

Deceit and Denial: The Role Surveys Play in False Advertising and Trademark Litigation

Session 1

Surveying the Truth: False Advertising and Trademark Litigation

ABA's Section of Antitrust Law
Advertising Disputes & Litigation Committee

Moderator: Chris Cole (Crowell & Moring)

Panelists: August Horvath (Kelley Drye), Joel Steckel (NYU Stern), Kristina Shampanier (Analysis Group)

February 2, 2016

Not a Section Member?

Section of Antitrust Members can attend unlimited committee programs for free.

- Join at www.ambar.org/ATJoin
- Benefits list at www.ambar.org/ATBenefits

Join Now >

Section dues are \$60. Lawyers and non-lawyers welcome.²

Webinar Series Overview

Session 1: Surveying the Truth: False Advertising and Trademark Litigation:

- History of surveys in false advertising and trademark litigation and current trends
- Best practices for getting affirmative studies admitted into evidence
- Survey experiments, “field” experiments, conjoint analysis, hybrid approaches
- “Apportionment”

Session 2: Can You Repeat the Question? Analyzing the Opposition’s Survey:

- Nontraditional rebuttal techniques
 - Similar survey with minor tweaks
 - Qualitative “pre-tests” of the opposing expert’s survey

Session 3: Compare and Contrast: Proving – or Disproving – Survey Results via Real-World Data

- Use of real-world data to confirm or refute the results of a survey
- Other research techniques: eye-tracking, incentive alignment

Agenda for Today

History of Surveys in Litigation

Methodologies and Case Examples

Survey Experiments (Surveys with Control Group)

Field Experiments

Choice Studies

Conjoint Studies

Considerations

Overview of Survey Use in Litigation

- False Advertising / Lanham Act
 - Deceptiveness – implied meanings
 - Claim substantiation
 - Efficacy
 - Preference
 - Class-Wide Injury and damages
- Antitrust
 - Mergers and acquisitions - Customer surveys
- Trademark / Trade Dress
 - Customer confusion
 - Genericness
 - Secondary meaning

Surveys in False Advertising Cases 1: Claim Interpretation

- Surveys are not required, maybe not even admissible, where claims are literal.
- Where an implied false claim is alleged, surveys examine whether a significant proportion of consumers understand the false message to be conveyed.
- “Significant” generally means about 20% of consumers “net of noise,” noise meaning the percentage that respond affirmatively to an innocuous control because of demand effects, yea-saying, or other artifacts.
- Survey format is less standardized than in trademark surveys.
 - Stimuli may be presented in various ways.
 - Open and/or closed end questions may be used.
 - There is no standard script for the questions, although there are principles for question writing.
- Control cells normally are used.

Surveys in False Advertising Cases 2: Claim Substantiation

- Sometimes the advertising claim itself involves people's attitudes or reactions to the product.
 - The benefit of the product may be a psychological one or one that can only be measured using self-reporting.
 - The claim may be for unilateral satisfaction, or consumer preference for one product over another.
 - There may be a claim that professionals (e.g. doctors) recommend the product.
- Substantiating or disproving such a claim may require the same techniques of social science research as does a claim interpretation survey.
- Some types of substantiation claims are common enough that there are quasi-standard techniques for them.
 - Comparative taste tests.
 - Doctor recommendation studies.

Surveys in False Advertising Cases 3: Class-Wide Injury and Damages

- Conventional surveys can be conducted on materiality and willingness to pay for products based on claims alleged to be falsely advertised.
- Conjoint analysis is a newer and more sophisticated technique.
- In false advertising class actions, under *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), plaintiffs must demonstrate the ability to prove that all class members suffered damages.
- This is a related, but distinct exercise from estimating the average or aggregate amount of damages, because such damages are not necessarily common to all class members.
- Courts have accepted a combination of conjoint analysis and hedonic regression analysis for this purpose.
 - Hedonic regression analysis generally is based on behavioral (actual purchasing) data rather than attitude or opinion surveys.

