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The Use of Surveys in Litigation: Recent Trends

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Introduction

Surveys are used in the courts to provide necessary evidence in a range of cases. In intellectual property cases, surveys often represent the predominant means by which to gather information on the “consumers’ state of mind.”¹ But, survey evidence is also used to establish labor patterns in employment cases (meal and break, hiring and firing, and the contours of the market) and cross shopping and product substitutions in antitrust cases. Additionally, surveys are used to establish or challenge the commonality and typicality of a class for certification issues across a broad range of litigation types. While survey evidence is generally accepted by the courts, surveys appear to have a variable reputation among judges and among lawyers with regard to their reliability as evidence. The variability in acceptance of surveys means that such evidence can be and is often challenged vigorously in cases where the survey is key.

The Federal Rule of Evidence 703 establishes the broad and generalized acceptance of the survey method as a legitimate means to introduce evidence. This Rule establishes that survey evidence cannot be excluded as hearsay if the methods are technically valid and the data produced are typical of data that would be relied upon by a qualified expert.²

Thus, while survey evidence can address a variety of issues in a case, it must generally adhere to certain standards to be admitted or be given evidentiary weight. While explained somewhat differently by various key treatises,³ consideration must be given to the following elements:

- An accurate definition of the legal problem was being tested
- The survey was designed, conducted, and interpreted by a qualified expert
- The target population or relevant audience was correctly defined
- Appropriate sampling procedures were used
- The questionnaire did not include biased survey questions

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- An appropriate test and control stimuli were used when testing a causal proposition
- Data were analyzed with the appropriate statistical techniques

Many surveys done for litigation never become part of the legal record, as cases settle or otherwise end without the disclosure of the survey evidence. However, in many cases survey evidence ultimately becomes part of the written record. NERA recently conducted a review of all cases with survey evidence submitted by an expert for 2008 and 2009 opinions.⁴ The review resulted in identifying 87 cases—44 in 2008 and 43 in 2009—in which surveys are mentioned in the decision. This review revealed a number of interesting trends in the challenges made to survey evidence in recent cases and how courts seem to view these challenges.

What Types of Litigation Use Surveys

During the period of our review, the majority of cases using surveys were intellectual property cases, as shown in Table 1. In our review, 61 of the 87 cases (or 70 percent) were in intellectual property. As shown in Figure 1, these 61 intellectual property cases involved the following specific types: 26 were trademark infringement cases, 11 were secondary meaning, eight surveys were submitted in trade dress matters, and eight for trademark application cases. There were a small number of surveys submitted as evidence in dilution, patent, copyright, and passing-off cases.

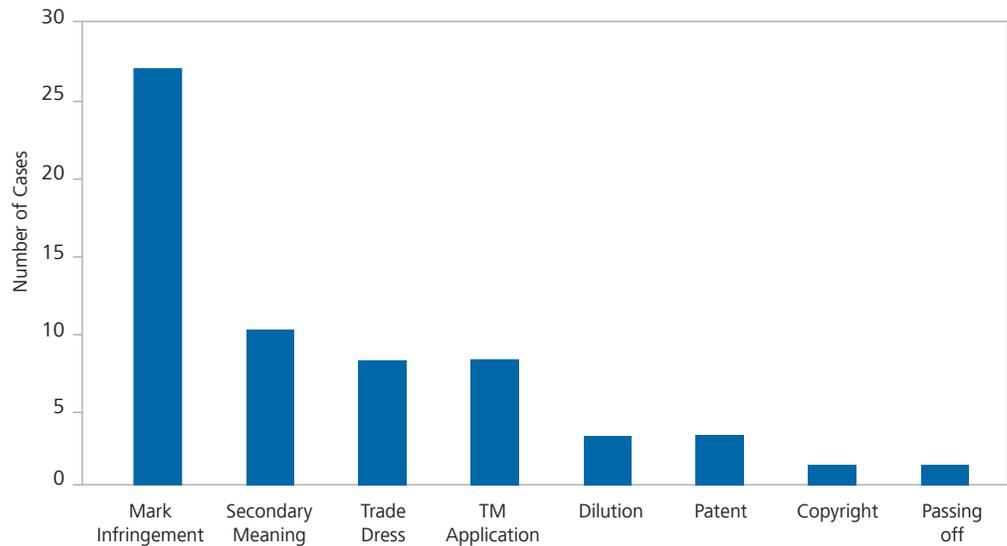
Table 1. **Number of Cases Reporting Surveys in 2008 and 2009**

