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Surveys in Lanham Act Matters

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As recent as fifty years ago, the question of whether consumer surveys were considered acceptable evidence for litigation purposes was still unsettled. Early doubts about the admissibility of surveys centered around the concern over a surveys' use of sampling and their status as hearsay evidence. However, in 1975, the Federal Rules of Evidence clarified the criteria for the admissibility of surveys and ever since both federal and state courts have accepted survey evidence on a variety of legal issues. Over time, through case law, different survey formats have been developed for specific legal claims, but even with established survey formats to serve as guidance, it

takes a concerted effort to develop an admissible, defensible survey.

Applications of Surveys in Lanham Act Matters

Surveys can be regularly used in different stages of a case: from as early as assisting in preliminary injunction, to support a motion for summary judgment, and during trial. Surveys provide courts with key insights into many different types of legal claims and defenses related to trademark infringement such as likelihood of confusion, secondary meaning, dilution, and genericness. For example, surveys in the likelihood of confusion cases can determine whether consumers are likely to be confused about the source of a product at the point-of-sale or in a post-sale environment. To measure such confusion, there are two widely accepted survey formats that have been established through case law. One is typically referred to as the Eveready format, while the other format is called Squirt. The Eveready survey format was first used in *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 188 U.S.P.Q. 623 (7th Cir. 1976) while the Squirt format can be traced to *SquirtCo. v. Seven-Up Co.*, 628 F.2d 1086, 207 U.S.P.Q. 897 (8th Cir. 1980).

Consumer surveys are also used in false advertising matters where the advertising is not literally false but alleged to be misleading. In these matters, plaintiffs can benefit from extrinsic evidence showing that the advertising in question leaves an impression on the consumer that conflicts with reality. Thus, the key objective in a false advertising survey is to determine whether the advertisement at issue conveys a misleading message to potential consumers of the goods and services at issue.

Surveys are also routinely used in class action matters. Consumer surveys can provide insight on the nature and similarity of claims between plaintiffs to support motions for or against class certification.

Critical Issues to Consider in the Design of Consumer Surveys

Consumer surveys that are introduced into evidence must be carefully designed to be considered probative.

Surveys that fail to follow proper protocols, outlined in the Manual for Complex Litigation, risk criticism which may impact the weight or admissibility given to the survey.¹

The first aspect of a survey that requires careful consideration is the survey's population. The survey population needs to be properly chosen and defined. In Lanham Act cases this is typically referred to as the proper universe. Defining the proper universe is crucial because there may be systematic differences in the responses of members of the population and nonmembers.² If the wrong universe is surveyed, the data itself may be irrelevant. For example, consider a survey on the source of high-end women's shoes. You would likely get different answers about the source of a high-end women's shoe if you asked male construction workers instead of typical female consumers, and as a result, the court may deem the opinions of male construction workers irrelevant if they were included in the sample. The proper universe for surveys depends directly on the legal claim that is disputed, as it typically dictates which group of consumer opinions are relevant to the particular issue. For example, in a forward confusion survey, the proper universe are individuals who are likely to purchase the junior user's goods or services at issue because they are the group who are likely to encounter the goods or services in the marketplace and potentially believe the junior user is made by or put out by the senior user.

In addition to choosing the proper universe, the sample needs to be representative of the population of consumers within the defined universe (*e.g.*, on factors such as age and gender). If the sample is not representative of the target population, the results of the survey may not accurately reflect the opinions of consumers in the real world. To illustrate, if the demographic breakdown for potential customers of a particular product is two-thirds female and one-third male, the survey sample should approximate this gender split because there could be a tendency for males to be more confused in the study. If the survey expert allowed more males than females in the sample, confusion would appear higher than levels than you would expect to see in the overall population. To obtain a representative sample, survey experts rely on quotas or other tools to ensure the sample matches the target population. One tool survey experts may rely upon to obtain a representative sample for online surveys is click-balancing. Click-balancing ensures that the group of potential survey respondents who enter the survey screener (not to be confused with those who qualify or complete the survey) is representative of the U.S. Census based on various demographic variables. Because respondents who enter the survey screener are representative of the U.S. population as a whole, their individual responses to qualification screening questions mean that the final

survey sample is representative of the target population on the screened dimensions.³

Another aspect of the survey that requires careful consideration is the wording in the survey instrument. Specifically, survey questions should be written so that they are clear, precise, and unbiased. Although this may sound like a relatively straightforward task, phrasing questions to reach that goal is often difficult. In particular, it is important that survey experts craft survey questions with the respondent in mind—ensuring the use of terminology that is uniformly understood by respondents. Also, questions need to be precisely drafted to ensure that survey answers are relevant to the legal claim.

