

Tips for Supervising a Trademark Survey Expert

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Both in market research and in trademark infringement litigation, trademark surveys can be a useful way to determine how recognizable a product or its packaging is to the public, as well as whether two products are so similar that members of their target audience confuse them. In court cases related to trademark infringement, one or both parties might retain trademark survey experts to provide expert witness testimony, because a properly designed and conducted survey is direct evidence of consumer perception. This strategy can help you win your case if you do it correctly. If you make mistakes in the design of your survey or in your reliance on survey experts, though, your trademark survey can work against you. An intellectual property lawyer can guide you through the trademark dispute process and explain the reasons why your case may benefit from a trademark survey.

Developing an Effective Trademark Survey

Even the best trademark expert cannot make a trademark survey support your claims about trademark infringement (or lack thereof) if the survey is improperly designed. These days, particularly considering COVID-19, the Internet is the principal way to distribute a survey. Historically, surveys have been conducted using cold calling or reaching out personally, such as in a shopping mall. Recently this has been less the practice, and it is more common to see surveys conducted via the Internet. A first consideration is to determine the relevant “universe” of individuals to participate. This is critical because even if the questions are correctly asked, the results will be immaterial if the questions were directed to the wrong people. In addition to choosing the right target demographic, you must ensure that your survey does not include leading questions.

No Survey is Perfect

Part of the task of the opposing party’s survey expert is to point out the flaws in your survey. The Daubert standard, which determines whether scientific expert witness testimony is admissible in civil and criminal court cases, encourages transparency about research methodology and error rate. The more the survey expert can speak about the survey methodology and support it, the better. It is critical to plan your survey early on, as this can help you identify the strengths or weaknesses in your case. Further, because designing and implementing a survey can take time, it is essential to be mindful of court-ordered deadlines for expert reports and disclosures.

National Law Review, Volumess XI, Number 78

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