Area	2008	2009	Total
Intellectual property	32	29	61
False advertising/unfair competition	4	10	14
Labor	4	3	7
Class certification	2	0	2
Antitrust	1	0	1
Health standards	1	0	1
Change of venue	0	1	1
Grand Total	44	43	87

It is not surprising that intellectual property cases represent the largest proportion of the total cases relying on survey evidence. The key legal issues in many intellectual property cases involve establishing consumer perceptions or understandings of particular products, their marks, or product advertising. Without direct evidence of consumer behavior (consumer complaints, misplaced calls to a competitor, etc.), proving or disproving allegations in an intellectual property case can be difficult. Moreover, the frequency with which surveys are submitted in intellectual property cases means that there are more established precedents for how surveys should be designed, conducted, and critiqued.

Beyond intellectual property cases involving trademarks, trade dress, and other types as shown in Figure 1, our review also revealed 14 cases involving evidence in false advertising/unfair competition cases. In this analysis, we have separated false advertising from other areas of intellectual property, as these cases often involve a slightly different range of complaints, including claims of unfair competition brought by competitors or class action-type allegations

Figure 1. **Number of Cases by Sub-area within Intellectual Property for 2008–2009**



brought by consumers.⁵ Of the 14 false advertising cases, nine were claimed as unfair competition cases, i.e., with the parties involved being two corporate or business entities. The remaining five were consumer cases; three were consumer class actions and two were cases filed by the Federal Trade Commission (FTC).

Surveys are common in false advertising cases as they can provide two types of key evidence. In cases in which the advertising is literally false, surveys often provide evidence on the materiality of the claim; in cases in which the claim is not literally false, surveys can provide evidence as to consumers' perceptions of the claims.

While intellectual property and false advertising/unfair competition cases dominate the record in which surveys are mentioned, survey evidence is represented in a few other key areas. Surveys are also used as evidence in labor and employment cases, and our research revealed that there were seven cases using surveys in this area. The surveys in labor cases generally focus on quantifying worker behaviors, such as establishing the rate at which meals and breaks were taken, determining the extent to which a worker's activities fell into an exempt category, or evaluating the frequency of uncompensated overtime. Specifically in our review, the seven labor cases consisted of two cases related to alleged meal and break violations, two related to exempt/non-exempt status, and three cases related to other issues.

Finally, three cases were published in which surveys were used to address class certification issues (unrelated to consumer products), one addressing antitrust concerns, one regarding health standards, and one regarding change of venue.

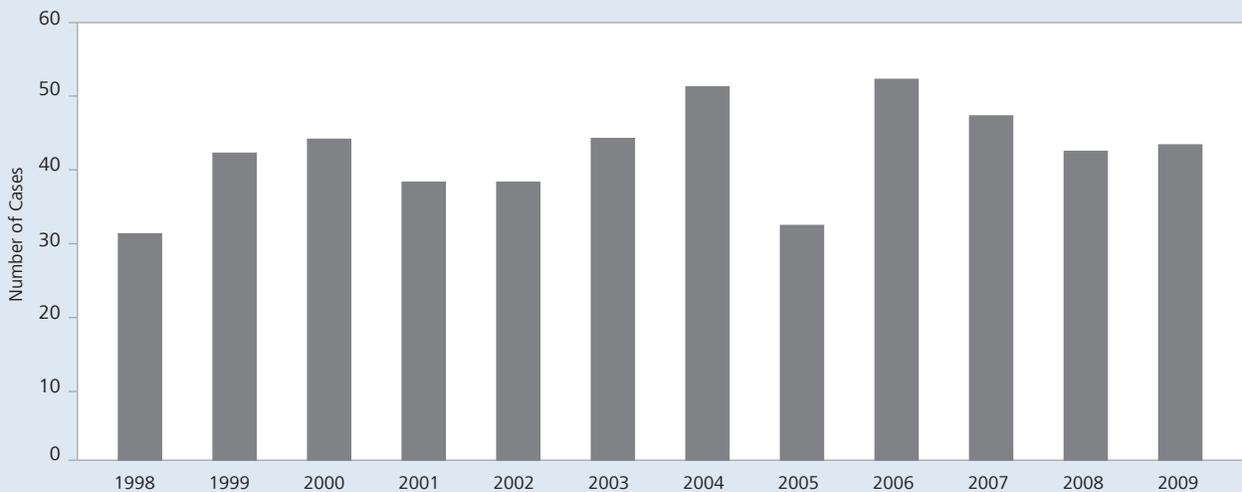
Historical Trends in Use of Surveys in Intellectual Property from 1998–2009