In addition, it is crucial that the data gathered is reliable, valid, and accurately reported. Surveys can be conducted through in-person interviews, telephone interviews, mail questionnaires, or Internet surveys. Today, many surveys for litigation are conducted online without any interviewer involvement. Data accuracy is less of an issue for Internet surveys as long as the survey has been accurately programmed and thoroughly tested. However, there are still instances where interviewers are necessary, such as surveys that require phone interviews or in-person interviews in a mall intercept study. In these instances, human error can occur when collecting or recording data so it is imperative that the survey expert create a clear, precise, easy to follow a methodology for the interviewer and ensure all interviewers have been trained on the proper protocol for conducting interviews prior to data collection. It is also important that the interview is conducted by someone who is “blind” to the end client and the research hypotheses to ensure objectivity as data are collected.

Finally, survey experts need to make sure that data are analyzed in accordance with accepted statistical principles. For example, the sample size should be large enough so that inferences can be made about the total population. Sometimes it is difficult to obtain a large enough sample to draw inferences (*e.g.*, in scenarios where the overall population is small or if the target respondent is difficult to reach). In these instances, survey experts should consider these obstacles before tackling a project and plan ahead to ensure adequate time in the field to obtain as large of a sample as possible.

The Survey Process

Exploratory Research

Before starting the survey design process, exploratory research is often conducted. One reason to conduct

exploratory is to better understand who the proper universe may be. This is especially true when the industry is specialized, and it is difficult to determine who a potential purchaser may be in a situation. For example, consider a situation where you need to speak to the decisionmaker who decides what drill bit is purchased for an oil drilling site: Should you speak to the driller, the site engineer, the site supervisor, or someone in a purchasing department who is at a higher level? Exploratory research can help clarify who the expert should speak with to ensure the proper universe is defined for the survey.

Exploratory research can also help an expert understand the relevant questions to ask respondents, as well as refine survey instrument language. Although some legal claims have prescribed survey formats, others (*e.g.*, false advertising and challenges to class action certification) do not have a “standard” format. Therefore, exploratory research can help inform the questions to ask and ensure the language is appropriate for the universe.

Finally, although exploratory research relies on small samples, it can give you some insight about the direction of the results if you were to go ahead and conduct a full market research study. In situations where the exploratory sample is large enough and the results show no sign of a favorable outcome, it may be a good indicator that moving forward with a full study is not worthwhile.

Survey Design

Once exploratory research is complete, the survey expert can focus on survey design. One of the most critical considerations an expert is tasked with is figuring out how they intend to account for survey noise such as guessing. Typically, to accomplish this goal, experts build a control into the survey design. The control is often in the form of an alternative stimulus which is shown to a portion of the overall sample. The other portion of the sample is shown the stimulus as it exists in the marketplace (often referred to as a Test stimulus).

When developing a survey, a survey expert should attempt to create realistic stimuli and attempt to replicate real marketplace conditions. For example, consider a likelihood of confusion claim where the alleged infringing product is sold mostly online. In this scenario, a survey expert should create a stimulus that mimics the online shopping experience. This might involve exposing the respondent to an online product page that simulates the typical shopping experience of an actual consumer. It is good practice for a survey expert to work with the end client to make sure that the stimuli and survey context are realistic.

Formal Pretesting

Depending on the complexity of the industry or legal issue, a formal pretest or pilot may be run to confirm that the proposed survey questions that were formed during exploratory research are clear and provide the types of answers that are helpful in understanding the claim at issue. Once this is completed, the data collection process begins.

Data Analysis

Once data collection is complete, the survey expert analyzes the data. Experts need to ensure that data are analyzed in accordance with “accepted statistical principles.” The sample size should be large enough so that the survey expert can make realistic inferences about the total population. Further, the survey expert should be reasonable when interpreting the data. This means making realistic interpretations about close-ended data, as well as coding open-ended answers properly and in an unbiased manner.

Examples of Lanham Act Matters Where Surveys Have Been Used Successfully

Next, four cases are covered which illustrate scenarios where surveys were introduced into evidence and successfully bolstered a client’s position. These cases were selected to highlight the value of surveys for supporting legal claims and defenses related to likelihood of confusion in both a post-sale and pre-sale environment, secondary meaning, and dilution.

***Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012)**

A likelihood of confusion survey was commissioned by counsel for fashion designer brand Christian Louboutin (CL) to measure the likelihood of post-sale confusion caused by the use of a red sole on an Yves Saint Laurent (YSL) shoe. Post-sale confusion focuses on confusion of potential customers who see the product bearing an allegedly confusing trademark while in use, rather than on confusion amongst potential customers at the point-of-sale.

