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Using Survey Research to Win Intellectual Property Disputes

by Larry Herman

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HOW TO ENSURE YOUR STUDY WILL STAND UP IN COURT



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Survey research is considered a necessity to have as evidence in Intellectual Property (IP) disputes for two reasons: First, most judges expect it because a survey represents the voice of the customer. And second, if one side introduces a survey to support their argument during litigation, then the other side must have one for equal leverage.

Used mostly in trademark or trade dress infringement cases for all types of business disputes and industries, survey re-

search is also conducted for advertising claims substantiation and in cases involving misleading advertisement. With the boom in popularity of the Internet, new IP cases involving domain name and website infringement are emerging at a rapid rate. As a result of this emerging new marketplace, the scope of IP disputes and the demand for survey research has broadened even further.

When a survey is introduced as evidence in an IP dispute, it is subject to the most meticulous scrutiny. IP litigators need to be prepared to defend their survey rigorously, as even the smallest mistake in the research process can destroy a study's validity. And once a survey has been discredited, the entire case may be too! By knowing the distinct roles of the players involved in producing and being aware of the common pitfalls that can destroy a survey's credibility, IP litigators can help ensure their survey is "ironclad" and maximize their chances of winning a case.

TWO PLAYERS WITH DISTINCT ROLES

There are two key players involved in conducting survey research, each with their distinct role in conducting and presenting a survey to be used as evidence:

The expert witness, usually a well-known marketing expert or business school professor, is the survey design specialist and "testifying" professional. His or her role is to create an unbiased methodology, questionnaire, and sample design for the survey, so that the results are viewed as truly objective evidence in court. Once the survey is executed he or she must testify and explain the results articulately and concisely on the witness stand, holding up graciously under cross-examination by opposing counsel.

The other key player is the professional researcher, the expert the market research firm responsible for managing and fielding the quantitative survey. He or she must be experienced in conducting legal surveys, since these studies require special attention and must meet more rigorous requirements than the usual market research. A legal survey must be micro-managed by the professional researcher to ensure that the data is collected and processed flawlessly, so that there will never be any question regarding its accuracy. Although the professional researcher rarely appears on the witness stand, his or her work in executing a survey will be subject to the same meticulous examination by opposing counsel.

To produce an "ironclad" survey and make the best case possible, both of these players need to be specialists in research for litigation and must work in tandem. While attention is most often given to hiring the best IP expert witness, the professional researcher's work is just as important since opposing counsel will be looking to discredit a survey's findings

10 STEPS TO CREATING SUCCESSFUL SURVEYS FOR INTELLECTUAL PROPERTY LITIGATION

1. Determine what kind of survey is needed to best support your case in an IP dispute. (You may wish to conduct a preliminary quantitative survey of limited scope as a "pre-test," to determine the best way to proceed.)
2. Hire two legal survey specialists: an experienced designer of legal research as your testifying expert and an experienced research firm professional as your executional expert.
3. Design an unbiased survey in terms of sample, questionnaire design and wording.
4. Execute the survey using the necessary quality control procedures.
5. Use double blind interviewing, where neither the interviewer nor the respondent is aware of the client or sponsor of the survey.
6. Validate results by re-contacting a minimum of 75% of all respondents.
7. Code verbatim responses twice, using two different people as coders to compare results.
8. Key punch the data twice to eliminate all errors and ensure 100% verification.
9. Get the final results via a written report or affidavit from the testifying expert.
10. Submit your survey findings as evidence.

wherever possible.

A study conducted among IP litigators who use research in the courtroom, yielded the following comments about where they look to find flaws in an opponent's survey evidence:

We attack the methodology ... try to break the study down. Then we typically ask for copies of every survey filled out and re-code it ourselves to see whether or not our answers concur with the expert's report.

The individual questionnaires are the Achilles Heel of the expert. That's where any weakness in the survey design or its execution can be uncovered and attacked.

In fact, to ensure that a study will stand up under fire, some IP litigators take this same hostile attitude towards their own surveys. One lawyer in the same study said:

We attack our own research... look at each questionnaire and try to find any problems ourselves.

These attitudes reinforce the needs for precision on the part of both the testifying expert witness and the professional researcher. Such an environment compels the IP litigators commissioning the survey, the expert witness designing the survey, and the professional researcher executing it to be extraordinarily attentive to all details so that their findings will survive unscathed.

POTENTIAL RESEARCH PITFALLS

Specific parts of the research process that are particularly vulnerable in the courtroom include the questionnaire wording, the data collection process and coding procedures. Some of these elements are the responsibility of the expert witness while others are under the control of the professional researcher.

In the survey designed by the expert witness, proper wording of questions is key. The lawyers who partici-

pated in the study identified "leading" and "vague" questions as flaws they focus on to attack the survey in the courtroom, punch holes in the entire survey's validity, and ultimately accuse the survey of producing biased results. Thus it is the testifying expert's responsibility to create questions which are clear and objective to avoid these pitfalls.

