THE USE OF SURVEYS IN TRADEMARK & TRADE DRESS LITIGATION

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Introduction

A pivotal legal question of concern—“How will consumers perceive the mark, dress, or advertising?”—is critical in trademark infringement or false advertising claims that allege confusion or deception. To establish confusion has occurred, attorneys now rely on the presentation of survey evidence that reflects the responses of a large number of consumers who have been asked about their reactions to a mark versus the infringing material.

In trademark and trade dress litigation, systemic survey evidence has begun to surpass the traditional parade of consumer witnesses that were carefully selected to support an infringement claim in the past. This is possible because surveys ensure the sample—selected to reflect the population of past, present, and potential consumers—is asked the relevant questions free of bias.

The resulting collection of empirical data demonstrating whether potential confusion exists can then be used for litigation or settlement purposes. Thus, trademark infringement cases are decided based on empirical facts, and attorneys are provided with an arsenal of evidence that is grounded in science. However, only a well-designed survey will provide litigators with such useful results.

This white paper focuses on common concerns surrounding surveys used in trademark and trade dress litigation such as survey design, use of control groups, survey administration, identifying the appropriate sample population, and the use of survey experts.

Further, surveys may not always be the best option. It is important to recognize the circumstances that may limit the efficacy of surveys for use in trademark and trade dress litigation. To best illustrate the points in this paper, we will be using the example of a fictitious pet supply company, Stanley’s Dog Beds.
An Example

Stanley has a passion for dogs. He has spent years designing dog beds and has come up with an innovative approach to climate controlled dog beds that also helps older dogs suffering from hip problems to get up with ease. Stanley also designs unique looks for each bed, so they become an architectural piece in the house.

These distinctive features have garnered a massive following. He has put much of his profits into research and development, website creation, maintenance, and customer service for Stanley's Dog Beds. He has designed a unique logo as well to differentiate his beds from others. The business has taken off and his dog beds have become known for their quality and beautiful aesthetics.

Unfortunately, others have taken note and have begun to sell dog beds that look very similar to Stanley's. While these beds look beautiful, on the inside they are not the same. The material is not as durable and their design does not actually provide climate control or relief from achy hips. However, some have gone even farther and begun using logos that seem eerily similar to Stanley's.

In addition to all this, several unauthorized sellers have begun selling Stanley's Dog Beds (especially his limited addition Christmas collections) through third-party vendors. Customers often receive used or damaged beds, but are unable to return the products as the unauthorized sellers do not accept them. This is not only cutting into Stanley's sales,
but is also creating confusion among consumers who have begun leaving bad reviews about his products. Stanley believes customers are now convinced that he uses false advertising and that his beds are low quality, not realizing they actually purchased a competitor’s dog bed or a dog bed through an unauthorized seller.

What is Stanley to do to help protect his business? While it may be the opinion of the plaintiff, Stanley’s Dog Beds, that competitors are attempting to free ride on his success, will the consumers think that the competitors are associated with Stanley’s Dog Beds? A well-designed survey can provide Stanley with the evidence he needs in order to ground trademark law in fact rather than conjecture.

Trademark & Trade Dress Infringement

This is just one example of instances where trademark or trade dress infringement might occur. Businesses can protect themselves through trademark and trade dress laws and through the use of surveys in their case. These surveys are distributed to the public in order to gauge the public’s perceptions. If the public itself is confused, then an infringement has occurred. They can also be used as a preventive measure to protect a business from such litigation. Surveys help to resolve the following questions:

1. Is the trademark unique and distinguishable from other products or is it more generic?
2. Has a non-distinctive mark developed a secondary meaning because it has been used so exclusively and continuously?
3. Does the public confuse one mark with another because they are so similar?
4. Can the public differentiate between authorized and unauthorized sellers?
5. Is an advertisement deceptive?

Surveys must be designed meticulously. A badly designed survey can be worse than no survey. The design of a survey must reflect the particular legal concept at issue in a case. These include likelihood of confusion, genericism, secondary meaning, deception, and likelihood of dilution to name a
few. The following are important issues to consider while designing a survey for any of the five concerns mentioned above.

**Survey Design**

Entire books are devoted to survey design and methodology that are written by survey experts. Proper survey design has become both a science and an art, as systematic empirical evidence is required in order to provide legal justification. With the growth of competing surveys in litigation, a survey must be well-designed to shield it from attack and to provide distinguishable valuable evidence from its counterpart.

Surveyors must be careful to use appropriate language in surveys. It is essential that respondents understand what the survey is asking them. Therefore, it must be written at the appropriate grade level. Questions must not contain double meanings or be misleading in any way; they must use clear and legally relevant questions. Often, surveys contain two questions in one, such as “Did you buy a Stanley’s Dog Bed and were you satisfied?” Respondents may answer “yes” to buying the bed, but not necessarily mean that they were satisfied.