To begin with a bit of background, CL began using a red lacquered sole for his women’s footwear after painting red nail polish on the sole of one of his prototypes on a whim. In 2008, CL was awarded a trademark registration

for the red sole. A few years later, YSL came out with a line of monochromatic shoes in various colors—such as purple, green, yellow, and red—that maintained the same color on the shoe upper as well as the sole. CL took issue with the YSL shoe that was red all over and filed suit against YSL alleging that the monochromatic red shoe put out by YSL infringed on their trademark for a lacquered red outsole. CL commissioned a survey to measure the extent to which potential customers of CL or YSL, who see a woman wearing YSL shoes with red soles, would believe they are from CL.

The relevant universe for this post-sale confusion survey was past and potential purchasers of women's shoes priced at \$500 or more. The survey took place over the Internet by sending email invitations to women living in high-income households and the survey followed the widely accepted Eveready format. In such a situation, the appropriate way to measure the likelihood of confusion is to show the junior mark (YSL) and measure the degree to which respondents believe the stimulus is put out by, or affiliated with, the senior user (CL).

Test Group respondents viewed a photograph of a woman walking in the YSL monochromatic red shoe that maintained the same red color on the shoe upper as well as the sole in a manner they might see in a real-world post-sale environment. The Control Group viewed the same shoe stimulus except that the shoe featured a traditional black sole.

The key survey question in the survey asked respondents "Who or what company do you believe makes or puts out these shoes?" In the Test Group, 49.6% of respondents answered, "Louboutin" while 2.5% of Control Group respondents provided this same answer. The key figure in survey findings that experts rely on when forming an opinion is the net result, which is the difference between the result of the Test Group and the result of the Control Group. Here, after deducting the Control Group percentage from the Test Group percentage, we find that the net confusion is 47.1%. When Test Group respondents were asked why they identified "Louboutin," 96.0% of those who identified "Louboutin" referenced the red sole.

The U.S. District Court for the Southern District of New York ruled against CL's motion for a preliminary injunction without discussing the survey evidence in the case. The U.S. Court of Appeals for the Second Circuit, however, disagreed with the district court's opinion and concluded that CL's red outsole mark did in fact merit protection based, in part, by the overwhelming references to the red sole by survey respondents. The appellate court, however, stated that CL's protection only applied to shoes where the red sole *contrasted* with the upper portion of the shoe. In other words, shoes that use the same red color on the outsole and upper were not seen as infringing. Ultimately, the court held that YSL was not

infringing for their monochromatic red-soled shoe, but upheld CL's trade dress for contrasting red soles.

Sara Lee Corp. v. Sycamore Family Bakery Inc., and Leland Sycamore, No. 2:09 CV 523DAK, 2009 WL 3617564

The above example illustrated an example when post-sale confusion is alleged. The next example illustrates a case where point-of-sale confusion was alleged by Sara Lee, and a survey was successful in helping Sara Lee obtain a preliminary injunction. To provide a little background on this case, the Sycamore Family Bakery sold rights to their Grandma Sycamore's Home Maid Bread in 1998 to Metz Baking Company which eventually became part of Sara Lee. As part of this transaction, Sycamore Family Bakery was allowed to use the Sycamore mark in certain areas of Arizona, Nevada, and Southern California, but agreed not to market or sell any confusingly similar marks outside of those areas. In May of 2009, Sycamore Family Bakery, however, began marketing and selling bread in Utah under the trademark the Sycamore Family Bakery. In response to Sycamore Family Bakery's alleged infringement of the Sycamore mark, Sara Lee commissioned a likelihood of confusion survey to measure the degree to which there would be confusion as to the origin or sponsorship of the Sycamore Family Bakery mark, specifically in Utah.

Because of the proximity in which these products were sold, a variation of the Squirt format was utilized to measure confusion. In particular, relevant respondents were presented with a sequential presentation of the senior and the junior users' marks and then indicate their beliefs about whether the products came from the same company or from companies that are connected or affiliated.

The survey was conducted over the Internet and respondents qualified if they indicated they were a potential purchaser of bread products in grocery stores and supermarkets in Utah in the next three months. Respondents were first presented with a photograph of Sara Lee's Grandma Sycamore's Home-Maid Bread. On subsequent survey pages, respondents were sequentially presented with one of three products: Farm Bread, Harmons Ranch Style Bread, and either Sycamore Family Bakery (if they were in the Test Group) or Dunford Bakers Old Fashion White Bread (if they were in the Control Group).

