either of the two sport-related screening questions and indicated that the merchandise they either had or were planning to purchase included merchandise for the relevant sport.⁶⁴

Two of these products were Major League Baseball Jerseys and National Football League t-shirts. These products were team-specific, and the jersey or shirt displayed to a particular participant was matched to the team from which the participant indicated they were most likely to purchase merchandise. To maintain consistency, the descriptions and precise wording of the ads accompanying the each jersey or shirt were identical apart from the team name. The jerseys were the white home-team versions and lacked player names. These shirts were, when possible, plain grey t-shirts with the team name and logo printed in the team colors. For a small number of teams, such t-shirts did not exist on Amazon and other

⁶² See, e.g., Dogan and Lemley, *supra* note 1, at 471-78; Calboli, *supra* note 1 at 880, referring to cases such as *Bos. Prof'l Hockey Ass'n v. Dall. Cap & Emblem Mfg.*, 510 F.2d 1004 (5th Cir. 1975), cert. denied, 423 U.S. 868 (1975) and *Nat'l Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651 (W.D. Wash. 1982).

⁶³ See, e.g., *Indianapolis Colts v. Metro. Balt. Football Club*, 34 F.3d 410, 416 (7th Cir. 1994).

⁶⁴ The screening questions are given in note 49.

team t-shirts were substituted.

A third product in this category was the USA World Cup Away Jersey. Soccer has fewer fans in the US than do baseball and football, but the 2014 World Cup attracted considerable American interest.⁶⁵ World Cup merchandising is also the subject of one of the more ridiculous stories in trademark law: several hundred Dutch fans attended a 2006 game in their underwear because FIFA prohibited them from entering the stadium while wearing pants in the team colors that were provided by a non-FIFA affiliate.⁶⁶ This particular product is also interesting because it represents a national team rather than a privately-owned local club.

In addition to claiming trademark rights in their team names, colors, and logos, leagues also sometimes claim rights in the names of their signature events. In particular there have been law suits and demand letters related to March Madness in basketball and the Super Bowl in football.⁶⁷ The survey therefore included t-shirts for each of these events.

2. Automotive Merchandise

Automotive companies often license their trademarks for use on products such as jewelry, keychains, t-shirts, mugs, bumper stickers, and even furniture. Some of these products are tailored for use with a particular vehicle and serve a functional purpose. But many are not and do not. Rather than attempt to match customers with products from their own automotive brands – potentially problematic given the multiplicity of brands and sub-brands – participants instead were asked about products from two well-known brands whose logos are widely recognizable and likely to be desired even by those who do not actually own the cars of the particular brand. The two chosen products were a Lamborghini Keychain and a mug with the Porsche Crest. Participants were eligible to view these products if they responded in the affirmative to the automotive screening question.

3. Colleges and universities

As in athletics, college and university merchandise includes a wide range

⁶⁵ <http://www.statista.com/statistics/198409/us-adults-favorite-sports/>

⁶⁶ *Dutch Fans Watch Match in Their Underwear*, ESPN SOCCERNET, June 17, 2006, <http://soccernet.espn.go.com/news/story?id=371466>.

⁶⁷ See *March Madness Athletic Association, LLC v. Netfire, Inc.*, 310 F. Supp. 786 (ND TX, 2003) (litigating the validity of the March Madness trademark); Ali Tourmadj, *The Super – Trademark – Bowl*, Jan. 27, 2014 <http://www.ipbrief.net/2014/01/27/the-super-trademark-bowl/> (describing the NFL's efforts to control the mark "Super Bowl").

of products. The central difference from a trademark perspective is that the colleges and universities are far more numerous, and this can inhibit brand recognition. According to the latest available figures, there are over 4500 degree granting institutions in the United States.⁶⁸ This has sometimes led to a labelling crunch, as multiple universities lay claim to the same acronyms. For example, the University of South Carolina's effort to register its "SC" mark was opposed by the University of Southern California, which had previously registered an understandably similar "SC" mark.⁶⁹ Nevertheless, there has been active litigation over university merchandising rights.⁷⁰

To avoid biasing the results in favor of not showing sponsorship confusion, a Harvard University product was chosen because Harvard has a distinctive and highly-recognizable name.⁷¹ The product was a standard university t-shirt in Harvard colors with the Harvard name and crest. The screening question for this product concerned college and university apparel.

4. City, museum, and government agency souvenirs

Trademark rights have been asserted for fire departments and police forces,⁷² museum facades,⁷³ and even city skylines.⁷⁴ Quasi-governmental bodies and non-profit groups, like the International Olympic Committee, have also been persistent in asserting trademark rights in their logos.⁷⁵ To capture this heterogeneity, six different products were employed. To qualify to view any of these, participants had to respond in the affirmative to the souvenir screening question.

Civic agencies sometimes license products bearing their logo, and some agencies have been very aggressive in defending their control over their marks. The New York Fire and Police Departments, for example, reached

⁶⁸ National Center for Education Statistics (December 2012). "Table 5 Number of educational institutions, by level and control of institution: Selected years, 1980-81 through 2010-11". U.S. Department of Education.

⁶⁹ University of South Carolina v. University of Southern California, 367 Fed. Appx. 129 (2010).

⁷⁰ See, e.g., Univ. of Kansas v. Sinks, 565 F. Supp. 2d 1216 (D. Kan. 2008).

⁷¹ According to the Harvard University Trademark Program website "Harvard University" is one of the most widely known and respected trademarks of any kind." *Use of the Harvard Name*, <http://osl.fas.harvard.edu/use-of-harvard-name>. This project was not sponsored by or conducted in affiliation with Harvard University.

⁷² City of New York v. Albert Elovitz Inc., 04 CV 2787 (S.D.N.Y. settlement 2006).

⁷³ Rock and Roll Hall of Fame and Museum v. Gentile Productions, 134 F.3d 749 (6th Cir. 1998) (denying trademark protection to the image of the Rock and Roll Hall of fame).

⁷⁴ See Andrew T. Spence, *When a Landmark Cannot Serve as a Trademark: Trademark Protection for Building Designs*, 2 WASH. U. J. L. & POL'Y 517 (2000) (describing such attempts and their degree of success).

⁷⁵ International Trademark Association, *Protection of Olympic Trademarks*, <http://www.inta.org/TrademarkBasics/FactSheets/Pages/ProtectionofOlympicTrademarks.aspx>

a settlement on the eve of trial with one unauthorized merchandiser.⁷⁶ The survey therefore included an NYPD hat and an FDNY t-shirt to represent this part of the merchandising universe. There has similarly been litigation over public monuments and city skylines.⁷⁷ These are arguably harder cases for trademark law because it is not even clear who would own the rights to these. Testing these more extreme cases were a Statue of Liberty figurine and a shirt displaying the skyline of St. Louis, including the famous Arch. As described below, participants did not need to be clear on who they believed licensed these particular products. Though both the Arch and the Statue of Liberty are administered by the National Park service, sponsorship attributions to the relevant cities or other government agencies were counted.

