

3 Questions To Ask When Using Surveys In Litigation

Law360, New York (May 15, 2015, 10:12 AM ET) --

Consumer surveys have long been relied on in trademark infringement cases. Recently, courts have noted that such surveys are now “de rigeur in patent cases”[1] as a tool to evaluate and quantify damages relating to alleged infringement. For example, by utilizing established and tested survey methodologies with the relevant customers of a product-at-issue, survey experts might be able to reveal the value of an allegedly patented feature. Recent high-profile litigation involving patents and technology from firms such as Apple Inc., Microsoft Corp., Samsung Electronics Co. Ltd., Oracle Corp. and Google Inc. shows consumer surveys being used in patent damages matters — intending to provide evidence on drivers of consumer demand, to determine impact of particular actions by competitors, and to evaluate “but-for” choices under alternative competitive conditions.



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The relevance and usefulness of surveys in litigation, however, is dependent on how they are designed and implemented. A recent decision from the Seventh Circuit, in which Judge Richard Posner affirmed a preliminary injunction sought by plaintiff Kraft Food Group Inc. to block Cracker Barrel Old Country Store Inc. (CBOCS) from selling branded grocery products, highlights some of the pitfalls of using surveys in litigation and exemplifies the skeptical view some have expressed with regard to their “probative significance.”

Consumer surveys conducted by party-hired expert witnesses are prone to bias. There is such a wide choice of survey designs, none foolproof, involving such issues as sample selection and size, presentation of the allegedly confusing products to the consumers involved in the survey, and phrasing of questions in a way that is intended to elicit the surveyor’s desired response – confusion or lack thereof – from the survey respondents.[2]

As Judge Posner’s opinion makes clear, it is critical to bring in reputable survey experts who will use academically rigorous and unbiased methodologies, employ best practices in survey design and implementation, and develop confirmatory evidence of survey results. Such experts can help attorneys capitalize on the wealth of evidence that primary research can yield in the context of litigation.

Are the Methodologies Academically Rigorous and Unbiased?

An appropriate and admissible survey should be grounded in academically rigorous and unbiased methodologies. Once the key questions are identified, the survey expert should consider the most appropriate approach. For example, if the objective is to assess the impact on consumer behavior of particular product logos or claims in advertising or packaging in a trademark or consumer confusion matter, a test and control experimental design is often the best choice, as it can isolate whether there is a causal link between the logos or claims and consumer behavior.

The “Eveready” trademark survey design, which is based on a survey used in *Union Carbide v. Ever-Ready Inc.*,^[3] is an early example of the acceptance of test-and-control design. In that matter, the Seventh Circuit determined that the district court had erred when it found that surveys were entitled “to little, if any, weight” and affirmed the value of surveys in determining whether there exists a likelihood of confusion between two products.

If the task is to evaluate the relative importance or value of various attributes to consumer choice in, for example, a patent infringement case, a conjoint study — a market research technique used to determine how people value the features that make up a product or service — may be optimal. In *TV Interactive Data Corp. v. Sony Corp.*,^[4] TVI sued Sony and a number of other Blu-ray and DVD player manufacturers, alleging infringement of four patents related to certain automatic playback technologies. TVI’s expert conducted three surveys, including one choice-based conjoint to measure the “market’s willingness to pay” for the technology in question, and then analyzed his findings using conjoint analysis.

Regardless of which survey approach is selected, experts must fulfill certain design requirements: These include demonstrating that the appropriate questions are asked clearly, that respondents understand the survey questions as intended, that they can complete the survey avoiding inaccuracies from fatigue, and that the stimuli and/or question designs are unbiased.

A survey written in an overly broad manner, even if based on a standard methodology, is likely to be inadmissible; in *Fractus v. Samsung*, for example, a broad survey was excluded because it confused the issue, risking a jury award based on the value of an internal antenna rather than the value of the at-issue aspect of the internal antenna. And in *Oracle v. Google*,^[5] Judge William Alsup ruled that conjoint survey results presented by Oracle’s expert were too narrow to be allowed to determine market share, but that they could be used in the “determination of relative importance between application startup time and availability of applications.”

Is the Implementation Appropriate and Unbiased?

As Judge Posner noted in his *Kraft v. CBOCS* decision, survey evidence, like most expert-presented evidence, is generally sponsored by a party in litigation. To avoid biases, the right survey questions must be asked in the right way, which encompasses multiple design choices. Based on recent litigation, we can conclude that the expert’s decision process in determining how the questions are asked should be made as transparent as possible to the trier of fact. Key design choices include question phrasing, survey methodology, experimental design and survey administration. Practically speaking, a survey in aid of litigation will have greater probative value if the expert can document and support the choice of question, sample, and method, while minimizing the possibility or appearance of biases that can “tweak” the survey method in his or her favor.

Additional steps can be taken to demonstrate that survey questions are unbiased and do not drive results in a particular direction. To evaluate various design decisions, for example, the survey may be

pre-tested before a full launch “to increase the likelihood that questions are clear and unambiguous”[6] and to minimize the possibility of demand artifacts (e.g., unintended implications from a survey design, such as a respondent’s ability to guess the sponsor or purpose of a study), which may arise from an aspect of the survey or experiment and “cause the subject to perceive, interpret, and act upon what he believes is expected or desired of him by the experimenter.”[7]

The results of such pre-tests have not always been formally documented in the past. However, in a litigation setting, such documentation can contribute direct support to an expert’s assertion that the survey instrument was comprehensible and bias-free; we are aware of cases in which the survey expert has provided testimony and, in some cases, documentation of pre-test results to the court. In the Kraft v. CBOCS matter, Judge Posner expressed concern that the Kraft survey might have encouraged guessing; a pre-test may have provided support that such guessing did not occur.