As noted earlier, our analysis found that in 2008-2009, intellectual property and false advertising cases made up the large majority of decisions in which surveys are mentioned. During this period, there were 36 such cases in 2008 (including four false advertising cases) and 38 such cases in 2009 (including 10 false advertising cases). Gerald L. Ford of Ford Bubala & Associates has been conducting a summary of the intellectual property cases for the International Trademark Association (INTA) since 1998.* We constructed a count of the intellectual property cases reported by Mr. Ford for each year and compared it to our analysis for 2008 and 2009.**

The results show that a total of 483 cases have been published mentioning survey evidence during the period from 1998 through 2009. The number of published cases ranges from approximately 30 to 50 per year with an average of 40 cases per year. As shown below in Figure 2, there is no discernable pattern that the use of surveys is either increasing or decreasing over time.

Between 1998 and 2009, surveys used as evidence for trademark and trade dress likelihood of confusion cases represent the largest number (241 out of 483). The next most common type of survey done is for cases related to secondary meaning and genericness (141 of the 483).

Figure 2. **Count of Cases by Year**



* Ford, Gerald L. (2010) "Intellectual Property Surveys Annual Cumulative Update 1998-2009."

** For cases reported by Mr. Ford as having multiple causes of action, we selected the code or case type (trademark, dilution, false advertising, etc.) that was primarily addressed by the survey evidence.

Trends in Challenges and Court Findings on Surveys

Court opinions rarely have a detailed summary of all the issues which may have been raised about a survey offered as evidence, but they frequently do include the major points made by either side or the judge in the case. We reviewed the decisions in 2008 and 2009 for any information on challenges regarding the submitted survey from either a designated rebuttal expert or from opposing counsel. Additionally, we reviewed the court's response to these challenges or any determination the court made regarding the admissibility or value of the survey evidence. Only three of the cases in our review contained no specific comments from opposing counsel or the court on the validity of the survey. The remaining 84 cases had at least some description of the challenges made to the survey.

In a number of decisions from the 2008-2009 review, the survey evidence was seen as unhelpful at best and misleading and irrelevant at worst because it did not meet the court’s interpretation of what legal issue should be tested and how this testing should have been undertaken.

The remainder of this paper discusses the major challenges made to surveys during the period from 2008 to 2009. Obviously, the effectiveness of a challenge depends to some extent on other aspects of the case and the overall technical quality of the survey. Given this consideration, the observations below must be seen as generalized descriptions removed from the case specifics. But, while these may be generalizations, some interesting patterns do emerge and can provide insight as to the current issues and essential frameworks for surveys used as evidence in litigation.

The types of challenges put to survey evidence are largely related to the case area and thus will be discussed as such. It should be noted that in almost all of the areas reviewed (intellectual property, false advertising, labor, etc.), there was at least one survey which was determined to be so far from meeting the scientific standards for acceptable research that the court determined that the classification as “survey” was incorrect. These “surveys” were excluded by the courts and will not be discussed in any detail below. In general, these excluded pieces of research included survey pilot tests, evidence based on very small sample sizes (less than 50), surveys based on interviews with hand-picked individuals, or prior market research completed for matters other than litigation.

