

# The Use of Surveys to Calculate Damages in Intellectual Property Cases

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# Apportionment Surveys in Patent Damages

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## Usage Survey

- Determines the extent to which a patented attribute might be used

## Demand Survey

- Determines the extent to which consumers demand the patented feature and would not buy the product without that feature

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# Apportionment Surveys in Patent Damages

**Example:** Automotive manufacturer accused of infringing patents for integrating audiovisual devices through its “infotainment” dashboard

**Key question:** What portion of the royalty base (dashboard sales revenues) results from infringing use?

- Designed a survey of purchasers of the accused autos to determine:
  - How often they integrate an audiovisual device into their infotainment system
  - Whether devices connect wirelessly or through the ports included in the dashboard system
  - The relative time spent on infringing use versus noninfringing
  - Whether the audiovisual device is controlled through the infotainment system controls or directly through the device.

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# Inducement Surveys in Patent Damages

# Inducement Surveys in Patent Damages

## How Can Usage Surveys Inform an Inducement infringement Case?

- *Direct Infringement* – Was the accused product used in an infringing manner?
- *Specific Intent* – How involved was the allegedly inducing party in the decision-making of the alleged infringer?

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# Inducement Surveys in Patent Damages –Direct Infringement

**Example:** Medical instrument manufacturer accused of inducing infringement by surgeons of a patented surgical technique

**Key survey questions:** How often did direct infringement occur? Was direct infringement the result of specific and intentional encouragement by the manufacturer?

- Plaintiff surveyed surgeons in the medical field at issue to determine for the past two years:
  - Whether they used the patented technique
  - Whether they did so use the Defendant's implements
  - Whether or not a manufacturer's sales rep was present for the surgery
  - Whether the surgeon received manufacturer's brochures or training

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# Inducement Surveys in Patent Damages – Specific Intent

**Example:** Medical instrument manufacturer accused of inducing infringement by surgeons of a patented surgical technique

**Key survey questions:** Did the infringement occur? Was the infringement the result of specific and intentional encouragement by our Defendant or another manufacturer in the industry? If so, when did the inducement occur – after the date of notification?

- We surveyed surgeons in the medical field at issue to determine:
  - Whether they ever used the patented technique
  - Where they first learned to perform the technique
  - Whether their first surgery used the Defendant's product
  - How they chose the products for their surgeries
  - Whether or not a manufacturer's sales rep or literature from the Defendant influenced them to use the technique

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# Apportionment of Profits in Lanham Act Damages

# Accounting of Defendant's Profits

Example Calculation of Defendant's Profits:

Plaintiff must show only the de

Defendant is responsible for pr  
and any apportionment of pro

|                           |        |
|---------------------------|--------|
| Revenue                   | \$100  |
| Costs                     | \$80   |
| Profit                    | \$20   |
| Apportionment of Profits  | 43%    |
| Total Defendant's Profits | \$8.60 |

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# Use of Trademark Survey Results for Apportionment of Defendant's Profits

## Surveys for Trademark Disgorgement

- Surveys Used for Apportionment of Profits:
  - **Published Surveys** used from existing research
  - **Newly created surveys** by a party in the litigation

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## Surveys for Trademark Disgorgement

- Proportion of defendant's claimed profit that is attributable to use of the trademark.
  - Confusion survey result might show 15% of respondents are "confused," so are 85% considered "not confused?"
  - Can one calculate the apportionment for the disgorgement of profits from the 15%?

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# **Use of False Advertising Survey Results for Apportionment of Defendant's Profits**

## Surveys for False Advertising Disgorgement

- Proportion of defendant's claimed profit that is attributable to the false advertising.
  - False advertising survey result might show 20% of respondents made a "purchase decision" based on the false advertisement.
  - Can one calculate the apportionment for the disgorgement of profits from the 20%?

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# Use of Copyright Survey Results for Apportionment of Defendant's Profits



# Uses of Surveys in Copyright Cases

- To apportion defendant's profits in a disgorgement case among various elements
- To determine the royalty rate when calculating actual damages
- To show a link or causal relationship between the infringing copyright and its sales

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