Though the NYPD is undoubtedly famous, it is not – generally speaking – in the business of selling merchandise; one does not buy an NYPD hat at one’s local police station. Museum gift shops, however, often sell items bearing the logo and name of the museum. These products are like the college and university shirts in that they bear the mark of an identifiable private institution and are generally sold in close proximity to that institution, but are only a tangential part of that institution’s business. To represent this portion of the merchandise universe, a small charm bearing the name and facade of Chicago’s Field Museum was included.

Also representing the quasi-government and non-profit category was a plain white t-shirt bearing the rings of the Olympics. Some believe that events such as the Olympics and the various city marathons are fundamentally public and, as such, belong to everyone. One participant, commenting on why they believed this product was not sponsored, said “the olympic rings, to the best of my knowledge, are public domain.” At a matter of copyright law, this is correct: the rings were first used in their present form in 1914. But trademark law has no term of years, and the International Olympic Committee does license its own merchandising.⁷⁸

5. Parody

Parody merchandise presents a particular puzzle for trademark law. Though parody receives some special treatment in other areas of law, for example copyright, parodic intent has only a small effect on the trademark

⁷⁶ *Elovitz*, 04 CV 2787.

⁷⁷ See note 74.

⁷⁸ See note 75.

analysis.⁷⁹ Nevertheless, there have been numerous cases involving parody merchandise. In one, Mutual of Omaha was able to block production of a shirt with the message “Mutant of Omaha” using a sponsorship confusion claim.⁸⁰ In another, Louis Vuitton brought suit against Haute Diggity Dog over parody pet toys that emulated several signature products made by the high-end European fashion house.⁸¹ Somewhat surprisingly given the other merchandising cases, the defense was actually successful here, and the Chewy Vuitton line of products is still unlicensed and available.

Two products from Haute Diggity Dog were included in the survey. One was a dog bone shaped toy that lampoons the famous Louis Vuitton mark. The other was a bottle shaped toy bearing the mark “Dog Julio,” lampooning Don Julio Tequila.

Figure 2: Chewy Vuitton Bone and NYPD Hat



6. Movie Naming

One of the more infamous sponsorship confusion cases involved a complaint by the restaurant chain Dairy Queen against planned release of a movie entitled “Dairy Queens.” The movie, later released as “Drop Dead Gorgeous,” was a satirical presentation of a beauty patent in Minnesota.⁸²

⁷⁹ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 261 (4th Cir. 2007) (noting that determining a product is a parody only informs the likelihood of confusion analysis and does not resolve it).

⁸⁰ *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987) (because consumers might believe that the insurer Mutual of Omaha “goes along” with the antiwar message on the shirts).

⁸¹ 507 F.3d 252 (4th Cir. 2007).

⁸² *Am. Dairy Queen Corp. v. New Line Prods.*, 35 F. Supp. 2d 727, 728–29 (D. Minn. 1998). This is repeatedly cited as an extreme examples of trademark law overreach. *See, e.g.*, Bone *supra* note 5, at 1371-72; Lemley & McKenna, *supra* note 5, at 418, 22.

Though one might assume that 1.) very few people would believe Dairy Queen made or sponsored a movie, and 2.) very few consumers would consider that information material, there was no survey in that case. The extreme distance between the core product (dairy goods) and the sponsored product (a movie) makes this a particularly hard case to justify under any of the theories of sponsorship materiality. This survey therefore incorporated the movie “Drop Dead Gorgeous” and attributed to it the original title “Dairy Queens” because it can serve as an example of what McKenna and Lemley have termed “pure sponsorship confusion.”⁸³

C. Origin and Sponsorship Confusion Questions

The standard method of measuring likelihood of confusion is the Eveready protocol, so named for its use in *Union Carbide v. Ever-Ready*.⁸⁴ The protocol presents the test stimulus (either the product or the ad) and, leaving the stimulus in view, asks “Who do you think puts out the [product] shown here?” and “What makes you think so?” Though the wording of the questions varies slightly from expert to expert, Eveready designs are now the standard way of conducting likelihood of confusion studies.⁸⁵ There is some concern that leaving the stimuli in view turns the confusion questions into a reading task, but the balance of opinion favors allowing the participant to examine the product or ad as the question is asked rather than relying on the participant’s memory.⁸⁶ The wording of the questions used in this survey was borrowed from that recommended by Jerre Swann.⁸⁷ On the same page as the advertisement was displayed, participants were asked “Who makes or puts out this product?” and “Why do you say that?” These questions were preceded by an instruction that informed participants that they should not guess and that it was acceptable to respond that they did not know the answer to a particular question.⁸⁸

Though there is near-consensus on the appropriate way to ask Eveready questions about product source, there is some dispute over the best way to ask about product sponsorship. One problem here is that the term of art in

⁸³ See Lemley & McKenna, *supra* note 5, at 436.

⁸⁴ 531 F.2d 366 (7th Cir. 1976).

⁸⁵ See, e.g., McCarthy, *supra* note 48, 32:174; Jerre Swann, *Likelihood of Confusion Studies and the Straitened Scope of Squirrt*, 98 TRADEMARK REP. 739, 739 (2008) (“Over time, this format has become the gold standard in cases involving strong marks, i.e., in cases where the senior mark is highly accessible (internally available) in memory.”); Swann, *supra* note 61, at 56-58.

⁸⁶ Jacoby, *supra* note 47, at 566-568.

⁸⁷ Swann, *Likelihood of Confusion*, *supra* note 61, at 56.

⁸⁸ Instructions not to guess are extremely common in trademark surveys. See, e.g., Shari Seidman Diamond, *Control Foundations: Rationales and Approaches*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS, *supra* note 47, 201, 205.

the trademark literature, “sponsor,” colloquially means something close to “benefactor,” which is not at all the intended technical meaning. Here, I follow the recommendation of Jacob Jacoby who prefers using the words “permission” and “authorization” as they have more appropriate lay meanings and, especially in the case of “permission,” are far more frequently used by general audiences.⁸⁹

The second issue in framing sponsorship questions is that courts have been divided on exactly what participants should be asked. Most courts have accepted some variant of “do you believe that whoever makes or puts out this product *did get* the permission or approval of another company.” Others, however, have preferred “do you believe [they] *needed to get* the permission or approval of another company.”⁹⁰ The former question is arguably a question of fact of which the participant has no knowledge – they were not witness to any contractual negotiations that may have occurred between the parties – whereas the latter is arguably a question of law on which the participant’s opinions are irrelevant. Though courts have excluded surveys for asking the “wrong” version of the question,⁹¹ some scholars believe the debate to be “largely a waste of judicial resources,”⁹² and there is a small amount of empirical evidence suggesting that both approaches will yield equivalent results.⁹³

Thinking about this debate from another angle, the main issue may be the word “believe.” Imagine two substitutions. If a consumer is asked “do you *know* that the producer had the permission of another company” then there is a problem because they have no way of “knowing” that information. This appears to be the stumbling block for the courts and scholars who object to that wording. But imagine instead participants are asked whether they “*assume*” there is sponsorship. The participant is perfectly capable of reporting their assumptions. Given that participants actually do answer the “believe” question, they likely are interpreting “believe” to mean something more like “assume” and less like “know.”

