
The Role of Market Research and Surveys in Litigation

Market research surveys, properly designed and executed, can be highly effective in antitrust, intellectual property, commercial damages, and securities litigation. Surveys capture and present consumer data ranging from perceptions of particular products or trademarks, to preferences for features, to the likelihood of substitutability among various options. Surveys and related market research techniques have repeatedly proved to be valuable tools in the attorney's arsenal, and are especially useful in cases where a lack of historical data precludes more traditional econometric analyses.

MEASURING THE WORLD “BUT FOR” Market research can be used to develop valuable information about the world but for the alleged action(s) at issue in a dispute.

Analysis Group has substantial expertise in survey design and implementation, and is experienced in working with selected experts specializing in survey applications in the context of both litigation and business strategy development. Our consultants and affiliates are skilled in selecting and applying the most appropriate research techniques to each case, ranging from conjoint analysis to consumer confusion studies to “voice of the customer” studies. In each instance, we apply robust analytical methods to ensure statistical representativeness.

Unlike firms that design surveys primarily to evaluate consumer reactions to products or marketing campaigns, we specialize in constructing unbiased questionnaires that are consistent with industry standards for legal surveys, and can stand up to intense scrutiny in court. Our experts apply sophisticated analysis to survey design and results and also deliver effective depositions and testimony that can defend against challenges regarding methodology, validity, subtle biases, and other factors.

For example:

- **Market Shares:** We can measure the but-for choices of consumers if a particular product were not launched or a particular product feature were not available
- **Total Sales:** We can measure the market expansion resulting from the availability of a particular product and the possible contraction in total sales in the absence of that product or product feature
- **Infringing Product Features:** We are able to evaluate the value placed on particular features in multifeature products (e.g., microcode)
- **Price Effects:** We can measure which products, at what sales level(s), would have been purchased at alternative prices

APPLYING MARKET RESEARCH IN SPECIFIC AREAS OF LITIGATION

Well-crafted market research surveys can be of significant value in a number of litigation areas, including:

TRADEMARK/TRADE DRESS INFRINGEMENT

In cases where the behavior, perceptions, or purchasing decisions of consumers are at issue, we use surveys to measure the incidence of confusion or potential confusion between various logos, trademarks, or other brand identifiers. Typical applications include trademark and trade dress infringement, as well as assessments of secondary meaning.

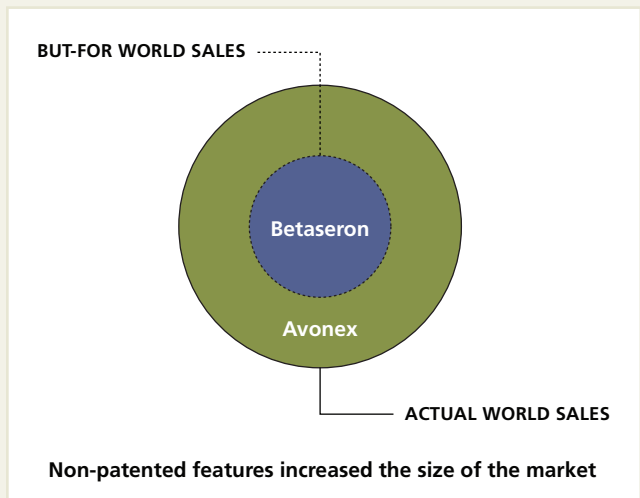
PATENT INFRINGEMENT

In matters involving allegations of patent infringement, we can use surveys to measure the value of various product features to consumers, leading to reliable determinations of damages in but-for scenarios. We can also use survey data to measure the value of individual component features in complex products by determining to what extent individual product features drive demand. Our expertise in both survey methodology and econometric modeling uniquely qualify us to handle these cases.

In antitrust matters, we use discrete choice – or conjoint – analysis to evaluate the effect of incremental competition on market shares, prices, and ultimately, profits.

Berlex v. Biogen

Analysis Group was retained on behalf of Biogen in defense of a patent infringement lawsuit brought by Berlex



regarding drugs used to treat multiple sclerosis. We worked with our academic affiliate, Professor Robert Pindyck of MIT, to develop a lost profits framework informed by results of both a patient survey and econometric diffusion models. We used these tools to model consumer behavior and but-for sales over the damages period. Academic affiliate Professor John Hauser, also of MIT, advised us in designing and implementing the survey to determine what choices patients would have made had Biogen's drug Avonex not entered the market. After a four-year legal battle, the case was decided in favor of Biogen.

CLASS CERTIFICATION

In cases where class certification is sought, we can use surveys and statistical sampling to show whether required conditions of numerosity, typicality, and/or commonality among the putative class have been met. A survey can show, for example, that use or application of a particular product varies so significantly among consumers that common evidence cannot be used with confidence. Such survey evidence can be particularly useful in demonstrating variability in value and/or impact when multiple features or products are inextricably linked or when historical market data are unavailable.