Surveys in Antitrust Cases

- Defining the market
 - Substitutability of products
 - Effect of small but significant non-transitory increase in price (SSNIP)
- Determining market shares
 - *FTC v. Whole Foods*, 502 F. Supp. 2d 1 (2007). Survey proffered by respondent to show many alternatives to merging entities. Rejected by judge as fatally flawed.
- Customer concerns about merging/acquisition of entities
- Customer reactions to product bundling
 - AT&T acquisition of DirecTV. Survey used to establish benefit of bundled services.

Surveys in Trademark Cases 1: Consumer Confusion

- Two standard formats, Eveready and Squirt.
- Eveready:
 - Respondents are shown the challenged mark/dress; open-end question as to source.
 - May be followed by closed-end questions.
 - Control condition is a non-infringing mark.
 - Standard for top-of-mind, readily accessible memory.
- Squirt
 - Traditional version: Respondents are shown both challenged and infringed mark/dress; closed-end source/confusion question.
 - Modern variations reduce demand effects by showing an array of other marks.
 - Used where senior mark is not as readily accessible to consumer memory.
 - More aided, but considered to be more leading.

Surveys in Trademark Cases 2: Genericness

- Seminal cases were American Thermos and Teflon.
- Thermos:
 - General approach was to ask consumers if they know a name for a product or service category and see how many of them mention the mark.
 - Not completely clear that respondents who mentioned the mark did so because they regarded it as generic.
- Teflon:
 - Presented respondents with a list of words and asked them to classify as a brand name or a common name.
 - These have become the preferred format.

Surveys in Trademark Cases 3: Secondary Meaning

- Measures the association between a claimed trademark and a product.
- Mark must be isolated from other potential cues to origin.
- Straightforward format: “Do you associate [mark] with a product from one company?”
- Methodological considerations:
 - Don’t-know or no-opinion option.
 - Control condition.
- Variations in format.

Assessing Research Studies

- Internal validity
- External validity
- Construct validity

Uses of Standard and Advanced Methods

Field Experiments (like Test/Control Surveys)

- Primarily, liability issues in likelihood of confusion cases
 - False claims (e.g., Overstock, “All Natural”)
 - Trademark cases

Choice / Conjoint studies

- Primarily, inputs for damages: estimation of the perceived value of feature or claim
 - Patent infringement / trade dress (e.g., Smartphone wars)
 - False claims / consumer fraud (e.g., “All Natural,” Tobacco)

Field Experiment

- Like survey experiments, field experiments use test and control groups to measure the effect of a stimulus on consumer choice/behavior.
- Unlike survey experiments, field experiments are conducted in a real-world environment.
- Participants are unaware that they are participating in an experiment, removing a potential source of bias from participants' choices.
- Case Examples:
 - Consumer protection and false advertising cases with online retailers
 - Copyright proceedings for online music

Field Experiment: Overstock



Group A: Compare

ALL DEPARTMENTS | FOR THE HOME | FURNITURE | BEDDING & BATH | WOMEN | MEN | JEWELRY & WATCHES | HEALTH & BEAUTY

Online Shopping › Sports & Toys › Toys & Hobbies › Pretend Play › Playhouses & Play Tents

Photos



Discovery
KIDS

View larger

Discovery Kids Cardboard Color and Play Playhouse

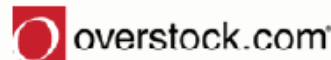
★★★★★ Rating 4.7 | 30 reviews | Write a review

Today \$25.99 Save \$65.04 (71%)

Compare ~~\$91.03~~

Item #: 14493300

Engage the budding designer in your child with this ready kids' playhouse. Made of eco-friendly recycled cardboard, this charming play-space comes ready up. The generous size makes having a friend over break out the crayons....more



Group B: MSRP

ALL DEPARTMENTS | FOR THE HOME | FURNITURE | BEDDING & BATH | WOMEN | MEN | JEWELRY & WATCHES | HEALTH & BEAUTY

Online Shopping › Sports & Toys › Toys & Hobbies › Pretend Play › Playhouses & Play Tents