This survey therefore asked a variant of the traditional “did get” wording:

⁸⁹ Jacoby, *supra* note 47, at 628-29.

⁹⁰ Swann, *Likelihood of Confusion*, *supra* note 61 at 57-59; Jacob Jacoby, *Sense and Nonsense in Measuring Sponsorship Confusion*, 24 CARDOZO ARTS & ENT. L.J. 63, 75-83 (2006).

⁹¹ See Jacoby, *supra* note 90, at 75-83.

⁹² Swann, *Likelihood of Confusion*, *supra* note 61, at 59 n. 39.

⁹³ See Jacoby, *supra* note 90, at 92 (describing a case in which both wordings were used to assess confusion regarding the same product in separate surveys. The results were within 5% of each other. The author is not aware of any more rigorous testing of this question).

Do you assume that whoever makes or puts out this product:

- Has the permission or authorization of another company to produce this product; or
- Does not have the permission or authorization of another company to produce this product; or
- You don't know or have no opinion about whether they have the permission or authorization of another company.

If the participant reported that they did assume sponsorship, they were then asked "What company do you assume gave permission or authorization for the production of this product?" and "Why do you say that?" This closed-ended question format, the inclusion of the "don't know" option, and the use of the follow-up questions are all standard in the Eveready protocol.⁹⁴

The order of the response options for all closed-ended questions was partially randomized. Though the "don't know" response always appeared last for questions that included it, the other choices appeared in random order as a way of minimizing order effects. Therefore approximately half of the time the "has permission" response came first and half the time the "does not have" response came first. This type of randomization is strongly recommended in trademark surveys.⁹⁵

Since the main question here is the materiality of sponsorship confusion, it was sensible to be liberal in coding who counted as a "correct" sponsor. If a person believes the t-shirt bearing the St. Louis Arch is sponsored by St. Louis, or the National Park Service, or "the people who own the Arch," all of those can count as confusion about sponsorship for which materiality can then be assessed; it is not important that the participant does not know exactly which level of government is responsible. Similarly, a respondent who believes that the Field Museum of Natural History is run by the City of Chicago is mistaken but can still meaningfully contribute to our understanding of sponsorship materiality. It would be much harder to justify such an expansive approach in the context of litigation, but it is appropriate given the goal of this research which was, primarily, to assess

⁹⁴ See, e.g., Swann *supra* note 61, at 57.

⁹⁵ See, e.g., Jacob Jacoby, *Are Closed-Ended Questions Leading Questions?*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS, *supra* note 47, 261, 280.

what percentage of sponsorship confusion is material.⁹⁶

Further, the confusion estimates may be slightly inflated because the survey lacked a control condition, and control conditions always lower confusion estimates. Were one litigating over the NFL t-shirt, for example, one would normally also test reactions to a t-shirt that is as similar as possible to the allegedly problematic shirt and lacks only the key infringing elements.⁹⁷ Likely the logo and name on the shirt would be swapped with ones not linked to an NFL teams but the coloration would remain constant. The proportion of people who attributed the control shirt to the NFL would be subtracted from the confusion estimate of the allegedly infringing shirt. The goal is to eliminate from the confusion estimate the proportion of people who are confused for reasons other than the elements at issue in the litigation.

Despite these limitations, the results shown in Table 1 are consistent with those found in actual litigation surveys for several products. The NYPD baseball cap is at 42.63% combined maker and sponsor confusion, which is fairly consistent with the surveys finding 38.3% and 43% confusion actually conducted in *Elovitz*.⁹⁸ The baseball jersey and football t-shirt are slightly above 60%, which is consistent with litigation surveys showing 58% and 59% confusion for NFL jerseys.⁹⁹ So the survey numbers may be somewhat inflated because liberal coding was used for both the origin and sponsorship questions, but they are not unreasonably so.

In trademark litigation, the threshold for actionable confusion is conventionally approximated as 15%.¹⁰⁰ This is not strictly a rule, however, and courts have sometimes both accepted as significant lower rates of confusion and rejected as *de minimis* higher rates.¹⁰¹ The general rule appears to be that rates below 10% rarely win and those above 20% rarely lose, but the treatment of surveys with confusion estimates between

⁹⁶ The problem of subjective coding judgments is inherent in the use of open-ended questions. For a discussion of some common coding difficulties, see Jacoby, *supra* note 95, at 264-65, 271-72.

⁹⁷ Jacoby, *supra* note 47, at 514-33. The ideal control is a function of the elements alleged to be infringing in the litigation and constructing a proper control requires careful consideration of both the essential features of the product as well as the exact causal claim one wishes to make.

⁹⁸ Described in Jacoby, *supra* note 90, at 92.

⁹⁹ *Id.* at 71.

¹⁰⁰ See, e.g., Daniel Gervais & Julie M. Katsko, *Who Cares About the 85 Percent? Reconsidering Survey Evidence of Online Confusion in Trademark Cases*, 96 J. PAT. & TRADEMARK OFF. SOC'Y 265 (2014).

¹⁰¹ See, e.g., Gerald L. Ford, *Survey Percentages in Lanham Act Matters*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS, *supra* note 12, 311, 313-15.

10% and 20% vary depending on the other confusion factors.¹⁰²

As can be seen in Table 1, nearly every product would qualify as confusing at a 15% threshold. The two parody products are marginal, but the various souvenir products average approximately 31% combined maker and sponsor confusion.

Table 1: Traditional Confusion Estimates for All Products

		Company makes	Company does not make but sponsors	Makes + Sponsors	Number of consumers
Sports	MLB Jersey	30.72%	31.37%	62.09%	153
	NFL Shirt	22.99%	38.31%	61.30%	261
	WC Jersey	4.76%	12.70%	17.46%	63
	March Madness	15.03%	12.72%	27.75%	173
	Super Bowl	18.22%	25.00%	43.22%	236
College	Harvard Shirt	17.72%	36.71%	54.43%	316
Souvenirs	NYPD Hat	15.94%	26.69%	42.63%	251
	FDNY Shirt	14.00%	21.67%	35.67%	300
	Olympics Shirt	11.11%	25.16%	36.27%	306
	Liberty Statue	11.11%	15.49%	26.60%	297
	Field Museum Charm	9.13%	16.67%	25.79%	252
	St Louis Arch Shirt	7.21%	12.13%	19.34%	305
Pet Parody	Don Julio Toy	4.88%	10.19%	15.07%	471
	Chewy Vuiton Toy	8.86%	7.05%	15.91%	440
Automotive	Lamborghini Key Chain	27.83%	28.80%	56.63%	309
	Porsche Mug	33.52%	25.35%	58.87%	355
Movie	Dairy Queens	4.01%	3.81%	7.82%	499

Notable in Table 1 is that many products are only above threshold, or only meaningfully above threshold, due to the contribution of sponsorship confusion. Very few people believe the parody products are actually made by the companies whose likenesses are being used, and the souvenir category only averages 11% maker confusion despite the liberal coding. Even the Harvard, March Madness, and Super Bowl shirts would be hard

¹⁰² Id.

cases were sponsorship confusion not counted. This underscores the importance of correctly quantifying sponsorship confusion.