DECEPTIVE ADVERTISING

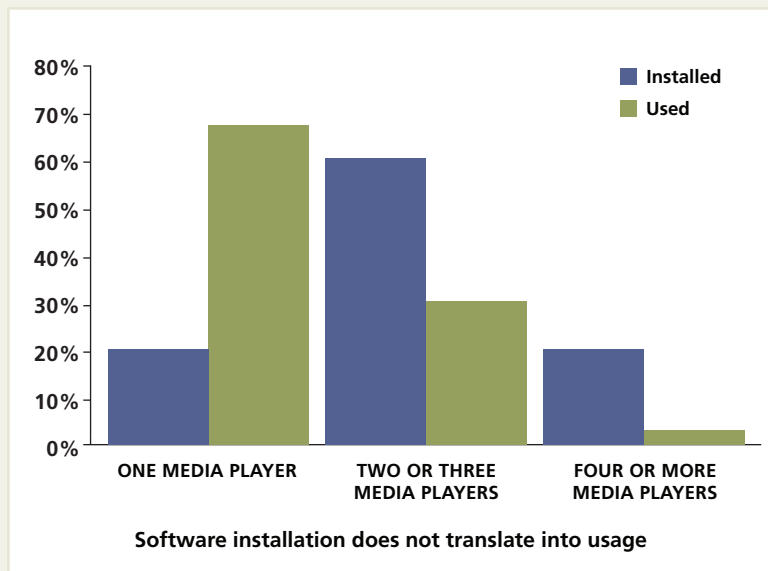
In cases involving false or deceptive advertising, we often use surveys to show the extent to which misleading information was relied upon in consumer purchase decisions. By using surveys to query consumers about key factors in their decision-making process, we can determine the likelihood and extent of any damages.

ANTITRUST CLAIMS

Analysis Group uses surveys to establish market definition in cases involving potential acquisitions, mergers, or claims of unfair competition. By analyzing input on how consumers perceive various products, and the degree to which they are likely to substitute among available products, we can provide valuable insights with regard to antitrust claims.

Competitor Antitrust Cases

An Analysis Group team supported our affiliate Professor John Hauser of MIT in his analysis involving computer software, in which he determined which media players and middleware products were installed on end-users' desktops/mobile computers and which were used by end-users, and why. He also used voice of the customer techniques to survey groups of software developers to understand their decisions regarding which operating platforms they chose to write for and why, identifying and valuing the key drivers of choice (for example, flexibility versus ease of use).



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OUR RIGOROUS APPROACH Our work draws on highly regarded market research and economic expertise.

Diverse and Specialized Capabilities

Analysis Group staff, along with our affiliated experts and research specialists, have designed, fielded, and analyzed hundreds of surveys using cutting-edge applications of techniques including conjoint analysis,

models, combining our expertise in survey methods and econometric modeling.

Our teams bring specialized Ph.D.-level quantitative and analytical expertise to each market research and survey research engagement. We have

caliber. We are also adept at critiquing surveys by opposing experts, and identifying flaws in their design, methodology, and execution.

Client- and Need-Driven Approach

Our staged approach to survey development enables us to work

We are adept at designing, implementing, and analyzing market research programs in addition to evaluating surveys developed by outside research firms.

maximum difference scaling, heuristic-based choice analysis, and voice of the customer analysis.

In addition to measuring current trends, we also are experienced in utilizing contemporary survey data to infer past behaviors. Our related capabilities in statistical sampling also have enabled us to assist clients in cases in which the survey population was limited or difficult to access. In other situations, we use survey results as input into affirmative damages

solid, long-standing relationships with qualified consultants and experts in each area, and can assemble the best possible team for every facet of every engagement.

Rigor To Withstand Court Challenges

We design surveys that are consistent with industry standards and backed by qualitative research and in-depth quantitative analyses. Our surveys have withstood rigorous critique by opposing experts of the highest academic

directly with counsel to develop strategies in the early stages of a project, or collaborate in later stages when the case strategy has already been established. When involved early, we can design pilot studies to optimize survey design and determine the relevance or viability of undertaking a broader research study. When brought on board later in the process, we can work quickly to produce reliable data that will withstand court challenges.

SELECTED SURVEY AND SAMPLING METHODS

Analysis Group consultants and affiliates are experienced in innovative and established techniques in survey design.

We can determine the best methodology for each case and vary our approach as circumstances change along the way. We employ a variety of survey methods, ranging from web questionnaires to mall intercepts to one-on-one interviews, depending on the particulars of each case. Our teams have extensive experience designing and implementing web-based surveys (including web-based conjoint studies) in litigation. Some of our most frequently used methods are described below.