Challenges to Surveys in Intellectual Property Cases

In the intellectual property opinions we reviewed, surveys were challenged on grounds that the evidence did not address the legal issues in the case, as well as on technical design and implementation issues. A challenge that the survey, as designed, did not address the legal issue at hand had a substantial impact on the court’s determination of the admissibility of and weight afforded to the evidence. It may seem surprising that a number of surveys in this review were excluded or given no weight because the research did not test the appropriate legal issue, but while the concepts of brand awareness, confusion, and dilution, etc. are somewhat clear and well established in the law, the best and most accurate manner by which to measure these concepts is less well defined in survey and consumer research. Moreover, while survey researchers can rely somewhat on legal precedent and survey methods that have been accepted in other cases, the specifics of each product or mark being tested often preclude a simple carbon-copy approach. Thus, crafting the appropriate instrument to test the pertinent legal matters is one of the complex aspects of designing surveys for litigation and is an area in which effective legal challenges can be made.

In a number of decisions from the 2008-2009 review, the survey evidence was seen as unhelpful at best and misleading and irrelevant at worst because it did not meet the court’s interpretation of what legal issue should be tested and how this testing should have been undertaken. In these opinions, the technical merits of the survey design were often not at issue (or were not the key issue). Rather, the survey expert had operationalized the legal concepts in a way the court found to be unacceptable. For example, in *Starbucks Corp. v.*

Wolfe's Borough Coffee,⁶ the expert designed a test attempting to address both issues of confusion and dilution. The survey included relevant consumers, had a large sample size, used probability sampling to locate potential respondents, and was generally designed in accordance with standard survey principles:⁷

"His testimony explained the results of his survey, which concluded in part that "[t]he number one association of the name 'Charbucks' in the minds of consumers is with the brand 'Starbucks' . . . [and that] [t]he name 'Charbucks' creates many negative associations in the mind of the consumer when it comes to describing coffee. [Expert] testified that the surveyed sample of persons were "designed to be representative of the United States" and that he believed a telephone survey of 600 adults in the United States would "do a good job of random sampling." Starbucks reasons that it has shown dilution by tarnishment because, pursuant to its survey, (1) 30.5% of persons surveyed "immediately associated 'Charbucks' with 'Starbucks'"; and (2) 62% of those surveyed who associated "Charbucks" with "Starbucks" "indicated that they would have a negative impression" of a "coffee named 'Charbucks.'"

Despite the seeming reliability of the survey, the court determined that the survey did not provide reliable evidence addressing either the confusion or the dilution claim:

"To the extent Starbucks relies on the survey, a mere association between "Charbucks" and "Starbucks," coupled with a negative impression of the name "Charbucks," is insufficient to establish a likelihood of dilution by tarnishment. That a consumer may associate a negative sounding junior mark with a famous mark says little of whether the consumer views the junior mark as harming the reputation of the famous mark. The more relevant question, for purposes of tarnishment, would have been how a hypothetical coffee named either "Mister Charbucks" or "Charbucks Blend" would affect the positive impressions about the coffee sold by Starbucks."

In this case, the court determined that "association" was not sufficient to prove confusion and a negative association with the alleged infringer was not enough to prove dilution.⁸ Therefore, the survey did not address the legal issue at hand and did not provide relevant evidence to support Starbucks' claims that Charbucks would create confusion for consumers and would ultimately dilute their brand.

Other surveys in our review that were dismissed or determined to be irrelevant by the courts for apparently not addressing the legal issue in the case include:

- A survey demonstrating the brand name at issue is not the *most* common generic name deemed insufficient to demonstrate brand has secondary meaning⁹
- A survey failing to establish whether the trademark at issue was associated with the brand and service or simply with the product category deemed insufficient to demonstrate secondary meaning¹⁰
- A survey showing general brand awareness deemed insufficient to demonstrate specific awareness of the mark at issue¹¹
- A survey showing likelihood of confusion cannot be used to prove claims of "passing off"¹²
- A patent survey demonstrating use of the product argued to be insufficient to prove infringing use of specific feature within the product¹³
- A survey not distinguishing between brand name and domain name determined to be insufficient to appeal trademark registration denial¹⁴

These cases demonstrate that even surveys conducted by experts, which were designed to adhere to general standards and used accepted methods, can be excluded if the specific legal aspects of the case have not been adequately addressed.

