

FINAL TRANSCRIPT

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****ACC - Trademark Survey Evidence - A Walk Down Memory Lane and a Year in Review**

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PRESENTATION

John Hogan - *ACC - Chair of Intellectual Property Committee*

Hello. Welcome to Trademark Survey Evidence -- A Walk Down Memory Lane and a Year in Review. This webcast is sponsored by ACC's Intellectual Property Law Committee and the IP Committee sponsor Kilpatrick Stockton, LLP.

I'm your moderator, John Hogan. I am chair of the IP Committee and I'm glad that you could join us for this presentation. I hope that if you're attending the annual meeting in Washington, D.C. next month that you'll stop by the IP Committee meeting on Wednesday morning.

First, some housekeeping matters. If you have questions for our speaker, please send me an email with your question. My email address is hoganj@wyeth.com. If you think of someone else who would benefit from this presentation, replays of this webcast will be available at the end of today and will be available for one year.

Without further review I would like to introduce Judy Powell, who is a partner in Kilpatrick Stockton, specializing in trade market vice and infringement matters. She served as co-chair of Kilpatrick Stockton's Trademark Group and as the firm's liaison to ACC's IP Committee.

Judy Powell - *Kilpatrick Stockton - Partner*

John, thank you. It's Kilpatrick Stockton's pleasure to sponsor the webcast today and my personal pleasure to introduce Dr. Gerald Ford. Dr. Ford is a partner in the marketing research and consulting firm of Ford, Bubala, & Associates. He's located in Huntington Beach, California.

Dr. Ford has been engaged in commercial marketing research and consulting for the past 30 years. He's also an emeritus faculty member of the School of Business Administration at California State University Long Beach, where he was a full-time professor for 25 years.

Dr. Ford holds a Bachelor's degree in advertising and both Master's and Doctoral degrees in business administration from the University of Southern California. He has written extensively on trademark surveys, is a frequent lecturer to both marketing professionals and to legal groups and is also a member of the editorial board of the Trademark Reporter.

Those of us active in the trademark bar know him as one of the most respected trademark survey experts in the country. Gerry, thank you for being here today and I'll turn it over to you.

Gerald Ford - *Ford, Bubala, & Associates - Partner*

Judy, thank you. And hello to all of you who are listening to this webcast today.

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Today I'd like to talk about the use and application of survey evidence in intellectual property cases, as well as emerging issues with respect to survey evidence. But before I begin, let's take a short walk down memory lane.

First, let's look at slide 2. As an initial note, because the sheer volume of surveys used in Lanham Act matters, my remarks here today will focus on trademark and false advertising surveys, as opposed to surveys used in other intellectual property matters.

For a historical perspective, using Lanham Act or the passage of the Lanham Act in 1946 as a starting point, you can see that the application development of survey evidence was initially slow, with only 18 surveys being offered in reported cases between 1946 and 1960.

Between 1961 and 1980, 193 surveys were offered in reported cases, approximately 10 per year on average. And in the 24 years between 1981 and 2004, 1,007 surveys were offered in reported cases, approximately 42 per year on average. I'm not sure these are good facts, that is the growing use of surveys in IP litigation. But that's a topic for another day.

As a side note, I might add that while to date survey evidence has been limited in its application in patent and copyright matters, based upon our recent experience, it would suggest that this is about to change. I would really expect to see the application of survey evidence in patent and copyright cases to grow in the near future, especially with regard to issues related to damages.

Now let's look at slide 3. What fueled the dramatic use in application of survey evidence? I believe it was the result of two things. First, the publication, in 1960, of the handbook of recommended practices for the trial of protracted cases. This was the predecessor publication to what we know today as the Manual for Complex Litigation, by the Federal Judicial Center, now in its fourth edition.

Initially, in 1960, and continuing today with the Manual for Complex Litigation 4, this publication provides a set of criteria upon which the federal courts can judge the trustworthiness of survey evidence. Additionally, and now augmenting the test of trustworthiness in the Manual for Complex Litigation, is the companion publication from the Federal Judicial Center, the Manual on Scientific Evidence, now in its second edition.

Next, slide 4.

Second, fueling the growth of survey evidence, I believe, was the adoption in 1975 of the Federal Rules of Evidence, specifically Rule 703.

Slide 5.

As alluded to a moment ago, the evolution of survey evidence has produced an interesting and varied history. Initially, surveys were routinely challenged and frequently excluded on the basis of hearsay judgments. This was followed by the near meteoric rise in the volume of survey evidence where, for the most part with notable exceptions, surveys were regularly admitted with deficiencies going to weight, not to admissibility.