Conjoint and Choice-Based Analysis

Conjoint analysis determines the relative value of specific product features to the consumer. Using conjoint analysis, we can model demand for both existing and hypothetical products, and compare the relative values of primary, secondary, and tertiary features. In recent litigations involving Microsoft, for example, Analysis Group supported our affiliate Professor John Hauser in developing conjoint analyses to assess consumers' preferences for and use of specific features of a software product.

Maximum Difference Scaling

We apply this method to assess preference or importance scores using best-to-worst or most-important-to-least-important comparisons for multiple items or characteristics, such as product features. Though similar to conjoint analysis, maximum difference scaling allows for a wider variety of applications.

Voice of the Customer

Voice of the customer research, often gathered qualitatively through customer interviews, is designed to define and prioritize customer requirements by relative importance and satisfaction. While most commonly used to gather customer input for the design of new products, voice of the customer research also is used in litigation to measure the relative value of product or service features. Using such results, we can establish a but-for world that forms the basis of a damages calculation.

Statistical Sampling

Statistical sampling is useful and often necessary in situations in which true market survey data are unavailable. We use statistical sampling when a population is too large to reasonably analyze each observation, when data are not available electronically, or when analyzing individual observations requires an unreasonable amount of time, money, or effort. Analysis Group has applied statistical sampling techniques in commercial litigation, intellectual property, health care, and other areas.

ADDITIONAL SELECTED CASES

GoTo.com Inc. v. The Walt Disney Co.

Analysis Group was hired to testify on the damages suffered by GoTo.com as a result of Disney's alleged trademark infringement of its logo, which loosely resembled a traffic light. We worked with Internet traffic data as well as consumer survey evidence regarding confusion between the two websites. Based on this information, we developed a model showing how Internet users arrived at either the GoTo.com site or the Go.com site, which we then applied to estimate the reduction in usage that GoTo.com suffered due to customer confusion. Based on the survey evidence, we were able to use GoTo.com's revenue information to estimate future profits lost under various scenarios as a result of the confusion.

Wood products class action

Analysis Group was retained in a mass tort case involving class action claims related to chemically treated wood products. We assisted the client in identifying an appropriate expert, Professor John Hauser of MIT, and developing a conceptual framework to defeat class certification. Through a carefully designed survey, we assessed variability in the manufacture, sale, composition, and use of treated wood, as well as variations in human exposures, consumer preferences, and purchasing behaviors. The survey data revealed that chemically treated wood products are used in numerous outdoor structures, each of which might cause different impacts on putative class members. Professor Hauser's survey played an important role in the trial judge's denial of class certification, as was cited in the judge's decision.

Playtex Products, Inc. v. Procter & Gamble Company

Playtex counsel Latham & Watkins LLP retained Analysis Group in a false advertising case in which Playtex claimed that a Procter & Gamble (P&G) advertisement for feminine hygiene products contained a misleading comparison. We supported our academic affiliate, Professor Joel Steckel of the Stern School of Business at New York University, who evaluated market research and product tests conducted by both Playtex and P&G to assess the validity of the claims. Professor Steckel presented his findings at trial, and the jury later returned a verdict in favor of our client.

American Express v. Visa and MasterCard (and related litigations)

In an antitrust matter involving payment cards, Analysis Group supported Professor John Hauser in validating and replicating consumer surveys undertaken by the plaintiff and industry analysts to understand customer preferences for payment cards. These surveys, which measure consumer choice at the feature level, can be used to model consumer demand for alternative choices that did not exist in the actual world to inform the but-for world.

Using industry-standard software to perform conjoint analysis, we measured interactions among numerous attributes (e.g., reward structure) to extract relative values (or partial utilities) for each respondent, i.e., which features contribute to a cardholder's choice of payment product. Using choice-based conjoint and hierarchical Bayesian analysis, we were able to simulate each respondent's preferences and calculate specific utilities for each attribute. We then ran these utilities through a model, enabling us to predict choice in a simulated marketplace.

For more information on our work in market and survey research, please see our website or contact Managing Principals **Rebecca Kirk Fair** (617-425-8256, rkirk@analysisgroup.com) or **Christopher Borek** (202-530-3985, cborek@analysisgroup.com).

A LEADING PROVIDER OF ECONOMIC ANALYSIS

Analysis Group provides economic, financial, and business strategy consulting to leading law firms, Fortune 500 companies, and government agencies.

Founded in 1981, with 500 professional staff, we assist law firms with all aspects of litigation and advise corporations and government clients on business issues that require expert analysis and interpretation of economic and financial data. We also help organizations create strategies for innovation and growth.



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