In addition to whether the survey adequately addressed the legal issues in the case, other criticisms we found in 2008 and 2009 will be familiar to any practitioner of Lanham Act cases. These include criticisms of:

- The population surveyed (were the relevant consumers studied?)
- The control stimuli used
- The extrapolation of results from specific stimuli to larger array of products
- Biased questions
- The replication of marketplace conditions

The last criticism, inadequately replicating marketplace conditions, can be grounds for exclusion if what was shown to respondents is so far from the actual product or the way in which the product would be seen that the test is deemed irrelevant. For example in *Componentone, L.L.C. v. Componentart, Inc.*:

“[The] Court will focus on [Expert’s] choice of stimuli. The survey’s stimuli did not replicate the parties’ marks as they would be encountered in any of these situations in which a potential purchaser would encounter the parties’ products or services. Instead of using screen shots of the parties’ websites, common Google searches potential purchasers would use, or ComponentSource or other resellers’ product listings, [Expert] presented the parties’ marks on a plain background in large block letters followed by descriptions of the companies [Expert] gathered from ComponentArt’s website and a listing of sponsors (not vendors) for a trade show. Since the survey failed to replicate market conditions, the Court affords it extremely minimal weight as circumstantial evidence of actual confusion. The survey, therefore, cannot serve as a meaningful measure of either source or initial interest confusion under the fourth or sixth prong of the Lapp calculus.”¹⁵

Thus, in this case, the court determined that the survey results provided no useful information as to the likelihood of confusion as the marks shown were not accurate representations of how these marks would be experienced by consumers in the real world.

In contrast, attempts to critique surveys for not replicating the purchase *process* are far less successful in our review of cases. In general, the courts seem to indicate that replicating the total shopping experience would be unduly burdensome and, for some product categories, impossible. For example, in *Visa Int’l Service Ass’n v. JSL Corp.*, defendants argued that the process by which respondents would come to view the allegedly infringing mark (“evisa”) was not replicated in the study. The court disagreed and stated that a replication of the process was unnecessary:

“Moreover, Defendant has provided no authority for the proposition that a scientifically valid survey must replicate the process by which a person will come into contact with the relevant mark. In contrast, Plaintiff presented evidence that accepted scientific methods require only that consumers are shown the mark at issue in the context in which it appears in the marketplace.”¹⁶

Particular attention must be given to how the strategic issues of the case are developed in concert with the survey expert and how the survey expert understands the parameters of the evidence needed.

Similarly in *Re/Max Int'l, Inc. v. Trendsetter Realty*, survey respondents were shown a series of real estate “For Sale” signs. The defendants in this case argued that the survey did not replicate the actual purchase process, which would have allowed potential buyers to review the sign up close and for a longer period of time and would more than likely have involved a broker who would have informed the potential buyer about the correct identity of the brokerage listing the property. The court disagreed, in particular arguing that only those who knew they were confused would ask their brokers:

“This argument does not apply to cases in which clients—who do not know they are confused as to the relationship between Trend Setter and RE/MAX—do not ask and the agents—who do not know of the client’s confusion—do not provide the information. And this argument does not address initial-interest confusion. Even if customer confusion is alleviated at the point of sale, the initial confusion generated by similar yard signs advertising Trend Setter listings is significant and should not be discounted in the likelihood of confusion analysis.”¹⁷

A review of challenges made to surveys in intellectual property cases between 2008 and 2009 demonstrates that when a compelling case is made that the concepts tested do not address the key legal issues in the case, the survey is likely to be excluded or deemed irrelevant by the court. In some cases, how best to test confusion, secondary meaning, fame, or dilution is relatively straightforward but in many circumstances, given the particular product, market for the product, or additional case issues, the “correct” test requires careful consideration. Thus, particular attention must be given to how the strategic issues of the case are developed in concert with the survey expert and how the survey expert understands the parameters of the evidence needed.