An additional way to minimize potential bias is to conduct surveys and experiments in a manner that is “double-blind,” thus eliminating the chance that the interviewer could influence the results. Research indicates that respondents generally want to please those conducting the survey; therefore, to ensure objectivity, both “the interviewer and the respondent should be blind to the sponsor of the survey and its purpose.” Use of online surveys has reduced the possibility of unobservable interviewer bias since the interviewer is a computer program.

The survey expert’s decision to use open-ended or closed-ended questions can have implications in terms of relevance, analysis and perceived bias. Open-ended questions increase analytical complexity and may make it difficult to group responses effectively, given the array of words and phrases respondents may use to express the same concept. Alternatively, closed-ended questions might “push” respondents into an answer they would not otherwise have given, a concern expressed by the Seventh Circuit in Hubbard v. Midland Credit Mgmt.[8] Qualitative research to justify closed-ended responses or a two-stage approach (i.e., open-ended followed by closed-ended questions) can help to alleviate concerns of such biases.

Even if a survey contains notable flaws in implementation, case law in the Ninth Circuit and elsewhere establishes that juries are able to assess the impact of possible technical deficiencies on the probative value of a survey. In a recent order in Sentius Int’l LLC v. Microsoft Corp., Judge Paul Grewal noted that “surveys are not exactly unusual or unfamiliar to the layperson.”[9] Citing the Federal Circuit’s 2014 opinion in Apple Inc. v. Motorola, Judge Grewal maintained that despite several methodological shortcomings, “questions regarding which facts are most relevant or reliable to calculating a reasonable royalty are ‘for the jury.’”[10] This decision demonstrates that proper vetting of survey evidence can be a crucial component of patent litigation strategy, because this evidence may be considered by a jury regardless of any concerns of the court.

Are the Survey Results Cross-Validated?

To demonstrate that the results of a survey are consistent with other data or economic theory, survey experts and their teams can also provide complementary evidence. For example, surveys and market research conducted in the normal course of business by the parties in suit or by third parties may support (or refute) the findings of a survey conducted in a litigation context. Similarly, data analyses — such as a hedonic pricing analysis or a before-and-after sales data analysis — may provide results consistent with those found in a survey. If a conjoint design is used to evaluate several product features, and the market price for one or more of the tested features can be determined from transaction data, comparisons can be drawn to confirm and/or scale survey results to match with historic pricing.

Fact witnesses, deposition testimony and the evidentiary record — as well as economic theory — can also corroborate survey results. For example, communication between customers and manufacturers, or third-party product reviews, may indicate that particular features are of importance in a purchase decision. But if these features appear irrelevant in the survey, one might conclude that the survey design was flawed. Design flaws and a disconnection from the marketplace realities of purchase decisions were among the Seventh Circuit’s issues in *Kraft v. CBOCS*.

While most experts would agree that marketplace conditions should factor into the choice of survey or experimental method, how well specific methods reflect actual consumer choice processes is a matter of debate. A conjoint experiment may be viewed by a traditional economist as a close approximation of the consumer decision-making process, but by a behavioral economist as not reflective of how consumers make decisions and therefore of little value. So, it is important at the design stage that the expert considers possible ways to validate data and methodologies. As Judge Posner noted, “[courts have failed] to develop a framework for understanding the conditions that may affect the attention that can be expected to be given to a particular purchase.”^[11] If results from a litigation-sponsored survey are confirmed with other data, the convergent results may help to strengthen the survey’s evidentiary weight and may demonstrate that distinctions between the survey and the marketplace do not affect results.

Surveys have been shown in some circumstances to be a useful method through which to deliver evidence, and can be particularly valuable when other sources of data are not available. Nonetheless, courts have been and are likely to remain skeptical of surveys — and methodological flaws can hurt both admissibility and weight of impact. Recent decisions relating to “gatekeeping” and survey evidence, along with other high-profile litigation outcomes, highlight the necessity for adherence to best practice at every step.

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[1] *Sentius International LLC v. Microsoft Corporation*, 2015 U.S. Dist. LEXIS 8782 (9th Cir. N.D. Cal. Jan. 23, 2015)

[2] *Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735 (7th Cir. Ill. 2013)

[3] *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir. Ill. 1976)

[4] *TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006 (N.D. Cal. 2013)

[5] *Oracle Am., Inc. v. Google Inc.*, 2012 U.S. Dist. LEXIS 33619 (N.D. Cal. Mar. 13, 2012)

[6] “Texts on survey research generally recommend pretests as a way to increase the likelihood that

questions are clear and unambiguous.” Diamond, Shari S., “Reference Guide on Survey Research,” in Reference Manual on Scientific Evidence, Third Edition, Federal Judicial Center, 2011, pp. 359-423, at p. 388

[7] Sawyer, Alan G., “Demand Artifacts in Laboratory Experiments in Consumer Research,” Journal of Consumer Research, Vol. 1, No. 4, March 1975, pp. 20-30, at p. 20

[8] “More fundamentally, it is not clear that closed-end questions are the appropriate way to test for the type of alleged deception in this case. The court perceives a significant risk that the closed-end questions would push respondents to read more into the disputed letters than is actually there.” Hubbard v. Midland Credit Mgmt., 2009 U.S. Dist. LEXIS 13938 (S.D. Ind. Feb. 23, 2009)

[9] Sentius International LLC v. Microsoft Corporation Apple Inc. v. Motorola, Inc., 757 F.3d 1286 (Fed. Cir. 2014).

[10] Id. (Citing Apple Inc. v. Motorola, Inc., 757 F.3d 1286 (Fed. Cir. 2014)).

[11] Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store Inc.