Even with unbiased, perfectly worded questions, issues can arise during the survey's execution that may seriously endanger a case. It is the job of the professional at the research firm to make sure the field data collection runs smoothly, that any processing problems are eliminated, and that nothing happens that can be used to undermine the survey's findings.

For example, one of the lawyers in the study made the comment:

We were able to show, through the actual questionnaires filled out, that there was a discrepancy in one survey center. The interviewers were supposed to take down verbatims, but it strained credulity that five people in a row would say the same thing.

Because the lawyer was able to show that the data from that center was suspect, the entire survey's results were discredited.

Breakdowns in double blind interviewing procedures can also undermine the results of legal research. For example, in one trademark infringe-

ment case mentioned by the lawyers, some materials for a survey were labeled with a project code, but the code inadvertently included the client's common brand identity in its creative title. The interviewers and possibly the respondents could easily guess who sponsored the survey. Subsequently, the survey's answers may have been biased, so the survey was discredited.

USING PRODUCT DISPLAYS FOR SURVEY RESEARCH

If displays are used to present two or more products for evaluation in a study, then the consumer's shopping experience needs to be duplicated accurately. For example, when two products that appear in different aisles in a supermarket are being compared, then the two packages should not be placed on the same shelf in a "supermarket-style" display for research. The actual consumer experience needs to be recreated as faithfully as possible in order for the survey's results to be accepted.

Whether it's poor use of displays to create a consumer shopping experience or any other survey implementation flaws, these problems may be discovered and revealed in court. Opposing counsel will quickly point out how these errors introduce bias to the survey's results and will use their discoveries to undermine your expert's testimony and the entire

A GLOSSARY OF RESEARCH TERMS

- 100% Keypunch Verification – the process by which all survey responses are keypunched twice, to eliminate any human errors.
- Coding – the process in which verbatim responses to questions are assigned codes for different categories of responses, allowing for analysis across multiple surveys.
- Double Blind Interviewing – ensuring that neither the interviewer nor the respondent can identify the sponsor of a survey.
- Re-Coding – the process of reviewing all verbatim responses to verify that the initial coding was correct.
- Validation – the process of re-contacting respondents to verify they were, in fact, interviewed and were qualified to participate in the study.

case.

PROPER CODING IN SURVEY RESEARCH IS KEY

Another area of vulnerability is coding, the process by which verbatim responses to open-ended questions are assigned codes for different categories of responses, allowing for analysis across multiple surveys. Whenever open-ended questions are used in a survey, the opposition will usually re-examine and try to attack the coded results. In order to introduce this in court, typically opposing lawyers will ask beforehand for copies of every questionnaire filled out and recode the answers themselves.

If the survey respondents' verbatim are ambiguous or unclear, opposing lawyers may interpret the responses differently. For example, in an IP dispute between two companies over bottle design, one coder may consider the open-ended verbatim answers "greenish" and "aqua-colored" to be the same, while another coder may see these as separate answers to be categorized differently. Since different coding will lead to different statistical results, the professional researcher must look for these differences ahead of time and bring such disputes to light before the survey is introduced as evidence in court.

Several steps can be taken to avoid coding problems. First, the expert witness can design the survey to ask as few open-ended questions as possible. Second, these open-ended questions can be worded very carefully to focus on a specific point. Third, the research firm executing the study can have two people code the responses and verify each other's work. This step will bring to light any different interpretations that might occur, so that the professional researcher and the expert witness become aware of other possible interpretations. The

survey may be redesigned or the different interpretations may be pro-actively acknowledged in the analysis when the survey results are presented on the witness stand.

SPECIAL QUALITY CONTROLS FOR RESEARCH USED IN LITIGATION

Special quality controls can be used at the research firm to minimize data collection problems. Their purpose is to eliminate any element of human error. Some of these special controls are:

- No one interviewer completes more than 1/3 of the interviews in a given market to help reduce the potential of fraudulent responses occurring.
- All interviewers conduct a "practice" interview, which is documented, signed and returned to the research company, to confirm that every interviewer is well-trained and understands the survey procedures.
- Only pens are used on questionnaires to prevent erasures which may suggest that an answer was altered.
- A truly neutral project code name is created and used on all materials to remove all references that may identify the client sponsoring the study; this includes even small items like the return address on packing labels.
- A minimum validation of 75% of respondents is required, versus the 15 – 20% required for a regular quantitative study.
- Questionnaires are 100% key-punch verified to eliminate errors, versus the usual 25% verification on a typical quantitative research survey.

For the professional researcher executing a survey, the overall impera-

tive is to have "No Errors," since the testifying expert witness will have to defend any irregularities on the witness stand.

Despite its potential pitfalls, survey research can be a powerful tool when used as evidence in intellectual property disputes. When properly designed and executed, it brings in the voice of the consumer to help prove or disprove the charge of infringement. Given the rigorous cross-examination encountered when using survey results in IP litigation, it's not surprising that many litigators approach survey research as a "necessary evil."

However, for those who understand the role of the each expert player involved in IP litigation and know how to avoid common research pitfalls, surveys can be powerful evidence that helps a client win the courtroom battle to protect their intellectual property rights. **IPT**