Challenges to Surveys in False Advertising Cases

Given that false advertising cases are often filed under Lanham Act causes of action, these opinions in our review share many of the same challenges that were put to the intellectual property cases. However, some challenges diverge from other intellectual property cases. One type of key challenge is the extent to which a consumer’s attention has been unduly directed to the advertising claim at issue by the survey methods used or whether the consumer’s attention has been focused on an inappropriate portion of the claim. Such challenges have to do with whether the survey method itself encourages greater observation of the allegedly misleading materials than would occur if the consumer actually encountered the product in the marketplace or whether what materials were tested actually represent the full portfolio of the advertising at issue.¹⁸ This presents another research difficulty for the survey expert—balancing the need to have the respondent attend to the specific materials in a meaningful way without biasing or influencing the consumer’s interpretation of the meaning of those materials.

While at times a criticism that the survey design led respondents to overly focus or interpret the advertising in a specific and desired manner is persuasive to the court, there is no clear finding from this review that there is only one way in which to construct questions testing consumer perceptions of allegedly false advertising materials. Specifically, in a number of cases, the survey critique revolved around whether the evidence was gathered using an open or closed-ended question. In these cases, the allegation was often that the closed-ended question “led” the respondent to a particular interpretation of the materials. Yet our review indicates that at least some courts do not agree that the only manner in which to ask respondents about the claim is to use an open-ended question. In fact, in *LG Electronics U.S.A., Inc. v. Whirlpool Corp.* the court asserted:

“To begin with, Whirlpool contends that open-ended questions are the “most probative evidence of any messages communicated by advertising,” and thus [Expert] erred in failing to base his opinion on responses to these questions. (Id. at 6.) The precedent cited by Whirlpool, however, does not support uncritical acceptance of answers to open-ended questions. Although [many] courts prefer open-ended questions on the grounds that they tend to be less leading, the value of any open-or closed-ended question depends on the information it is intended to elicit. Open-ended questions are more appropriate when the survey is attempting to gauge what comes first to a respondent’s mind, but closed-ended questions are suitable for assessing choices between well-identified options or obtaining ratings on a clear set of alternatives. The differences between the test and the control may affect the weight that a jury attributes to the study, but they are insufficient to find the [Expert] Study inadmissible.”¹⁹

Thus, in this opinion, critiques of direct questions about the advertising claim at issue may have affected the weight given to the survey evidence, but these arguments did not determine the evidence’s overall admissibility.²⁰

In our review, the courts seem less persuaded by arguments that the survey has not proven the materiality of the allegedly false or misleading materials.²¹ In some cases, it appears that the survey did not need to address materiality because materiality could be proven by other means. Indeed, in one case, survey evidence of no materiality was not sufficient to demonstrate that the allegedly false claims were immaterial. In *Rexall Sundown, Inc. v. Perrigo Co.*, the court explained:

“Although the survey concluded that consumers who saw the claim were not statistically significantly more likely to express interest in purchasing Osteo Bi-Flex, the survey’s inability to find evidence that any confusion influenced the purchasing decision does not require a finding of immateriality as a matter of law. In other words, the fact that a portion of the survey may undermine Perrigo’s position regarding materiality does not mean that materiality cannot be proven by other means. Unlike on the issue of consumer confusion, materiality need not be proven by extrinsic evidence such as consumer surveys.”²²

False advertising cases, like other intellectual property cases in this review, are often subject to technical challenges, but in these cases a key issue is the way in which consumers are shown and asked specifically about the allegedly misleading materials.

Challenges to Surveys Used in Other Types of Litigation

Surveys were discussed in the opinions for other case types. The challenges raised in these surveys were somewhat different than the critiques put forward in intellectual property and false advertising surveys. In the labor cases included in our review, the challenges to survey evidence focused on the representativeness of the pool of respondents and the potential for bias introduced by surveying individuals who may be aware of their stake in the questions being asked.