Photos



Discovery
KIDS

View larger

Discovery Kids Cardboard Color and Play Playhouse

★★★★★ Rating 4.7 | 30 reviews | Write a review

Today \$25.99 Save \$65.04 (71%)

MSRP \$91.03

Item #: 14493300

Engage the budding designer in your child with this color-ready kids' playhouse. Made of eco-friendly recycled cardboard, this charming play-space comes ready to set up. The generous size makes having a friend over easy to break out the crayons....more

Field Experiment – Stages/Measures

- Stage 1: Consumer shopping as they would normally
- Stage 2: Consumer makes purchase decision

- Stage 3: Post-purchase survey (e.g., Overstock case)
 - Recall of seeing reference price
 - Recall amount of reference price
 - Recall label of reference price

Consumers are
unaware that they
are in an
experiment

Choice Studies

- Choice studies are based on the notion that consumers make tradeoffs among attributes, features, or benefits.
- Survey provides respondents with a choice or choices, perhaps in an enhanced shopping context
 - Between-subject design allows for increased content consideration
- Results can generate a demand curve under different scenarios to evaluate
 - What share of the purchase price is attributable to alleged infringement?
 - How would changes in labeling influence market prices?
- Case Example:
 - *TiVo Inc. vs. Verizon*

Choice Studies

TV Example

Imagine now that Samsung offers two TVs of the same size (43-inch), with the only difference being that one has Smart TV functionality and the other does not. You could save **\$45** if you chose the Samsung 43-inch TV *without* Smart TV functionality instead of the Samsung 43-inch TV with Smart TV functionality. Which TV would you choose?

Different price
provided to
each
respondent



Samsung TV

- 43-inch
- Smart TV
- Regular price



Samsung TV

- 43-inch
- Not Smart TV
- Save **\$45**

Choice Studies

TiVo Inc. v. Verizon

Imagine now that Verizon FiOS offered a pricing option that would afford you a monthly discount of **\$17.00** off your total cable bill if you gave up the ability to pause, rewind, and fast forward **live** programs on one TV while watching a **recorded** show on another TV.

You would still be able to simultaneously:

Different price
provided to
each
respondent

- Watch a live program on another TV without pausing, rewinding, and fast forwarding
- Watch a recorded program with the ability to pause, rewind, and fast forward

Imagine also that it would be simple to make this change on your account. Would you accept the discount or keep the pause, rewind and fast forward functionality?

(Select one only)

- ☐ I would accept the discount, and give up the pause, rewind, and fast forward functionality for live TV while watching a recorded show on another TV
- ☐ I would keep the pause, rewind and fast forward functionality for live TV while watching a recorded show on another TV

Conjoint Analysis

- Conjoint analysis is based on the idea that consumers consider different features of a product “jointly” when making purchase decisions.
- A survey provides respondents with a series of repeated “choice tasks,” and asks them to choose among a set of products defined by selected attributes.
- The relative importance of each of the features is estimated using traditional regression analysis or more advanced statistical method like “Hierarchical Bayes.”
- Case Examples:
 - “All Natural”
 - Tobacco
 - Smartphone Wars

Conjoint Analysis: Four-Feature Example

Which of the following TVs do you prefer most?



Samsung

- 40-inch
- Smart TV
- \$347.99



LG

- 43-inch
- Smart TV
- \$397.99



Samsung

- 43-inch
- Not Smart TV
- \$364.00



Vizio

- 40-inch
- Smart TV
- \$328.00



None



Choice modeling

Measures might include
source of sales, expected
share and but-for prices

Considerations When Using Surveys in Litigation

- 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.
- Courts have been, and are likely to remain, skeptical of surveys – and methodological flaws can hurt both admissibility and weight of impact.

Considerations When Designing Surveys

Are the Methodologies Academically Rigorous and Unbiased?