Another example of a badly designed survey occurs when respondents are forced to provide either a yes or no response. Surveys should include another option, which gives respondents the ability to choose that they do not know or do not wish to answer. By providing this option, one can then assume that a response of “no” or “yes” truly represents that belief or sentiment. Some legal questions are very complex and require several questions to be posed to the respondent instead of just one. While the legal issue may seem clear to an attorney, the issue may be too complex for a respondent to answer in just one question. To compel an accurate and truthful response, additional questions are warranted.

The survey expert is able to discern which questions are necessary and which questions are just additional “fluff”. Unnecessary questions can ultimately be used against the results of the survey by introducing inconsistencies, no matter how many. While a client may think that asking additional marketing questions can be better bang for their buck, it can ultimately backfire.
Survey experts also design surveys to distinguish whether the respondent is guessing. Can respondents truly tell the difference between Stanley’s Dog Beds and a competitor’s or between authorized and unauthorized sellers of the product? Or are they just guessing? Properly qualified survey experts don’t just create the survey, they utilize their statistical knowledge to calculate how many of the responses are due to guessing, an important tool for analyses.

Courts have increasingly come to recognize the importance of control group methodology to address the question of causation and to more accurately assess consumer perceptions not attributable to measurement error. Proper survey designs makes this sort of analysis possible.

Finally, responses must not be guided, otherwise, the survey is biased. Asking questions such as “Did you buy this low quality dog bed?” guides the respondent into believing the dog beds are of low quality without the respondent ever confirming that they themselves believe the bed was of low quality. The court will not believe that a dog bed is of low quality until the survey respondent unbiasedly tells them this information.

**The Use of Control Groups**

Not all surveys require a control group, but, when warranted, they can help tease out any noise from surveys and to rule out alternative explanations. This is done so that the presumed cause becomes the only explanation for the effect. It is up to a qualified survey expert to inform legal counsel if one is warranted and to ensure proper design in regard to the use of controls, to keep costs down as much as possible.

Designing a survey is not as straightforward as it might seem, and the design can vary depending on the legal questions that require answers. The following is an example of various control group options, but is a mere snapshot of potential survey design options.

A survey can be designed by assigning different people to experimental and control groups, or by exposing the same person to both control and test conditions. Suppose the researcher wants to recruit 400 individuals to examine
the effect of Drug X on high blood pressure. He or she could assign 200 individuals to take Drug X and a further 200 who would take either a placebo or a common blood pressure drug utilized on the market today. The difference is then compared.

Because of randomization, one can measure whether the difference is statistically significant. Note that in this case, a drug trial, one cannot typically give the patient both Drug X and the competing drug—it’s only possible to do one or the other. Surveys on trademarks or trade dress may also require the respondent to see only the control or the test condition—common sense should prevail.

On the other hand, depending on the drug, one could have all 400 individuals take the placebo, measure the effects, wait some amount of time (as deemed appropriate by study doctors) and then take Drug X and measure its effect. The former example is an external control while the latter is an internal control. As the placebo isn’t going to affect a person in a physical sense, this design allows for a before and after comparison.

Again, there are similar situations in trademark and trade dress which would allow a consumer to be exposed to both the test and the control. In trademark infringement, we can use both internal and external controls, such as by adding additional questions not related to the case or asking an array of questions regarding several products. Surveys also use random assignment of respondents into either the experimental or control groups. While not a guarantee, random assignment usually helps to recruit groups of equal background etc. The larger the samples, the more likely this is.

**Deception Under the Lanham Act**

Deception caused by a certain advertisement is usually the basis for a claim under section 43(a) of the Lanham Act. While a simple survey can demonstrate that after viewing a certain advertisement individuals were deceived, it may not rule out whether a third factor also played a role. Just because the presumed cause is related to an observed effect does not necessarily equate to them being related. Take for example the relationship between ice cream sales and drownings.
The more ice creams are sold, the more drownings occur. Does this mean that we must stop selling ice cream, as it causes one to drown? Or could it be that ice cream is usually purchased in the summer which is usually the time when most drownings occur.

In the same sense, we may need to tease out whether a certain advertisement caused deception. Is it possible a third factor had this effect instead, that the opinions occurred prior to the introduction of the advertisement, or the introduction of a survey before the presentation of the advertisement “primed” respondents to answer in a certain way? These alternative explanations are important to understanding the relevance of a claim. Ruling out alternative explanations in a survey helps to create greater confidence in the survey results. For reasons such as these, experimental designs are the best option to present empirical evidence to the court.

**Survey Distribution**

Survey distribution is not as simple as it may seem. It is important to choose a survey administration method that is cost-effective and does not bias the results of the survey. For example, not only can surveys be administered through the telephone, online, or in paper-and-pencil format, but the way the desired survey population is recruited is also essential. If Stanley’s Dog Beds are sold only online, then the survey population should consist of any person who has made an online purchase in the last year.