Additional issues in the labor decisions we reviewed were raised regarding whether the questions being asked or the behaviors being evaluated were so complex that respondents would have difficulty answering with accuracy. Generally, meal-and-break and overtime questionnaires ask about repeated yet somewhat mundane or routinized behaviors, which sometimes occurred over a number of years. In the cases reviewed, courts were not definitive on this issue. In some circumstances the questions asked were determined to be imprecise and therefore unable to yield reliable evidence.²³ In other cases, the survey data gathered was seen as sufficient given the lack of alternative evidence on the behaviors in question.²⁴

In the remaining small number of opinions we reviewed, the survey evidence was challenged on a number of technical issues and was additionally challenged for not meeting the general standards of survey research. Without a larger sample to review, it is difficult to know if survey evidence in class certification, antitrust, and other areas have key issues beyond the basic research standards. Future reviews are likely to allow for a better assessment of survey evidence in these areas.

Summary

During 2008-2009, a total of 87 surveys submitted as evidence were discussed in published opinions of various case types. Of these, the large majority were surveys submitted in intellectual property cases (70 percent) and false advertising (16 percent). A smaller number of cases in labor, class certification, antitrust, and other areas also discussed surveys in the opinions.

In our review of survey evidence from 2008–2009, the key challenges varied somewhat by the type of case. While many of the critiques focused on technical issues, these were seen generally by the courts as going to the weight of the evidence as opposed to requiring the exclusion of the survey evidence in its entirety. In intellectual property cases, survey evidence that appeared to have failed to address the legal issues in the case was often excluded or given no weight by the courts. In the false advertising cases we reviewed, a key issue seems to be how consumers were directed to review the relevant materials. While this is an important issue in the reviewed opinions, there was no clear determination by the courts as to preferred technical survey methods (open- versus closed-ended questions). In labor cases, the population and whether a survey method should even be used seemed to be the key issues in the decisions reviewed. While the types of criticisms were varied and no broad generalizations can be made about how best to design a survey for particular case types, this review suggests the importance of a survey expert who clearly understands the legal issues involved in the case and who can apply not only the general appropriate standards but also develop the most appropriate conceptualization and design for the legal issues of the case.

