SURVEY ADMISSIBILITY ISSUES

Mark Puzella
March 17, 2022

orrick

The Gatekeeper

- Courts exercise a **"gatekeeping function"** to ensure that the survey evidence is based on **scientifically valid** principles and is **relevant** to the facts of the case. *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993); Fed. R. Evid. 702.
- Evidence from a professionally-conducted survey is **generally admissible** under the Daubert test.
- Any deficiencies in the survey methodology will impact the **probative weight** of the survey. *See E. & J. Gallo Winery v. Gallo Cattle Co*., 967 F.2d 1280, 1292, (9th Cir. 1992).
- However, if **the methodological defects or the irrelevance are so severe** a judge exercising the gatekeeping function will not admit the survey into evidence.

What are those circumstances?

Manual of Complex Litigation

The Manual for Complex Litigation lists four factors to consider when deciding whether to admit survey evidence:

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

Manual for Complex Litigation (Fourth) § 1.493 (2004).

McCarthy on Trademarks and Unfair Competition

Our host identifies several examples of when surveys may be excluded:

- The survey was designed by someone who **doesn't qualify as expert**
- The survey was "**so informally designed and conducted** that it fails key tests of professionalism and reliability"
- The survey and reporting contained "**errors . . . so serious** that the survey is unreliable or insufficiently probative"
- The survey asks "questions . . . **not congruent with the issues of the case**"
- The survey contains **other serious structural or methodological flaws**

6 McCarthy § 32:170 (5th Ed. 2017).

Recent Examples

Over the last several years, most cases excluding surveys have been based on one of the three types of survey errors:

- failing to survey the **correct universe**
- presenting **leading questions**, and
- presenting marks in a way different from **how consumers actually encounter the marks**.

Improper Survey Universe

- ***Lontex Corp. v. Nike, Inc*** — Parties disagreed on appropriate breadth of universe, based on discovery and deposition testimony. Court held that factual dispute would be resolved at trial, and resolution in favor of Lontex would lead to exclusion of Nike's Survey. 2021 WL 1145904 (E.D. Pa. Mar. 25, 2021)

> ***Nike Survey Universe:*** *"[P]eople between the ages of 18 and 64 who had either purchased athletic apparel in the past twelve months or planned to do so in the next twelve months*"

Lontex Says…

- ***Lontex* Customers*:*** "[P]rofessional athletes, individuals focusing on physical rehabilitation, serious non-professional athletes, and individuals seeking the benefits of compression technology"
- ***Nike Customers:*** "[I]ndividuals between the ages of 18-26 who are or were game-day athletes."

Nike Says…

- ***Lontex* Customers*:*** "[A]nybody that wants to be healthy, anybody that want to do any type of activity."
- ***Nike Customers: "***[S]uper democratic, a 15 year old boy to an 84 [year old] man;" Nike "want[s] to allow everybody to have the ability to wear our product and to feel good about doing so."

Improper Survey Universe

- ***Omaha Steaks Int'l, Inc. v. Greater Omaha Packaging Co., Inc***. — Survey selected a population that intentionally eliminated "a large segment of meat eaters because they purchase their meat from grocery stores and markets, and not specialty kiosks and websites" similar to the plaintiff's sales model. 908 F.3d 1315 (Fed. Cir. 2018)
- ***Saxon Glass v. Apple*** — Sample size of 40 survey participants was inadequately small. 393 F. Supp. 3d 270 (W.D.N.Y. 2019)
- ***Hain BluePrint, Inc. v. Blueprint Coffee, LLC*** — survey only targeted one aspect of defendant's business: whole bean coffee sold in Whole Foods. Appropriate universe should have targeted all of junior user's goods and services, which also includes direct sales online, and the operation of a standalone coffee shop. 2018 WL 6246984, *3 (E.D. Mo. 2018).

Improper Questions

- ***Pinnacle Advertising & Marketing Group*** — questions were closed ended and suggested a connection between the two marks:

> *"There is an advertising and marketing consultancy named Pinnacle Advertising and Marketing Group, Inc. There is an advertising and marketing consultancy named Pinnacle Advertising and Marketing Group, LLC. Do you believe that they are the same or affiliated consultancies?"*

  - This question suggested a connection *and* primed respondents to say that the two companies' websites were connected when asked to compare in a later survey question. 2019 WL 7376782 (S.D. Fla. Sept. 26, 2019)

Improper Presentation of the Marks

- ***Pro Video Instruments, LLC v. Thor Fiber, Inc.*** — Survey photos were heavily edited to remove marks. As a result, participants were merely comparing a black box to a grey box. Absent any marks, the survey could not help a jury assess "the overall impression created by the parties use of the marks." 2020 WL 1512448 (M.D. Fla. Mar. 30, 2020)

PVI (edited and original)	Thor Fiber (edited and original)	Control

Improper Presentation of the Marks

- ***Saxon Glass v. Apple*** — Survey did not use a standard visual stimulus but had participants write the words (“IONEX” and “ION-X”) in their own handwriting to evaluate similarity. 393 F. Supp. 3d 270 (W.D.N.Y. 2019)

IONEX

Improper Presentation of the Marks

- ***Superior Consulting Servs., Inc. v. Shaklee Corp.*** — Survey did not present images of the marks as they appear in the marketplace but just the words, "particularly odd" given the importance of the visual similarity for likelihood of confusion. 2021 WL 4438518 (11th Cir. Sept. 28, 2021)
- ***Pinnacle Advertising & Marketing Group*** — Survey asked participants about the full business names of the parties, rather than only the protected portion of the name. 2019 WL 7376782 (S.D. Fla. Sept. 26, 2019).

Shaklee Trademark

Superior Trademark

Other Grounds

- **Improper Controls**
  - ***Pro Video Instruments, LLC v. Thor Fiber, Inc.*** — Products at issue where black/grey and stripped of marks while control was yellow and green. 2020 WL 1512448 (M.D. Fla. Mar. 30, 2020)
  - ***Saxon Glass v. Apple*** — survey did not use a control. 393 F. Supp. 3d 270 (W.D.N.Y. 2019)
  - ***Superior Consulting Servs., Inc. v. Shaklee Corp*.** — survey did not include a control group. 2021 WL 4438518 (11th Cir. Sept. 28, 2021)
- **Failure to Replicate Market Conditions**
  - ***Pinnacle Advertising & Marketing Group*** —
    - Survey created an “artificial marketplace” in presenting two websites side-by-side, not how consumers would actually encounter the sites.
    - And a Google search for the protectable word, "Pinnacle," would not place website links in close proximity. 2019 WL 7376782 (S.D. Fla. Sept. 26, 2019).