In conjunction with this rise in volume of survey evidence, two things were happening. First, surveys were becoming increasingly more sophisticated and complex and, I might add, more expensive. And second, correspondingly the judiciary was becoming more sophisticated in evaluating survey evidence.

But now, we seem to have come full circle, following the U.S. Supreme Court's gate keeping mandates regarding the admissibility expert testimony in the Daubert v. Merrell Dow decision. Admissibility of surveys and expert opinions are again being challenged.

Slide 6.

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Is the expert evidence admissible? In addressing this question, the Supreme Court and its now famous Daubert decision, corrected judges to fulfill their gate keeping function by answering the question: Would the determination of whether or not the evidence is relevant and reliable?

Slide 7.

So much for memory lane. Now let's look at some recent cases in which survey evidence was offered during the period covered by the paper that you have received, that's May 2003 to September 2004. During this time, as you can see, 71 surveys were offered in reported cases. As you probably note from this slide, the majority of these surveys were offered to address the issue of (inaudible) confusion, followed by secondary meaning, false advertising, et cetera.

Now let's look at some of the 71 cases which might be of particular interest.

Slide 8.

Let's start with Ty v. Softbellies. This was a genericness case. This issue in this case was whether or not the word "beanies" had become generic for a beanbag stuffed animal. In this case the defendant used a mark "Screenie Beanies" for a beanbag animal with a chamois tummy that was used for cleaning a computer screen.

In this case, the plaintiff's survey showed that the primary significance of the word "beanies" among consumers was that of a brand name, as opposed to a common or generic name. The importance of this case? Well, aside from the now famous witness tampering issues, this case, I think, is important because it evidences the use of both a linguist and a statistician to augment the survey results on the issue of genericness.

In this case, plaintiff used a linguist to show that references to beanies in newspaper articles, magazines, and dictionaries evidenced brand usage, not generic usage. Additionally the plaintiff employed a statistician to sample all uses of the words "beanies" on Yahoo and eBay to determine if the references evidenced again, brand or generic use. Thus, the linguist and the statistician further helped establish that the word "beanies" in this case was a brand name and not a generic word.

Slide 9.

The second case, the Straumann case, involved a product configuration. The issue in this case was whether or not certain portions of a dental implant had acquired secondary meaning, and thus functioned as a trademark. The survey results in this case evidenced that 44% of the respondents -- the survey universe in this matter were dental practitioners -- associated the appearance of the overall implant with plaintiff, Straumann.

The importance of this case? Importance lies in the fact that the survey did not filter out the degree to which functional versus claim's non-functional features were used by customers to identify the source of the implant. The result, no weight on the issue of secondary meaning, no measure of causality due to the claim's non-functional trademark features.

Additionally, the court found the survey suffered from a seriously flawed question. The secondary mean question in this survey was, "What company do you think puts out these implants?" The court found that this question suggested a single company, (inaudible) the survey results with respect to the issue of secondary meaning. The ultimate result? The survey was not admitted.

As a side note for a moment, I'd like, before I continue, I'd like to point out that there are numerous cases in which survey evidence has been found to be probative and has been relied on by the courts. So often, some of the best learning lessons come from survey evidence which was found to be deficient, or lacking a probative value. As such, the next 8 slides or so focus on surveys deficient enough to result in exclusion or of notably limited probative weight.

Slide 10.

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The events of the barbell matter again involve secondary meaning for features of a product configuration. This is a TTAB matter, or a survey in a TTAB matter. The issue was whether or not the configuration of Appellant's barbell weights, specifically the holes and the pattern of the holes, the ridges on the weights, and the raised boarder on the weights, functioned as a trademark.

In this case, Appellant did a survey at two major industry trade shows among a group of gym owners, managers, and fitness instructors. The results of the survey evidenced recognition of Appellant's barbell weights.

The importance of this case? The importance of this case lies in the fact that there was no evidence that the broader group of perspective purchasers, for example home purchasers of barbells, recognized Appellant's design.

Here, the TTAB looks at the application, which was not restricted to any particular market or prospective purchases, and found that the survey universe was too narrow. That is, that it was only a small subset of all potential purchases.

The result? The survey was afforded no weight.

Next slide, 11.

Most economics involve the issue of likelihood confusion with respect to the title of a yet-to-be published magazine. The issue in this case was likelihood of confusion with respect to the title of two publications. One title, "Month Prescribing Reference," versus a new month magazine titled, "The PDR Monthly Prescribing Guide."

In this case the court actually found the survey evidence showed some confusion. The importance of this case? The importance of this case lies in the fact that the survey employed no control to determine if the confusion was due to the title of the new magazine or some other factor, such as the popularity or market share of defendant's publication or alternatively some other non-trademark reason.