Following exposure to the Test or Control stimulus, respondents were asked: "Do you believe this product is made by the same company that makes the product you saw in the very first picture or do you believe it was made by a different company?" If a respondent did not think they were made by the same company or if they

indicated they were unsure, they were asked: “Do you believe the company that makes this product is connected or affiliated with, or is not connected or affiliated with, the company that makes the product you saw in the very first picture, or don’t you know?” Respondents who indicated that they thought the bread products came from the same company, and respondents who indicated that they thought the companies that put these bread products out were connected or affiliated with one another, were counted as confused.

In the Test Group, 47.1% of respondents thought that Grandma Sycamore’s Home Maid Bread and the Sycamore Family Bakery product came from the same company or from companies that were connected or affiliated. In comparison, 13.4% of Control Group respondents had that belief. Net confusion is the difference between the result of the Test Group and the result of the Control Group (*i.e.*, 33.8%). The United States District Court for the District of Utah stated that the survey supported Sara Lee’s likelihood of success on the merits and thus improved the chances of Sara Lee obtaining a preliminary injunction.

In re Hershey Chocolate and Confectionery Corp., Serial No. 77809223 (T.T.A.B. June 28, 2012)

The next case illustrates how consumer survey evidence can support a claim of secondary meaning. Hershey wanted to register its four by three segmented chocolate bar configuration as a trademark in response to the alleged copying of its Hershey bar trade dress by Williams Sonoma for a brownie pan. Before Hershey could seek registration, Hershey first needed to prove that its four by three segmented chocolate bar had acquired secondary meaning amongst relevant consumers and served as a trademark for Hershey.

To this end, Hershey commissioned a secondary meaning survey to measure the degree to which relevant consumers associated the four by three segmented chocolate bar, without the name Hershey within the rectangular panels, with a single source. The survey was conducted over the Internet and respondents qualified if they indicated that they had purchased a chocolate candy bar in the past six months and were likely to purchase a chocolate candy bar in the next six months.

After qualifying, the main survey began by showing a picture of either the four by three-paneled chocolate bar (Test Group) or a one by three-paneled chocolate bar (Control Group). The stimulus was initially shown for 10 seconds before respondents could continue and then was made visible to respondents throughout the rest of the survey.

The key survey question asked respondents: “Do you associate the design and appearance of this chocolate candy bar with one particular company, more than one company, no particular company or do you not know or have no opinion?” A potential concern for this survey, however, is that respondents might overwhelmingly answer “Hershey” regardless of what candy bar they saw because of the fame of the brand in the chocolate space. As such, respondents who indicated that they associated the chocolate candy bar with one particular company were then asked: “With what particular company do you associate the design and appearance of this chocolate candy bar?” Respondents could then type a company name or select “don’t know.”

The survey results indicated that 83.8% of Test Group respondents answered one particular company and named “Hershey” when presented with the four by three segmented chocolate bar configuration at issue. Comparatively, 41.6% of Control Group respondents answered “Hershey” to the one by three segmented bar stimulus, which provided a measure of survey noise. After accounting for this level of noise, the net level of secondary meaning was 42.2%. The final TTAB decision approved Hershey’s trademark application and cited the consumer survey as persuasive evidence supporting that decision.

National Pork Board and National Pork Producers Council v. Supreme Lobster and Seafood Company, Opp. No. 91166701 (T.T.A.B. June 11, 2010)

In the last case addressed within this article, survey evidence was requested by counsel for The National Pork Board to measure the extent to which the phrase “THE OTHER RED MEAT” would be associated by consumers with “THE OTHER WHITE MEAT” and thus dilute the distinctiveness of The National Pork Board’s registered mark. For some background, The National Pork Board used the slogan “THE OTHER WHITE MEAT” for many years to promote pork as an alternative to chicken or turkey. A seafood company wanted to register “THE OTHER RED MEAT” for its fresh or frozen salmon and The National Pork Board opposed this registration on the grounds that “THE OTHER RED MEAT” may dilute the distinctiveness of their famous “THE OTHER WHITE MEAT” mark.

To test this proposition, a survey was conducted over the telephone by using random digit dialing to reach a representative sample of the consuming public. Respondents were chosen at random within each household and quotas were established for age and gender based on U.S. Census data. To qualify, respondents were read a list of

foods and asked whether they had purchased the food in the past two months to eat at home or ordered it at a restaurant. The list that was read to them included a variety of foods such as steak, lamb, chicken, as well as seafood and fish. Respondents who reported that they had purchased or ordered either fish or seafood in the past two months qualified as potential customers of Supreme Lobster and targets of their advertising slogan.