A sufficient number of datapoints were collected to draw meaningful conclusions for all of these products apart from the World Cup Jersey. Though courts have not been consistent in their sampling requirements, a review of the case law suggests that surveys with fewer than 100 data points are at meaningfully increased risk of rejection and those above 100 tend to be acceptable, at least in terms of sample size.¹⁰³ From a purely statistical standpoint, the confidence interval for the 17.46% confusion estimate for the World Cup Jersey is $\pm 9.37\%$.¹⁰⁴ Were there 153 participants rating this product – as there were for the next lowest – the confidence interval would be $\pm 6.02\%$, a substantial improvement. Nevertheless, the World Cup Jersey is getting reliably fewer attributions of sponsorship than any of the other sports products.

A.) Materiality of Sponsorship Confusion

The materiality of sponsorship confusion was assessed with a series of four questions. These were only asked if the participant indicated that they believed the product was sponsored, and the results given in Tables 1 and 2 are only for those participants who identified the correct sponsor for a particular product.

The first sponsorship materiality question asked who the consumer believed was responsible for the quality of the product. The choices were: the company identified as the maker of the product, the company identified as having permitted or sponsored the product, both, neither, or don't know.¹⁰⁵

Even Lemley and McKenna, who are extremely skeptical of sponsorship confusion claims, recognize that there is a “strong interest in protection when the defendant's use of a mark suggests the plaintiff controls the

¹⁰³ Jacoby, *supra* note 47, at 439-44.

¹⁰⁴ The confidence interval for a proportion is a function both of the sample size and of the extremity of the estimate. <https://www.mccallum-layton.co.uk/tools/statistic-calculators/confidence-interval-for-proportions-calculator/>

¹⁰⁵ The exact wording of the response items is given here:

- The company you listed as the MAKER of the product
- The company that you listed as having PERMITTED or AUTHORIZED the product
- Both of the companies you listed
- Neither of the companies you listed
- Don't know/Have no opinion

quality of the defendant's products or services."¹⁰⁶ As can be seen in Table 2, about half of the consumers evaluating each product believed that the appropriate sponsor was at least partially responsible for product quality. For the six souvenir items, for example, the average was 48.2%.

The next materiality question assessed what is known as relation-back, whether the consumer would blame the parent brand for bad experiences with the product. This question asked whether the participant would have a better, worse, or unchanged opinion of the sponsor of the product if they had a bad experience with the product.¹⁰⁷ Answers to this question interestingly differ from those to the quality question. Only about 26.0% of those rating the six souvenir products would have blamed the sponsor for a bad experience. More than twice as many (57.4%) would have had an unchanged opinion. The difference was similar for the two automotive products (34.7% vs. 54.2%), if slightly less stark.

Some scholars believe that marketing research has suggested that relation-back will not be a problem. Lemley and McKenna have argued that "the research suggests that consumers generally do not alter their global evaluations of brands....when they encounter negative information about related products offered under the same mark."¹⁰⁸ But others are more skeptical of that literature and believe that, at best, this is an open question.¹⁰⁹ Resolving this debate is beyond the scope of this paper, but it is interesting to note that 1.) a meaningful proportion of consumers *believe* they would blame the perceived parent company to some degree; and 2.) of the four measures of materiality, this one would show the lowest proportion of material confusion.

¹⁰⁶ Lemley & McKenna, *supra* note 5, at 433.

¹⁰⁷ The exact wording was:

If you had a bad experience with this product, would you:

-Have a worse opinion of the company that you said PERMITTED or AUTHORIZED the making of the product,

-Have a better opinion of the company that you said PERMITTED or AUTHORIZED the making of the product,

-Have no change in opinion regarding the company that you said PERMITTED or AUTHORIZED the making of the product

-Don't know/don't have an opinion

A similar question regarding the maker of the product was asked regardless of whether the participant believed the product was sponsored.

¹⁰⁸ Lemley & McKenna, *supra* note 5, at 430-32. See also Mark McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 97-111 (2009).

¹⁰⁹ Bone, *supra* note 5, at 1367-68.

Table 2: The Materiality of Sponsorship Across Products

		Sponsor partially responsible for quality	If bad experience:		Less interested if un-sponsored	Explicitly equally interested	Pay more if sponsored	Explicitly pay equally	Number of Consumers
			Blame sponsor	No change in opinion of sponsor					
Sports	MLB Jersey	47.92%	27.08%	56.25%	58.33%	35.42%	66.67%	29.17%	48
	NFL Shirt	53.00%	34.00%	45.00%	51.00%	28.00%	45.00%	41.00%	100
	WC Jersey	62.50%	12.50%	87.50%	25.00%	62.50%	37.50%	50.00%	8
	March Madness	63.64%	40.91%	27.27%	31.82%	54.55%	27.27%	63.64%	22
	Super Bowl	49.15%	35.59%	49.15%	66.10%	22.03%	47.46%	38.98%	59
College	Harvard Shirt	49.14%	28.45%	57.76%	52.59%	34.48%	39.66%	43.10%	116
Souvenirs	NYPD Hat	46.27%	32.84%	52.24%	41.79%	37.31%	34.33%	47.76%	67
	FDNY Shirt	49.23%	21.54%	58.46%	49.23%	36.92%	46.15%	40.00%	65
	Olympics Shirt	48.05%	28.57%	51.95%	41.56%	37.66%	38.96%	42.86%	77
	Liberty Statue	52.17%	36.96%	45.65%	36.96%	45.65%	34.78%	50.00%	46
	Field Museum Charm	47.62%	11.90%	71.43%	35.71%	38.10%	30.95%	54.76%	42
	St Louis Arch Shirt	45.95%	24.32%	64.86%	45.95%	29.73%	37.84%	56.76%	37
Pet Parody	Don Julio Toy	56.25%	22.92%	50.00%	41.67%	35.42%	25.00%	52.08%	48
	Chewy Vuiton Toy	45.16%	25.81%	48.39%	48.39%	32.26%	29.03%	35.48%	31
Automotive	Lamborghini Key Chain	58.43%	38.20%	48.31%	55.06%	30.34%	38.20%	44.94%	89
	Porsche Mug	51.11%	31.11%	60.00%	51.11%	34.44%	42.22%	43.33%	90
Movie	Dairy Queens	42.11%	26.32%	57.89%	15.79%	47.37%	21.05%	63.16%	19