- Sample is representative of an appropriate target population
- Survey setting, stimuli, and questions appropriately represent the marketplace
- Questions are clear, understood as intended, and not leading
- Control group/questions are used and control stimuli/questions are appropriate
- Survey is not too long (no fatigue issues)
 - Pretesting helps with many of the items above
- Coding of open-ended questions and statistical analysis of the data are appropriate
- Are the survey results cross-validated by other market research/analyses or economic theory ? (To be discussed in Section 3).

Manual for Complex Litigation, Fourth

Federal Judicial Center 2004

The sampling methods used must conform to generally recognized statistical standards. Relevant factors include whether

- the population was properly chosen and defined;
- the sample chosen was representative of that population;
- the data gathered were accurately reported; and
- the data were analyzed in accordance with accepted statistical principles.

in assessing the validity of a survey, the judge should take into account the following factors:

- whether the questions asked were clear and not leading;
- whether the survey was conducted by qualified persons following proper interview procedures; and
- whether the process was conducted so as to ensure objectivity (e.g., determine if the survey was conducted in anticipation of litigation and by persons connected with the parties or counsel or by persons aware of its purpose in the litigation).

Relevant factors include whether

- the population was properly chosen and defined;

Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76 (2d Cir. 1981)

- Survey related to children's products sampled only children but not the parents who are also relevant decision makers.

R.L. Winston Rod Co. v. Sage Mfg. Co., 838 F. Supp. 1396, 1401–02 (D. Mont. 1993)

- “[W]hen the plaintiff submitted the results of a survey to prove that the green color of its fishing rod had acquired a secondary meaning, the court gave the survey little weight in part because the survey solicited the views of fishing rod dealers rather than consumers.”

Gencom, Inc., 56 Rad. Reg. 2d (P&F) 1597, 1604 (1984); Gencom, Inc. v. FCC, 832 F.2d 171, 186 (D.C. Cir. 1987)

- Survey to project demand for cellular phones included only potential business users. FCC concluded that the population was under-inclusive and research – flawed, a position affirmed on appeal.

- whether the questions asked were clear and not leading;

Fractus, S.A. v. Samsung et al., Civil No. 6:09–cv–203–LED–JDL (U.S. Dist Court, E.D. Texas, Tyler Division, 2011)

- Survey questions focused on the internal antenna of cellphones rather than, more narrowly, on the at-issue aspect of the internal antenna. Survey was excluded. While this is a patent case, similar issues may arise with respect to trademark infringement or false advertisement.

- whether the process was conducted so as to ensure objectivity

Surveys have been criticized for not sufficiently approximating marketplace realities

- Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store, Inc., No. 13-2559, U.S. Court of Appeals, 7th Cir. 2013
 - The court had “doubts about the probative significance of the ...survey” in part because “it’s very difficult to compare people’s reactions to photographs shown to them online by a survey company to their reactions to products they are looking at in a grocery store and trying to decide whether to buy. The contexts are radically different, and the stakes much higher when actual shopping decisions have to be made.”
- Fancaster, Inc. v. Comcast Corporation, 832 F. Supp. 2d 280; 2011
 - A survey was excluded for using printouts of static screenshots of an interactive website as stimuli instead of using a live version of the website, therefore not replicating how an Internet user would actually encounter and experience the website in the marketplace.

Summary

The use of surveys in litigation has evolved:

- Traditional surveys such as simple experiments are still in use
- More recent litigation has seen the advent of more sophisticated methods
 - Field experiments
 - Conjoint surveys and simpler choice studies
- Careful consideration for admissibility

Coming up in Session 2...

Can You Repeat the Question? Analyzing the Opposition's Survey

- Nontraditional rebuttal techniques
 - Similar survey with minor tweaks to show weaknesses and faults in survey design
 - Qualitative “pre-tests” of the opposing expert’s survey to determine degree of understanding of survey

Questions?

August Horvath

Kelley Drye

ahorvath@kelleydrye.com

Joel Steckel

Professor of Marketing and Vice-Dean for Doctoral Education, NYU Stern
School of Business

jsteckel@stern.nyu.edu

Kristina Shampanier

Vice President, Analysis Group

kristina.shampanier@analysisgroup.com