During the survey, Test Group respondents listened to an audio recording of “THE OTHER RED MEAT” and Control Group respondents listened to an audio recording of the slogan “THE TASTY MAIN DISH.” This was determined to be an appropriate control because it shared many characteristics with the Test Stimulus (e.g., it had the same number of words, syllables, and cadence as the Test phrase and it implicitly referred to the same category of goods) and was not used as a trademark or advertising slogan. To avoid concerns that different interviewers might put emphasis on different words or syllables in the slogans, the slogans were audiotaped and played to respondents on the phone.

After playing the recording of the slogan “THE OTHER RED MEAT,” the interviewers asked respondents the main survey question: “Thinking about the slogan you just heard, do any other advertising slogans or phrases come to mind?” If a respondent answered “Yes,” they were then asked two follow-up questions: (1) “What other advertising slogan or phrase comes to mind?” and (2) “In your opinion, what does that advertising slogan or phrase you just mentioned refer to?” In the Test Group, 30.7% of respondents named “THE OTHER WHITE MEAT” and another 4.4% believed the advertising slogan referred to pork. In total, 35.1% of Test Group respondents associated “THE OTHER RED MEAT” with “THE OTHER WHITE MEAT,” or pork.

In comparison, no control respondents who heard “THE TASTY MAIN DISH” indicated that it brought to mind “The Other White Meat” and no respondents thought the advertising slogan referred to pork. As a result, net dilution was 35.1% and accordingly the TTAB refused the registration due to the likelihood of dilution. The survey employed was cited as probative on the issue.

Survey Benefits and Drawbacks

What is evident from the cases presented above is that surveys can strengthen a case. Simply put, quantitative measures of consumer perceptions, behaviors, and experiences are more reliable than qualitative observations, anecdotes, or unsubstantiated opinions. Survey data provides a real advantage: it captures the beliefs,

experiences, and opinions of *hundreds* of relevant consumers. Furthermore, quantitative measurements allow the survey expert to provide a point estimate within a certain margin of error.

However, there are some potential drawbacks to conducting a survey. Surveys add time and expense to case preparation and litigators should be realistic that the results may not support their client’s position. Indeed, conducting a survey might seem like a double-edged sword at times. If a survey is not produced, the opposing side or triers of fact may infer that results were unfavorable, but if a survey is presented, it becomes a target for criticism from the opposing side. In such cases, a rebuttal survey expert may be hired to try to show that the survey is “fundamentally and fatally flawed” and that no reliable conclusion can be drawn from the data. In general, most criticisms (when valid) about a survey, however, tend to go to the weight, not the admissibility, of the survey evidence. But in some cases, a *Daubert* motion is put forth to challenge the admissibility of the survey evidence, to exclude the presentation of unqualified evidence to a jury.⁴ If the expert doesn’t survive the challenge, the survey is not admitted into evidence. Accordingly, it is very important to work with a qualified survey expert and a market research team who understand the standards and nuances for litigation research.

Survey Costs

Finally, it would be remiss to not address survey costs. Costs for surveys can vary widely. There are a number of factors that contribute to the variability in survey cost. One factor that contributes to cost is the ease of finding people who will qualify for the survey. For example, finding people who own a smartphone is easy and thus respondents should be relatively inexpensive. Finding people who are in the market for women’s shoes that cost over \$500, however, is not as easy and such respondents will be more expensive to survey. Another factor that contributes to cost is the compensation expected for participation. Some individuals, like doctors, are busy and it can be difficult to get 10 minutes of their time for a survey. Higher incentives are required for these types of survey participants because the target sample can be hard to reach and because they require more money for their time. Additionally, the mode of data collection can drive the length of data collection and costs. Internet studies are typically more cost effective and can be conducted quicker than other modes such as telephone or mail intercept studies. Finally, project complexity drives costs. Complex studies require additional time in the planning and design phase, may require exploratory research, and may require additional time for analysis and reporting.

Conclusion

Federal and state courts regularly accept survey evidence on a variety of legal issues but determining whether to conduct a survey is often a tough decision. Surveys can take a lot of time, effort, and money to develop and there is no guarantee that the survey will produce results that are favorable to a client's position. Surveys, however, provide empirical evidence on which to base an expert opinion and can be a reliable measure of relevant consumer opinions and behavior. Indeed, in some cases, a survey may be the *only* way to present the evidence.

When evaluating or considering experts for a potential survey engagement, attorneys should make sure that the survey expert understands the specific guidelines for surveys as described in the Manual for Complex Litigation. That is, the survey expert should not only have expertise in market research methods and design, but also a deep understanding of the legal standards required for survey research used in litigation. A qualified expert provides guidance on how best to frame the relevant research question into a defensible survey that conforms to proper survey research principles and will withstand judicial scrutiny.

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