Both of the preceding questions assessed indirect forms of trademark harm in that they undermine the integrity of the trademark but do not affect consumer decisionmaking in the instant case. The final two questions, however, do address the consumer's purchase intentions. The first of these asked the participants to imagine that the maker of the product did NOT have the permission or authorization of any other company, and that the company they had believed had sponsored the product was completely uninvolved. Further, they were asked to assume that this was perfectly legal. Given that the product was now unsponsored, were they more or less interested in purchasing it?¹¹⁰

For the two major sports items – the jersey and the NFL t-shirt – over 50% of participants would have been less interested. Across the six souvenir items, 41.9% would have been less interested. For the automotive items, 53.1% would have been less interested. As can also be seen in Table 2, there is a growing divergence between the main line of the products and Dairy Queens, which has reassuringly dropped to 15.8% less interested. Since Dairy Queens was, *ex ante*, predicted to be the most extreme of the merchandising cases, it is can be taken as some validation of participant attention that they so clearly distinguish it from the other products.

The final materiality question asked participants whether they would be willing to *pay* more if the product were sponsored or unsponsored.¹¹¹ Table 2 displays both the proportion of respondents who would pay more if the product was sponsored, as well as the proportion that would explicitly pay an equal amount regardless (the remainder expressing a preference for *unsponsored* products or having no opinion). Apart from the baseball jersey, there is no product for which a majority of consumers

¹¹⁰ Imagine you learned that the maker of this product did not have the permission or authorization of any other company, and that the company you thought authorized it was completely uninvolved. Assume that this is perfectly legal, and that the maker of the product did not need anyone's permission or authorization to make it.

If this product were made without permission or authorization:

- I would be more interested in purchasing it.
- I would be less interested in purchasing it
- I would be equally interested in purchasing it
- I have no opinion.

¹¹¹ Which of the following statements best describes your perspective on this product?

- I am willing to pay more for this product if it is made with the other company's permission or authorization.
- I am willing to pay more for this product if it is NOT made with the other company's permission or authorization.
- I am willing to pay the same amount either way.
- I have don't know or have no opinion on this issue.

would pay more if it were sponsored. For the six souvenir products – which are much like those so fiercely questioned by scholars such as Dogan, Lemley, and McKenna – a mere 37.2% of those who believed the products were sponsored would have paid less if they were not.¹¹² Fully 48.7% explicitly state that they would pay the same amount regardless.

Across all products, responsibility for quality is the most sponsor-friendly measure and relation-back is the least. On average, 51% said that sponsors monitored quality but only 28% would blame the sponsor for a low quality product. The other two measures were intermediate. 44% would be less interested were the product unsponsored and 38% would pay less.

Sponsorship therefore counts for (at most) half. For only four of the seventeen merchandising are more consumers willing to pay a premium for sponsored goods than are explicitly indifferent to whether the goods are sponsored.

Table 3 updates Table 1 to show how the imposition of a materiality requirement based on this willingness to pay measure would impact confusion estimates. As described at the beginning of Part II, this materiality calculation discounts the sponsorship confusion estimate to only take into account those respondents who would pay less were the product not sponsored. Several products that were previously firmly above the traditional confusion threshold are now below or in play, including the Field Museum Charm, the Statue of Liberty, and the St Louis Arch shirt. The pet parody products went from being marginal cases – just above 15% – to meaningfully below threshold. Imposing a materiality requirement would therefore matter.

¹¹² A follow-up question asked how much of a discount the consumer would need in order to be indifferent between the sponsored and unsponsored version. Those data are available from the author.

Table 3: Traditional and Material Confusion Estimates for All Products

		Traditional Confusion	Material Confusion	Difference Between Traditional & Material	Number of Consumers
Sports	MLB Jersey	62.09%	49.02%	13.07%	153
	NFL Shirt	61.30%	42.53%	18.77%	261
	WC Jersey	17.46%	7.94%	9.52%	63
	March Madness	27.75%	19.08%	8.67%	173
	Super Bowl	43.22%	34.75%	8.47%	236
College	Harvard Shirt	54.43%	37.03%	17.41%	316
Souvenirs	NYPD Hat	42.63%	27.09%	15.54%	251
	FDNY Shirt	35.67%	24.67%	11.00%	300
	Olympics Shirt	36.27%	21.57%	14.71%	306
	Liberty Statue	26.60%	16.84%	9.76%	297
	Field Museum Charm	25.79%	15.08%	10.71%	252
	St Louis Arch Shirt	19.34%	12.79%	6.56%	305
Pet Parody	Don Julio Toy	15.07%	9.13%	5.94%	471
	Chewy Vuiton Toy	15.91%	12.27%	3.64%	440
Automotive	Lamborghini Key Chain	56.63%	43.69%	12.94%	309
	Porsche Mug	58.87%	46.48%	12.39%	355
Movie	Dairy Queens	7.82%	4.61%	3.21%	499

But those who are critical of the merchandising right should note the products that are still firmly above the confusion threshold. The core of sports merchandising is generally immune; baseball jerseys and NFL shirts are both well above 40%. The March Madness t-shirt and Super Bowl shirt do not fare quite as well, but the NFL and NCAA likely have little reason to sweat 35% and 19% confusion ratings. The World Cup jersey is an exception but, again, note that the sample size is quite small for that product. Even the NYPD hat is still safe. The exact values in the Table should not be taken as gospel – there are limitations to the design used in this survey – but there is every reason to think they are fairly close.

Revisiting Table 2, it is clear that adopting the other metrics of materiality would yield fairly similar results. Slightly more sponsorship confusion would be deemed material under responsibility for quality, meaningfully less under negative relation-back, and approximately the same under

interest in purchasing. But always in the same range of 30-50%. Therefore endorsing any single test for sponsorship confusion creates a 50+ percent haircut in most merchandising cases.

Taking seriously the variations across the materiality measures, however, raises the question of *why* participants would pay less for an unsponsored product if they do not, say, believe the sponsor ensures the product's quality. When asked to explain their purchase interest judgements, many of the participants who said they would be less interested were the product unsponsored cited fairness to the mark owner as their principal motivation. Though the answers were generally not extensive enough to allow for a serious quantitative analysis, they were suggestive. This brings us to the final substantive portion of the survey: equitable beliefs.

B.) Equity

After making confusion judgments about each product they were eligible to rate,¹¹³ participants entered another phase of the survey. The instructions here explained that they were being asked "about whether it SHOULD be legal for a company to make this product without the permission of the LISTED company." Rather than reporting their assumptions about the status quo, they instead were being told to make a normative judgment and told to think of the rights of a specific company. They were then again presented with the product ads one at a time.

