

HEADNOTES



EXPERTS

Weird Science: Consumer Survey Experts in the Courtroom

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I was never much of a science student. I majored in English. I satisfied my science requirement by taking a course known as “Physics for Poets.” There was no exam, no complex equations to be solved; we wrote a paper. Mine was entitled “The Problem of Quark Confinement.” To this day, I have no understanding of what that phrase means.

Fortunately for me, my career as a litigator led me to the world of trademark

litigation. In a trademark case—unlike medical malpractice, where a trial lawyer must become conversant with scientific terminology and surgical procedures—there is typically no “hard” science involved. Perhaps that is why trademark law is often referred to (derisively, usually by patent lawyers) as “soft IP.”

We trademark litigators, however, do get to dip our toes in the science pool. The science of consumer behavior, which has long guided advertisers on how to pitch products, is at the core of every trademark case. After all, the issue of whether one trademark is infringed by another comes down to how consumers perceive the marks. In other words, this branch of science delves into the consumers’ thought processes triggered by the words, lettering styles, designs, and other stimuli presented on a product or its packaging. Unlike most scientific disciplines, consumer surveys seek to bring pure

subjectivity into the realm of empirical analysis and measurable statistics.

Judges recognized early on that they are ill-suited to divine the perceptions of the relevant purchasing public. In a 1940s trademark infringement suit by *Seventeen* magazine against the manufacturer of “Miss Seventeen” girdles, Judge Frank of the Second Circuit famously observed that the trial judge’s “surmise” was no substitute for evidence of how girls and women would react to the marks, as “neither the trial judge nor any member of this court is (or resembles) a teen-age girl or the mother or sister of such a girl.” *Triangle Publ’ns, Inc. v. Rohrlisch*, 167 F.2d 969, 974 (2d Cir. 1948).

Nowadays, consumer surveys are *de rigueur* in trademark litigation. Some courts will even draw an adverse inference against a party that fails to proffer one despite having the financial means and opportunity to do so. So, whether

Illustration by Sean Kane

you're an MIT grad or scientifically challenged like me, you need to embrace the science of consumer surveys to win your case. What follows are some tips on how to navigate this process effectively.

First, learn and know the science. While the books and articles on the subject are legion, I recommend Shari Seidman Diamond's seminal article, "Reference Guide on Survey Research" in the *Reference Manual on Scientific Evidence* (Fed. Judicial Cntr./Nat'l Research Council, 3d ed. 2011). It is an excellent scholarly overview of the topic with practical suggestions and practice pointers.

Second, use your knowledge of the science in working with your expert. The design and execution of a consumer survey for trademark litigation is a complicated process, ranging from definition of the "universe" of survey respondents to the wording and sequencing of the questions and selection of appropriate stimuli. You

will know your case better than your expert, so make sure your expert designs the survey to yield the evidence you need and proof that will withstand attacks on its validity and reliability.

Third, select your expert carefully, keeping in mind the evidence you want to establish through the expert's consumer survey. This is one area where retaining a "professional" witness can make a real difference. There are a handful of consumer survey methodologists who are the leaders in the field. You will likely be better served by one who has an established track record as a testifying witness in trademark litigation than by a neophyte. In my experience, experts from academia often lack the familiarity with how trademark law intersects with the science of consumer surveys. A seasoned consumer survey expert should be able to testify credibly (and accurately) regarding both disciplines.

Fourth, vet your expert thoroughly. If

your expert's curriculum vitae shows a long list of published court opinions in which the expert's survey was at issue, read those cases and be prepared to defend against your opponent's effort to dredge up any instances where a judge excluded your expert's survey or gave it little weight.

Finally, be sure your expert is experienced in conducting web-based consumer surveys. Courts have gradually come to embrace these surveys as admissible and probative evidence in trademark cases. A web-based survey can be completed quickly, sometimes within a week, and can give you a strategic advantage in courts with a fast-moving civil docket.

In short, you don't need to be a science genius to develop the scientific evidence to help win your trademark case. Though it may not be as hard as physics, the science of consumer surveys still bedevils some judges and juries. A good survey expert will help you keep it simple. ■