The result? No weight. Although some confusion, no causality had been shown.

Slide 12.

In the Colt versus RJG case, the issue was likelihood of confusion as to the trade dress of a replica of the Colt Peacemaker revolver. In this case the survey results evidenced that respondents identified defendant's replica gun as coming from plaintiff Colt.

The importance of this case? Well the court found new numerous faults in the survey, the universe, with questions, et cetera. Most notably the court found that the trustworthiness of the survey was brought into serious question because the expert and his son had conducted some of the survey interviews.

It should not need to be said, surveys and litigation matters as well as most other research need to be double-blind. That is, both the survey takers -- the interviewers -- and the survey respondents -- the interviewees -- should not be informed, either of the purpose or the sponsor of the survey, in a manner similar to a double-blind medical drug test.

Now let's look at slide 13.

In Scott Fetzer versus House of Vacuums, the issue in this case was likelihood of confusion due to defendant's use of the Kirby name in a Yellow Page advertisement. This advertisement listed for sale a number of new and used brands of vacuums, including Kirby, for which the defendant was not an authorized distributor, but offered new Kirby vacuums purchased from authorized independent distributors.

In this case, plaintiff's survey universe was comprised only of people who had purchased a new Kirby vacuum from an authorized distributor. Plaintiff's survey stimulus was defendant's Yellow Page ad, and plaintiff's survey question or principle survey question

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was, "Looking at this ad, would you say that this company is in any way affiliated with, or connected with, or sponsored by Kirby?"

The result? I bet you figured it out. No weight. First the court found that the survey universe was too narrow, that is, not a representative sample of potential purchasers of vacuums, even Kirbys. And second, the court found that the question posed suggested a connection between defendant and Kirby instead of permitting the participants to make their own association, thus further biasing the survey results.

Now let's look at slide 14.

In Wells Fargo versus WhenU, the issue in this case was likelihood of confusion with respect to the source of pop-up ads on Wells Fargo's website. No survey was conducted in this case.

Plaintiff's expert in this case opined that a likelihood of confusion existed relying on two prior surveys he had conducted in unrelated matters.

The importance of this case? First, if you have an Internet-based matter, this is a case I think you need to review. I would also suggest in that same vein that if you are involved in Internet-based trademark issues that you would also review both the district and appellate decisions in companion to this case. Its 1-800 Contests versus WhenU, out of the southern district of New York.

And another case, Learning Network versus Discovery Communications, it's a 1993 or 1994 case out of district court in Maryland.

So continuing on, the Wells Fargo versus WhenU is a good example I think of the rising sophistication of the judiciary with regard to evaluating survey evidence and expert testimony. The court clearly understood in this case what was necessary to provide proof of likelihood of confusion and gave no weight to the expert's testimony and the court was well-versed in the use and application of survey evidence and the limits that the prior surveys that the expert wanted to rely on, the limits to the applicability of those surveys.

Now for a very recent case on slide 15.

In Geico versus Google the issue was likelihood of confusion with respect to sponsored links, which I'm sure you are all familiar with when you do searches, which contain the name Geico, which would appear as a result of a Google search for Geico car insurance.

The importance of this case? Well aside from the issue of whether or not Google's use was trademark use, the importance of this case again reflects the rising sophistication and expectation of the judiciary in evaluating survey evidence. Here the survey suffered from four major deficiencies according to the court.

First, the survey stimulus in this case was a screen shot of a search for Geico on Google, but was not representative of the typical screen shot that Google searches would have produced or that Google searchers would have seen, either in 2004 when the case was filed, or in 2005 when the case was tried.

The second deficiency the survey suffered from, the court described as demand effects. Demand effects are survey questions and other procedures in the survey which could influence the respondent's answers by suggesting the correct answer or by implying associations which may never have occurred to the respondent.

Thirdly the court found that the survey suffered from order effects. That is where a survey respondent's answers to one question effects his answers to subsequent questions.

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And finally, fourth, the court found that the survey suffered from an inadequate control, which would have allowed the measurement and assessment of the cause of any confusion, which was measured. I will speak more about the concept of controls later in my presentation.

The result? The survey's deficiencies gave the court serious doubt about the accuracy of the survey results.

Now let's look at slide 16.

The Pharmacia case is a false advertising case and if you have a false advertising case which involves a product comparison, this is a must-read case. The issue in this case was whether or not defendant's ad was likely to deceive customers or consumers into believing the defendant's product was superior to plaintiff's product in helping people to stop smoking.

The survey in this case showed defendant's television ad to survey respondents and asked them a variety of questions including a control question.