The question asked for each product was deceptively straightforward "Should it be possible to make this product without the permission of the [mark holder]?" The available responses were "Yes, any company should be able to make this [product]," "No, companies should only be able to make this [product] with the permission of [mark holder]," and "I have no opinion on this question."

The main problem with this question, and the reason why this battery of questions was placed at the end of the survey, is that it is impossible to ask the question this pointedly without providing some suggestion as to the appropriate response. Many of the participants in this study did not believe that the products shown were made or sponsored by their mark holders. It may have not even occurred to them, for instance, that the National Park Service has any claim to the Statue of Liberty, or that Dairy Queen has

¹¹³ The survey was coded so as to cut off the rating process at 10 products even if the participant qualified for more.

any connection to a movie titled “Dairy Queens.” This question directly raises these possibilities and implies that “Yes” is a plausible response.¹¹⁴ But, unlike with the sponsorship materiality questions – which were only relevant for those who believed the product was sponsored – these questions were meant for the entire sample. Therefore it was necessary to propose a sponsor and, having done so, attempt to mitigate the accompanying risks.

To minimize the risk of the question being leading, careful attention was given to response balance.¹¹⁵ The two main alternatives were therefore written with equal levels of elaboration, and their order rotated across person and product. Though this does not entirely dispel the concern that the question is leading, it does help minimize the costs of using a closed framework while still allowing for the benefits of consistency and clarity.¹¹⁶

As can be seen in Table 4, there was a strong inclination to believe that sponsorship should be required for most products. Given the relatively low rates of sponsorship materiality, it is hard to interpret these findings. One possibility is that the closed-ended format prompted a form of post-hoc reasoning. It may not naturally occur to participants that there is a restaurant named Dairy Queen and that, perhaps, the restaurant is connected to a movie named “Dairy Queens.” But once participants have been reminded that there is such a restaurant and the connection has been made presumptively relevant, they may then have concluded that the restaurant should have rights to the name “Dairy Queen.”

The opinion that Dairy Queen *should* own the name “Dairy Queens,” is fundamentally distinct from the questions of a traditional confusion analysis. Recall that virtually no participants were actually confused by the movie title. This is more of a moral judgment that the popularizer of a brand has a right to its proceeds than a statement about consumer expectations.

This pro-ownership lay reaction is consistent with a trend in intellectual

¹¹⁴ See Paul Grice, *STUDIES IN THE WAY OF WORDS* 24-40 (1989) (positing that listeners generally presume that a speaker is speaking truthfully, informatively (saying no more and no less than necessary), and relevantly, and that listeners will interpret statements to make them intelligible).

¹¹⁵ Jacoby, *supra* note 47, at 738; Jacoby, *supra* note 95 275.

¹¹⁶ Jacoby, *supra* note 95, at 283 (explaining his view that “[p]roperly constructed closed-ended questions are not leading and possess as much scientific legitimacy as do properly constructed open-ended questions,” each having their own advantages and disadvantages).

property law recently described by Mark Lemley. He observes that many IP scholars have abandoned arguments that utilitarian considerations can justify current intellectual property rights and instead have begun to treat intellectual property as a moral end in itself.¹¹⁷ And, certainly, there has been a lot of recent attention to moral psychology in the IP community and increased use of moral reasoning in IP discussions.¹¹⁸

Table 4: Equity Beliefs

Should Sponsorship Be Required?		Yes	No	No Opinion
Sports	MLB Jersey	71.90%	18.30%	9.80%
	NFL Shirt	71.65%	16.48%	11.88%
	WC Jersey	53.97%	28.57%	17.46%
	March Madness	43.68%	43.10%	13.22%
	Super Bowl	58.05%	26.69%	15.25%
College	Harvard Shirt	64.56%	26.58%	8.86%
Souvenirs	NYPD Hat	62.15%	25.90%	11.95%
	FDNY Shirt	60.67%	27.00%	12.33%
	Olympics Shirt	53.59%	33.01%	13.40%
	Liberty Statue	33.67%	51.52%	14.81%
	Field Museum Charm	50.79%	34.92%	14.29%
	St Louis Arch Shirt	32.79%	50.82%	16.39%
Pet Parody	Don Julio Toy	53.50%	30.36%	16.14%
	Chewy Vuiton Toy	47.20%	36.47%	16.33%
Automotive	Lamborghini Key Chain	67.96%	18.77%	13.27%
	Porsche Mug	66.48%	21.97%	11.55%
Movie	Dairy Queens	36.45%	44.02%	19.52%

This trend toward moralizing IP is also present in trademark law. Several trademark theorists would place moral blameworthiness at the heart of trademark confusion. Bone, who otherwise supports a materiality requirement, would hold that morally blameworthy conduct should itself

¹¹⁷ Mark Lemley, *Faith-Based Intellectual Property*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587297.

¹¹⁸ See, e.g., J. Janewa OseiTutu, *Corporate 'Human Rights' to Intellectual Property Protection*, SANTA CLARA L. REV., forthcoming available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533577; Christopher J. Buccafusco and David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV., forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587339. See also David Fagundes *The Moral Psychology of the Fair Play, Fair Pay Act*, <http://prawfsblawg.blogs.com/prawfsblawg/2015/04/the-moral-psychology-of-the-fair-play-fair-pay-act.html>; Lea Shaver, *Copyright and Human Rights*, <http://leashaver.net/2015/03/18/copyright-and-human-rights/>

be a basis for trademark liability even absent consumer confusion.¹¹⁹ His particular interest is informed by his understanding of the development of trademark law in the mid-twentieth century, when competing judges on the Second Circuit debated whether trademark law should focus more on consumer harm or more on blameworthy conduct.¹²⁰ But even given the historical framework it is hard to distinguish between pro-competitive copying and impermissible free-riding without reference to some broader theory of what intellectual property is trying to do.¹²¹ Others, writing in opposition to scholars like Dogan, Lemley, McKenna, and Tushnet, have taken a dim view of what they see as morally problematic free riding on the goodwill created by mark holders.¹²²

These data suggest that scholars who want to interject more morality into IP are reflecting a fairly strong popular impulse. Given the purposes of trademark law, however, popular opinion may have little intrinsic relevance here unless there is a relationship between moral judgments and consumer behavior.

C.) Relationships Between Materiality Metrics

Scholars calling for a materiality requirement have not generally drawn hard edges between the different possible meanings of materiality. Here, however, it is possible to examine whether the four materiality metrics rise and fall together. An analysis was therefore conducted that treated each of the 17 merchandising-right products as individual cases. Table 5 presents the correlations between the proportions of the sample finding materiality on each metric from Table 2 and the proportion of the sample that believed sponsorship should be required on the equity question.