Notes

- * Ms. Butler is a Vice President and Dr. Van Liere is a Senior Vice President with NERA Economic Consulting. The authors thank Arie Singer for her valuable research assistance.
- ¹ See McCarthy, J. Thomas (2006) *McCarthy on Trademarks and Unfair Competition* 4th Edition, § 32:158, "Evidence of such mental associations may consist of evidence as to the quantity and quality of advertising coverage, testimony of dealers and consumers, testimony of experts in the field, or merely an appeal to the subjective impressions of the trier of fact. However, a more scientific means of evidencing mental associations is to introduce the actual responses of a group of people who are typical of the target group whose perceptions are at issue in a case. Survey evidence is often introduced for this purpose and a large body of legal literature has developed around the subject."
- ² See, S. Diamond (2000), "Reference Guide on Survey Research," in Reference Manual on Scientific Evidence, pp. 233-234.
- ³ For intellectual property cases, *McCarthy on Trademarks and Unfair Competition* is typically cited. Other relied upon treatises include Federal Judicial Center (2004); *Manual for Complex Litigation*, Fourth, Federal Judicial Center at: [http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/\\$file/mcl4.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf); "Reference Guide on Survey Research" in the Reference Manual on Scientific Evidence Second Edition, Federal Judicial Center at: [http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/\\$file/sciman00.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/$file/sciman00.pdf).
- ⁴ NERA researchers searched the Westlaw database of published and unpublished opinions for survey evidence using a variety of keywords and search terms to identify relevant cases from 2008 and 2009.
- ⁵ See McCarthy, § 27:1-3.
- ⁶ *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 2005 US Dist. LEXIS 35578, *14-*15 (S.D.N.Y. 2005).
- ⁷ Additionally, the survey was designed by an expert accepted by the court, used an outside interviewing firm to conduct the calls, and used a generally accepted format.
- ⁸ In both *Bass Pro Trademarks, L.L.C. v. Sportsman's Warehouse, Inc.* and in *Univ. of Alabama Bd. of Trustees v. New Life Art Inc.*, the surveys were deemed insufficient as the courts indicated the results simply demonstrated an assumed association in consumers' minds between the two sources and were insufficient as evidence of a likelihood of actual confusion.
- ⁹ *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, Not Reported in F.Supp.2d, 2008 WL 1913163, 86 U.S.P.Q.2d 1344, , C.D.Cal., March 27, 2008(No. SACV 06-0827 AG (RNBx)).
- ¹⁰ *Nextel Communications, Inc. v. Motorola, Inc.*, 2006 & 2009 T.T.A.B. LEXIS 443.
- ¹¹ *Lumber Liquidators, Inc. v. Stone Mountain Carpet Mills, Inc.* 2009 WL 2013599.doc.
- ¹² *Georgia-Pacific Consumer Product LP v. Myers Supply, Inc.*, 2009 U.S. Dist. LEXIS 63774 (W.D. Ark. 2009).
- ¹³ *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 2009 WL 2950226, 92 U.S.P.Q.2d 1340, , C.A.Fed. (Ohio), September 16, 2009(Nos. 2008-1479, 2008-1517.).
- ¹⁴ In *re Hotels.com, L.P.*, 573 F.3d 1300, 2009 WL 2183269, 91 U.S.P.Q.2d 1532, , C.A.Fed., July 23, 2009 (No. 2008-1429.No. 78/277,681.).
- ¹⁵ *Componentone, L.L.C. v. Componentart, Inc.*, 2008 U.S. Dist. LEXIS 87066 (W.D. Pa. 2008).
- ¹⁶ *Visa Int'l Service Ass'n v. JSL Corp.*, 2006 U.S. Dist. LEXIS 81923 (D. Nev. 2006).
- ¹⁷ *Re/Max Int'l, Inc. v. Trendsetter Realty, LLC*, 2009 U.S. Dist. LEXIS 79356 (S.D. Tex. 2009).
- ¹⁸ As an example, see *F.T.C. v. National Urological Group*, Not Reported in F.Supp.2d, 2008 WL 2414317, 2008-1 Trade Cases P 76,183, N.D.Ga., June 04, 2008 (Civil Action No. 1:04-CV-3294-CAP.) in which the court asserted, "Second, the court concludes that Dr. Richey failed to survey the impact of any of the advertising claims at issue in this case, and thus failed to establish that these claims were immaterial. Rather than testing the claims that serve as the basis for the complaint, the study tested small portions of these claims, misstatements of these claims, or claims wholly irrelevant to the case. What survey participants thought of the representations in the survey is irrelevant, as this case concerns only the claims set forth in the complaint."
- ¹⁹ *Whirlpool Properties, Inc. v. LG Electronics U.S.A., Inc.*, 2005 & 2006 W.D. Mich. 2005 & 2006.
- ²⁰ In *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 547 F.Supp.2d 491, 2008 WL 1838719, 2008-1 Trade Cases P 76,159, , D.Md., April 22, 2008 (Civil Case No. RDB-08-210), the court dismissed opposing expert's criticism that the survey did not rely sufficiently on open-ended questions.
- ²¹ In this review, this applies to cases in which the advertising was not shown to be literally false.
- ²² *Rexall Sundown, Inc. v. Perrigo Co.*, 651 F. Supp. 2d 9, 36-37, 39 (E.D.N.Y. 2009).
- ²³ *OwnerOperator Independent Drivers Ass'n, Inc. v. Supervalu, Inc.*, 2009 WL 799614.doc.
- ²⁴ "The questionnaire used here is not particularly complicated. It asks employees to identify the work they did during a typical shift. While not all parts of the questionnaire are precise, precision is sometimes not possible in an FLSA case when there are no contemporaneous records showing what work was performed." *Fast v. Applebee's Intern., Inc.*, Slip Copy, 2009 WL 2391775, 80 Fed. R. Evid. Serv. 230, W.D.Mo., August 03, 2009 (No. 06-4146-CV-C-NKL).

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