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The Use of Surveys to Calculate Damages in Intellectual Property Cases

McCarthy Institute

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Apportionment Surveys in Patent Damages

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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

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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

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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

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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

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Accounting of Defendant's Profits

Example Calculation of Defendant's Profits:

Plaintiff must show only the defendant's sales.

Defendant is responsible for proving all deductions in the assessment of profits.

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

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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%?

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

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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

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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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Empirical approaches to understanding consumer impressions

Augmenting survey evidence in trademark and trade dress litigation

Colleen Carroll

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Overview of discussion topics

1. Why use additional empirical approaches?

2. What kinds of additional empirical approaches have been introduced as evidence?

3. What are important analytical considerations when considering additional empirical evidence?

4. What challenges and opportunities does additional empirical evidence present?

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Why use additional empirical approaches?

Support and Validate

- Enrich survey evidence by serving as a robustness check to support and validate survey data

Fill Gaps and Hedge Risk

- Fill gaps and manage risk in the face of known survey limitations (e.g., surveying a difficult to reach consumer audience)

Reveal Inconsistencies

- Highlight inconsistencies in an opposing expert's empirical analysis or resulting conclusions

Reclaim the Edge

- Move the needle when alternative empirical evidence introduced by opposing parties leads to a 'neutralizing' effect

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What kind of additional empirical approaches have been introduced in litigation to assess consumer impressions?

Studies of Actual Use

Social Media Analysis of 'Actual Use'

Linguistic Analysis of 'Actual Use'

Studies of Online Consumer Behavior

Web Traffic

Search Engine Experiment

Market Analysis

Crowded Field Analysis (Prevalence)

Crowded Field Analysis (Quantitative Positioning and Demand)

AL/ML Prediction-Based Studies*

Algorithmic Classification

*Approach has been studied in the context of trade dress infringement applications but has not been introduced in US courts.

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Additional empirical approaches to assess consumer impressions: studies of actual use

Example Approach	Description	Expertise	Legal Context
Social Media Analysis of 'Actual Use'	• Compile social media comment data associated w/ entity holding trademark or trade dress (e.g., Twitter, Reddit, Facebook) • Apply analytical techniques (e.g., NLP) to categorize comments • Measure frequency of consumer associations of brand with trademark / trade dress • See, e.g., YETI v. RTIC (W.D. Tex.)	• Marketing; consumer behavior	• Secondary meaning
Linguistic Analysis of 'Actual Use'	• Search and extract instances of trademarked language in 'actual use' from text-based corpus databases (e.g., COKA, iWeb) or similar consumer-focused databases (e.g., Yelp) • Measure frequency of 'actual use' of trademark association with brand v. without brand • See, e.g., Reinalt-Thomas Corporation v. Mavis Tire (N.D. Ga.)	• Linguistics	• Secondary meaning

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Additional empirical approaches to assess consumer impressions: studies of online consumer behavior

Example Approach	Description	Expertise	Legal Context
Web Traffic	• Compare website traffic patterns for website w/ URL containing infringing mark v. patterns for trademark holder's website • Define, track, and compare key metrics indicative of accidental diversion from one website to another (e.g., visit length, new v. returning visitor, pages visited) • See, e.g., AKH v. Reinalt-Thomas Corporation (C.D. Cal.)	• Online consumer behavior; Internet marketing; online retailing	• Confusion
Search Engine Experiment	• Compile and compare Google 'Related Search' results for designated generic terms (e.g., ham, grape) with Related Search results for the trademarked language • Compile results for other known trademark associated language (e.g., apple, whole foods) for validation • Categorize results for each Related Search result as generic or trademark-associated • See, e.g., Reinalt-Thomas Corporation v. Mavis Tire (N.D. Ga.)	• Online consumer behavior; Internet marketing; online retailing	• Descriptiveness

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Additional empirical approaches to assess consumer impressions: market analysis

Example Approach	Description	Expertise	Legal Context
Crowded Field Analysis Prevalence	• Systematically search relevant databases and information sources (e.g., trademark databases, corporate records, online commerce) • Document associations of third-party usage of trademarked language, including on third-party products and entities • Validate research and assess impact of 'crowded field' on strength of consumers' associations with mark/brand • See, e.g., American Dairy Queen Corp. v. W.B. Mason Co., Inc. (D. Minn.)	• Marketing; market research; branding; consumer behavior	• Secondary meaning
Crowded Field Analysis Quantitative Positioning and Demand	• Compare ad spend, sales data (e.g., Nielsen, IRI) against comparable metrics for relevant set of 3rd party product names containing trademark language; supplement with relevant internal company marketing documentation to assess differences in relative consumer awareness/demand • Assess impact of 'crowded field' on strength of consumers' associations with mark/brand • See, e.g., Fage USA Dairy Inc. v. General Mills, Inc.	• Marketing; market research; branding; consumer behavior	• Secondary meaning

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Additional empirical approaches to assess consumer impressions: AL/ML prediction-based studies

Example Approach	Description	Expertise	Legal Context
Algorithmic Classification	• Assemble training dataset of product images comprised of trade dress products ('target product'), non-infringing 3rd party products (which serve as proxy for the market) • Train algorithm to accurately ID target product v. non-infringing products. Measure algorithm's baseline accuracy (%) • Once trained, measure algorithm's accuracy for ID-ing target product v. non-infringing 3rd party products (distinctiveness) • See, e.g., Keystone 2018 NABE-TEC conference presentation 'Neural network analysis of trade dress infringement'; not submitted in litigation	• Computer science; artificial intelligence	• Pre-litigation detection; distinctiveness

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What are important analytical considerations when weighing the use of additional empirical evidence?

Topic	Considerations	Viability

Data Availability and Robustness

- Readily accessible and available
- Able to be tested or sampled for feasibility
- Easily and quickly customizable, if needed
- Large enough to yield a robust set of findings
- Uniform and complete

Ease and Replicability of Analysis

- Uses accepted analytical techniques
- Can be validated and replicated
- Is easily explained and documented
- Is practiced among recognized subject matter experts

Viability

- Responses to considerations will help to gauge the viability of the empirical approach

- Case specifics (e.g., timeline, budget) will inform the weight given to various considerations

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What challenges and opportunities exist given the nascency of alternative empirical evidence?

	Challenges	Opportunities
Case Precedent	• Limited case precedent may create greater uncertainty of outcomes (e.g., admission, exclusion, and weight)	• Unique and creative approaches for filling in evidentiary gaps
Standardized Methodology	• Supporting the novel approach with traditional social science methodologies and/or new theoretical justifications	• Potential for greater flexibility in study design
Nature of Investment	• Assessment of time, cost, and ROI may be difficult to predict v. 'tried-and-true' approaches (e.g., survey)	• Depending on data source and analysis, some studies may be quickly conducted with minimal external dependencies

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SURVEY ADMISSIBILITY ISSUES

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March 18, 2022

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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).

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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**.

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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."

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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).

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Improper Question   s

• **_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?"_ asked

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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)

Apple Watch Series 3 has Ion-X front glass.

IONEX

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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).

HEALTHPRINT™

Shaklee Trademark

HealthPrint®

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).

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