¹¹⁹ Bone, *supra* note 5, at 1310.

¹²⁰ *Id.* at 1316-34.

¹²¹ Stacey Dogan, *Beyond Confusion*, JOTWELL, December 2012, available at <http://ip.jotwell.com/beyond-confusion/>

¹²² *See, e.g.*, Jeremy N. Sheff, Marks, Morals, and Markets, 65 STAN. L. REV. 761, 768-772 (2013) (describing the Lockean approach to trademark law).

Table 5: Relationships Between Equity Beliefs and Materiality Among Merchandising Items

	Willingness to Pay	Purchase Interest	Responsible for Quality	Relation-Back
Purchase Interest	.69**			
Responsible for Quality	-.08	-.12		
Relation-Back	.07	.33	.17	
Equity Beliefs	.63**	.61**	.14	.10

** $p < .01$.

Purchase interest and willingness to pay were strongly related, as one would expect. The correlation between these two proportion scores is $r = .69$ and is significant at the $p = .01$ level. A product's score on one of those measures is therefore an extremely good predictor of its score on the other. Importantly, however, neither of those measures is related to beliefs about the sponsor's role in product quality or the willingness to relate back their experience with the product to the sponsor. Those two measures of materiality are unconnected to whether consumers actually think they would want to purchase the item and how much they think they would be willing to pay. They were also not significantly related to each other. Also interesting, especially in light of this disconnect between materiality metrics, are the extremely high correlations between equity beliefs and the purchase interest and willingness to pay measures. Equity beliefs correlated with both of these at above $r = .60$.

Taken together, these findings show that the effect of sponsorship on willingness to pay and purchase interest is not driven by a belief that the sponsor is somehow policing the quality of the product. Instead, effect of sponsorship on these factors appears to be a function of whether people believe that the sponsor should have a right to control the use of their mark on a particular good. This interrelationship suggests that lay moral judgements may have some role in trademark law, albeit an indirect one.

PART III: MATERIALITY AS A WAY FORWARD

A. Presuming Materiality

These data support a presumption that sponsorship attributions are only material to about half of consumers in merchandising cases. If one wanted to impose a materiality requirement – consistent with the work of Lemley, McKenna, Bone, and Tushnet – sponsorship attributions would therefore be discounted by 50% absent a showing that another ratio is appropriate

for the particular product at issue. Given these data, it is likely that parody products and products that contain only incidental overlap with existing trademarks will generally have greater discount rates and that strong, commercially-active marks – such as those belonging to sports teams and automotive product lines – will have rates closer to the 50% baseline.

Adding a materiality requirement to sponsorship confusion cases would affect outcomes in many cases, but it would not completely change merchandise licensing. The owners of many strong marks, particularly sports franchises and automotive product lines, have very little to fear. Those products of which scholars have been most skeptical, however, go from being easy wins for mark holders to very close cases. It is much safer to make parody products in a world that uses a materiality requirement, and much safer to make souvenir representations of museum facades and city skylines.

B. How Should Materiality Be Measured

The four different versions of the materiality question tap three distinct underlying concepts. Interest in purchasing and willingness to pay correlate very strongly and, though not perfect substitutes, are likely conceptually interchangeable. Of the two, the willingness to pay question is somewhat preferable because it has a slightly greater tone of immediacy and lends itself more to quantifiable estimates. Changes in it are therefore a better indication of whether consumer *behavior* is affected.¹²³

Attributions of responsibility for quality and inclination to relate-back experiences with the junior good to the senior mark holder are both fairly unrelated to willingness to pay. Despite the commentary by scholars such as Lemley and Bone, this should not be too surprising. These are classic non-competing goods. Though Ferrari is known for making excellent cars, there is no particular reason to believe that shirts made under its supervision will likewise be excellent and no reason to think less of Ferrari's cars if they endorse a poor shirt. Relation-back may be the principal harm that flows from mark infringement for competing goods, but – as McKenna has observed¹²⁴ – the world of non-competing goods may work fundamentally differently.¹²⁵

¹²³ Consumer behavior being the principal test for scholars such as Tushnet, *supra* note 5, at 1353.

¹²⁴ See McKenna, *supra* note 108, at 97-111 (arguing that relation-back occurs only to a *de minimis* extent outside of principal product lines).

¹²⁵ One problem with putting too much faith in the noncompeting goods argument is that it is actually very difficult to determine when a company is in a particular business. It is tempting to say that Hershey's is in the

If one approaches trademark law from the standpoint of consumer protection, as Tushnet does by drawing on the law of fraud, then willingness to pay is the best measure of sponsorship materiality. Importantly, however, this question gives rise to two possible study designs. One is the procedure used here, asking each participant to make sponsorship attributions and discounting those who would not pay more for the sponsored version. But there is an alternative. One could run an experimental study that asked participants in one condition to supply a willingness to pay estimate for a version of the product that was explicitly authorized and participants in another condition to supply an estimate for a version that was explicitly not. This would divide products into those for which sponsorship is material and those for which it is not. But this would not allow for a direct estimate of how *many* consumers cared.¹²⁶ Since trademark law has always asked how many are confused rather than how much they are confused, this alternative approach does not yield helpful data.

C. Materiality Affects the Shape of the Debate

Materiality is meant to be a solution to the Batman problem. The strong intuition is that people just want Batman to be there; no one cares who sent him. Though this intuition might be true of children and superheroes, however, the data show that it is not true of adults and treasured sports logos. People do care who sent the Red Sox logo. Materiality is therefore not the answer Dogan and Lemley need if they want to slay the merchandising right.

The problem here may be one of circularity. The data show that people care about whether a product is authorized because they feel the mark owner *deserves* to control these uses of their mark. Though the present results cannot speak to what is driving that intuition, Lemley and McKenna themselves speculated that the last few decades of merchandising experience have not been lost on consumers. It may be that

business of making chocolate, Porsche is in the business of making cars, and neither is in the business of making mugs or t-shirts. Anyone making those products is surely not competing with them, only their licensees. The awkward fact, however, is that both companies actually do make their own mugs and t-shirts.

¹²⁶ A quantitatively sophisticated judge might appreciate seeing data from both approaches as it would give indications of both the prevalence of sponsorship materiality as well as the intensity of feeling. But the same information can be extracted from the present design by asking participants to answer a follow-up question asking how much an unsponsored version would need to cost before they would buy it over the sponsored version.

The greater problem with the alternative design is that a sufficiently large sample would almost always show a statistically significant difference between the authorized and unauthorized versions even if only a very small proportion of respondents cared.

consumers once believed that college shirts were unlicensed because, at one time, they *were* unlicensed.¹²⁷ Now, however, they generally are licensed. Given that people are confronted with this reality daily, it is not surprising that they have, first, noticed, and, second, come to accept it as justified. It is well established in the psychology literature that people have a tendency to justify the status quo; there is natural slippage between “is” and “is right.”¹²⁸ To quote Lemley and McKenna slightly out of context, “sponsorship and affiliation confusion has taken on a life of its own.”¹²⁹ What may once have been irrelevant to the consumer’s decision-making process now is relevant, at least half the time.

