

The Use of Surveys to Calculate Damages in Intellectual Property Cases

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Apportionment Surveys in Patent Damages



Apportionment Surveys in Patent Damages

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





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.



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?



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



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



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 proand any apportionment of pro

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



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



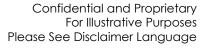
Surveys for Trademark Disgorgement

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



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%?



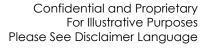


Use of False Advertising Survey Results for Apportionment of Defendant's Profits



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%?





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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