Be careful not to limit the population to those who own dogs and shop online. Anyone can purchase a dog bed, even those without pets, as they may purchase the product for a friend or family member, or they are planning to buy a dog. Limiting the population too much opens a gateway for attack regarding the survey design as the survey population must be any prospective customer. Also, if the primary clientele is not tech savvy, then an online survey may bias results. These easy to make errors in administration can undercut the legitimacy of the survey itself as it does not address the correct survey population.
**Identifying Appropriate Survey Population**

In order to obtain accurate results, attention to who is being surveyed and how many in the population are being surveyed is essential. The population must be one that uses the product or service, or may be purchasers of the product in the future. This is important since many people who try to conduct surveys focus on a convenience sample of anyone who wants to complete a survey and not on the appropriate sample.

If a product is meant to target an older adult population, then the survey should not include young adults. If a product is available in a certain region only, then the sample needs to consist of respondents from the same region. If half of the loyalty card members signed up using an email address and the other half signed up using a mailing address, both types of card members need to be contacted, even though mail correspondence is far more costly than sending out an email.

Survey population sampling is always a concern. Some populations are more difficult to recruit due to culture, sociodemographic status, or they belong to a population class that may be too busy or ill to volunteer their time to a survey. Foregoing the best survey population for a convenience sample is not the answer.

While surveys can be conducted with smaller samples in order to reduce costs, there are certain trade-offs to this approach. Reducing the sample size reduces the reliability of the results. Surveys need to utilize enough sample to yield reliable results with a minimum margin of error, or the amount of random error in the results of a survey. On the other hand, one needs to remain cognizant of needlessly driving up costs with unnecessarily large numbers of respondents.

However, some populations may be very difficult to reach, making a large survey sample very difficult to collect. In either case, however, concerns regarding sample size can be addressed much more simply by making the survey projectable to a population. This is infinitely preferable to choosing a biased sample from a convenient group rather than the appropriate population.
When a Survey May Not Be the Best Option

There are several reasons to not proceed with a survey, including survey population concern, lack of time, cost, and sufficient evidence/expert testimony. First and foremost, the collection of the survey may be out of the budget. If cost is a severe constraint, it may be better to forego conducting a survey. A properly designed and executed survey can be costly.

Some survey populations are much more difficult to contact, a reason that the survey effort can be expensive. For example, certain populations are weary of providing answers, in fear of retaliation, having their identity stolen, lack of time, or lack of desire to complete surveys. This may result in either a survey with a small sample or a biased one.

Utilizing a Skilled Survey Expert

No matter how well one designs a survey, naysayers will always offer a counterargument to the methodology utilized or survey results presented in a case. In order to develop a survey that will hold up in court for either the plaintiff or the defendant, one needs a qualified survey expert to defend the survey and demonstrate why the approach taken was the best and/or most practical one and that the results being presented are free of bias. A survey expert is capable of defending their own survey or is able to point out flaws in a competing survey.
Again, considering costs, the tendency would be to minimize the sample size as an economy measure. While the responses of a few respondents can be valuable, the lack of statistical power renders one open to attack to the reliability of the survey. On the other hand, if other non-survey expert testimony is strong or other sufficient evidence exists (e.g. a plethora of negative reviews directed toward unauthorized sellers), a survey may not be necessary.

Finally, in order to develop a methodologically strong survey, sufficient time is necessary. If time is limited, a survey may not be the best approach, as a rushed survey can result in numerous unintended outcomes because sufficient planning and understanding of the issues is impossible. In these circumstances other evidence or expert testimony may be a more appropriate course of action.

**Conclusion**

In all, trademark surveys serve to provide an unbiased collection of responses from the general public that can estimate the level of confusion or deception in respondents. They are able to accomplish this by providing scientifically proven, unbiased results. In addition to demonstrating whether confusion or deception exists, surveys can help establish causation and, therefore, provide valuable support to a case. Although there may be circumstances when surveys are not appropriate, at times when they are warranted and feasible, they can be used to create evidence that may not be available from any other source.
ABOUT ANALYTIC FOCUS, LLC

Analytic Focus, LLC is a quantitative consulting firm headquartered in San Antonio, TX with offices in Washington, D.C. and Birmingham, AL. We serve our clients with economic, financial and statistical analyses. For the last decade, Analytic Focus has provided support in approximately 150 lawsuits involving thousands of Residential Mortgage Backed Securities.

Our team comprises Ph.D.’s and industry experts with decades of experience serving the banking, education, energy, finance, government, healthcare, housing, insurance, legal, retail and transportation industries. We analyze data and apply innovative methods to complex problems.

Our experts have testified at trial, in hearings and in depositions for cases that involve financial dealings, deceptive sales practices, fraud, biostatistical measurement and environmental issues. Our underwriting team has re-underwritten a quarter of a million residential loans for litigation and they underwrite commercial loans for credit unions, banks and cities.

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Gabriela Orsak is a Senior Survey Research Analyst for Analytic Focus, LLC. Dr. Orsak has 10 years of experience in research methods and design. She has conducted interdisciplinary research in numerous fields including psychology, healthcare, economics, and public health. Dr. Orsak has also written many publications in the fields of psychology, public health, and healthcare. She has served as a reviewer for many journals and as a member of the Institutional Review Board—an ethics review board for human research studies. Dr. Orsak has also taught undergraduate and graduate courses in public health, psychology, and biostatistics.

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