If courts want to reign in the merchandising right wholesale, then, they are going to need to do more than merely impose a materiality requirement. Given that consumers believe mark-holders *should* have fairly extensive merchandising rights, however, such heroic judicial efforts in the merchandising context may be misplaced. After all, merchandising rights are primarily distributional. When such rights are strong, entrants are discouraged, competition is limited, and consumer surplus is transferred to mark-holders. The principal alleged harm is to consumers. If the consumers themselves do not object and may actually be in favor of broad trademark rights,¹³⁰ perhaps it is not necessary to drastically rewrite trademark defenses to protect them.

And, though materiality may not be the hero that trademark public domain advocates deserve, it may be the hero trademark law needs. Consider carefully Dairy Queens. This was the only product in this study that did not plainly fall within the merchandising right. The name is almost identical to the senior mark, but its use is the kind of incidental overlap that is increasingly common given the proliferation of marks rather than an attempt to capitalize on existing good will.

A materiality requirement has the effect of making it virtually impossible

¹²⁷ Lemley & McKenna, *supra* note 5, at 441-43 (“But sponsorship and affiliation confusion has taken on a life of its own, leading courts to declare as infringing a variety of practices that might be confusing in some sense, but that do not affect consumers’ decision-making process”).

¹²⁸ See generally Scott Eidelman, et al., *The Existence Bias*, 97 J. OF PERS. AND SOC. PSYCHOL. 765 (2009); John T. Jost & Mahzarin R. Banaji, *The Role Of Stereotyping In System-Justification And The Production Of False Consciousness*, 33 BRIT. J. OF SOC. PSYCHOL. 1 (1994); John T. Jost, et al., *A Decade Of System Justification Theory: Accumulated Evidence Of Conscious And Unconscious Bolstering Of The Status Quo*, 25 POL. PSYCHOL. 881 (2004).

¹²⁹ Lemley & McKenna, *supra* note 5, at 414.

¹³⁰ Given the expanded dilution protection in the 2006 Act, there does not appear to be any legislative or popular push to rein in merchandising rights. See Federal Trademark Dilution Revision Act of 2006, P.L. 109-312, 120 Stat. 1730.

to prove a likelihood of confusion in this kind of incidental case. Only 20% of those confused rated their confusion material. On one hand, this number is higher than many would have expected. On the other, it is really difficult to win a likelihood of confusion case if you only get to count one confused consumer in five. You would need 75% sponsorship confusion to clear threshold at that discount rate.

The consequences of this discount rate have important implications for an alternative method of solving the chilling effects problem. Rather than relying on a potentially-costly materiality requirement, some scholars have advocated greatly expanding trademark defenses in cases involving certain types of expressive uses, third party promotions, and the like.¹³¹ One recurring problem for these scholars is that courts are extremely reluctant to endorse a trademark defense that trumps a finding of consumer confusion.¹³² William McGeeveran has termed this reflexive tendency on the part of some judges the “Gravitational Pull” of likelihood of confusion.¹³³

Thinking in terms of a materiality requirement serves to justify these innovations from within the likelihood of confusion framework, potentially avoiding the gravitational pull problem. Take the example of *New Kids on the Block*.¹³⁴ In that case, the 9th Circuit held that certain descriptive uses of a mark do not create sponsorship confusion “as a matter of law.” This doctrine of nominative fair use has been criticized for, among other things, “displac[ing] the likelihood of confusion analysis.”¹³⁵ And, in fairness, the court might well have been wrong about consumer perceptions as a strictly factual matter. Maybe a survey would have shown 15% confusion in that case; it is a low bar, and people seem to attribute sponsorship generously. But we can be fairly confident that such a survey would not have shown 15% material confusion given the kind of results we saw for the parody products and Dairy Queens. In a world with a materiality requirement, nominative fair use does not need to be viewed as

¹³¹ See generally William McGeeveran and Mark McKenna, *Confusion Isn't Everything*, 89 NOTRE DAME L. REV. 253 (2013); McGeeveran, *supra* note 7.

¹³² See McGeeveran and McKenna, *supra* note 131 at 255 (describing a Second Circuit case); *id.* at 286-98 (describing similar issues in comparative advertising, nominative fair use, parody, and third party promotion cases); McGeeveran, *supra* note 7 at 67 (noting that various courts and Professor McCarthy have advocated using the likelihood of confusion test in almost all expressive use cases).

¹³³ McGeeveran, *supra* note 7 at 112

¹³⁴ 971 F.2d 302.

¹³⁵ Chad Doellinger, *Nominative Fair Use: Jardine and the Demise of a Doctrine*, 1 NW. J. TECH. & INTELL. PROP. 66, 67 (2003); See also McGeeveran and McKenna, *supra* note 131 at 287 n 154-56 (citing cases).

some kind of weird exception to the normal operation of trademark law. Instead, it is merely a doctrinal shortcut that conserves resources and lowers the cost of defending a trademark lawsuit. Normal trademark law would eventually reach the same result, it would just cost several hundred thousand dollars more.

Materiality may therefore serve to help justify the kinds of per se rules that courts sometimes use in cases that directly pit free expression interests against trademark rights more generally.¹³⁶ Taking seriously the Dairy Queens and parody findings, it is unlikely that even those technically confused in cases where trademarks appear incidentally in movie and TV clips, or where marks are parodied artistically, would rate their confusion material.¹³⁷ So, though materiality may only reign in the edges of the merchandising right, it may serve to drastically restrict the kind of sponsorship confusion arguments that pose the greatest threats to free expression.¹³⁸ This is a hypothesis that can be tested in future work.

A materiality requirement would not reset merchandising law to the status quo of the 1960s. The NFL is safe, and Louis Vuitton loses only the pet-toy parody market.¹³⁹ But such a requirement would do much to justify the kinds of limiting doctrines that courts have tried to invent when faced with hard questions at the boundary of trademark law and free speech. It therefore may be exactly what trademark law needs to counter the problems of mark proliferation and chilling effects.

¹³⁶ William McGeeveran, *Four Free Speech Goals for Trademark Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 1205, 1207-23 (2008).

¹³⁷ See examples of such uses in Mark McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV., 67, 68-70 (2012); Lemley & McKenna, *supra* note 5, at 417-18.

¹³⁸ Lemley & McKenna, *supra* note 5, at 417-21; Mark Lemley and Mark McKenna, *Owning Mark(ets)*, 109 MICH. L. REV. 137, 138-40 (2010).

¹³⁹ Reasonable minds can differ on how upset Louis Vuitton should be at this result.