The importance of this case lies in the court's rejection of the control question, which measured only guessing or agreement bias, and not causality. The court wanted a control cell, a separate survey, with another comparative ad. The court's logic was, when A is compared to B in an advertisement, consumers always get some level of superiority claim of A over B and that needed to be accounted for.

The expert's excuse? Too costly and no time, it was not accepted by the court.

Slide 17.

Again, if your practice includes matters involving false and misleading advertising claims, this again is a must-read case. The issue in this case was whether the claim, "America's favorite pasta," can say that the pasta was a number 1 brand or a national brand.

Survey results confirmed that potential purchasers believed that the claim meant 1, that "America's favorite pasta" meant it was the number 1 brand or a national brand, both of which were not true.

The result? Well surprisingly enough, the 8th Circuit found that the survey was not applicable in determining the meaning of the claim "America's favorite pasta." The 8th Circuit adopted the recent logic of the 7th Circuit in the Mead Johnson case which concluded that "dictionaries are surveys by people who devote their entire life to discovering the usage of words and that it would be a bad idea to replace the work of these professionals with the opinions of people on the street."

The importance of this opinion? Now the 7th and 8th Circuit have opined that surveys are generally unnecessary and not relevant to the meaning of advertising claims or the meaning of words. If followed, these 2 circuit opinions could have a profound effect on false advertising litigation strategies.

But the paper you've been provided with gives you the cross reference for the Mead Johnson case for your convenience. If this is an issue that you're interested in, you need to look at not only Mead Johnson, but probably a case that many of you will remember, the Pizza Hut versus Papa John's litigation over "better ingredients, better pizza."

In addition to that, I might add that with respect to this issue, the most recent issue of the Trademark Reporter, May-June 2005, includes an article by Richard Layton (ph) addressing the 7th and the 8th Circuits decisions with respect to (inaudible) and dictionaries and survey evidence.

Now let's look at slide 18.

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This is the last case. This is (inaudible) case, was a design-patent case with respect to an oxygen tank. The issue was, who was the ordinary observer?

In this case, the survey was conducted among patients, which the court determined not to be relevant under the Supreme Court's test in Gorham versus White.

The importance of this opinion? It was the court's determination that the ordinary observer in a design-patent case under the Gorham versus White standard were purchasers of the type of product that they issued.

In this case, they would be physicians or medical equipment distributors who make a purchasing decision and who supply the oxygen tanks to patients, not to patients themselves.

The result was no weight.

Slide 19.

Didn't we learn from survey evidence over the past few years? Well we can see at least three emerging trends, I think. One, continued application of Daubert challenges. Two, the court's increasing focus on causality. And three, maybe the beginning of a change in how courts receive criticism from opposing survey experts.

Slide 20.

First, with respect to Daubert and its impact. If you look at the 10 years prior to the Supreme Court's decision in Daubert, 380 surveys were offered in reported cases. Five surveys were excluded: that's approximately 1%.

Slide 21.

Now for a comparison. Let's look at the number of surveys offered and excluded subsequent to the Daubert decision.

In the 10 years since the Supreme Court's decision in Daubert versus Merrell Dow, 492 surveys were offered in reported cases, 23 surveys were excluded, approximately 5%. Still a small number.

But if one looks closely, only 12 of the 23 were excluded for Daubert reasons. The remaining 11 were excluded for non-Daubert reasons, specifically procedural reasons. In one case or in two cases, surveys were offered months after the close of discovery and in another case in a motion for a preliminary injunction the plaintiff's survey only shows up in the plaintiff's reply to the defendant's opposition to the motion for a preliminary injunction. In that case the court was unwilling to consider plaintiff's survey.

Once you adjust that number, you're at about a 2% exclusion rate, just about the same as it was before Daubert. But does that mean that Daubert challenges are not an issue today? No. It does not mean that Daubert challenges are not becoming routine because they are.

And because they are becoming routine, responding to Daubert challengers is making survey evidence again more expensive.

Slide 22.

So if we stepped to a determination of relevant and reliable, what has been the court's focus? The answer is the court's (inaudible) have been about the same as it was before Daubert. Courts are still focusing on the core building blocks of a survey, that is a survey universe, the survey questions, and the survey procedures in determining admissibility.

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Slide 23.

Second, with respect to emerging issues, I believe that causality may be the biggest single issue relative to the admissibility and weight given to survey evidence today.

Slide 24.

Causality was of significant importance in a number of opinions we've talked about today, regarding the weight afforded to surveys in 2003 and 2004. For example, you saw the issue of causality rise in the Straumann case over the dental implants; in medical economics over the title of the two medical-related publications; in the Wells Fargo case as well as the Pharmacia matter, as well as others. And in specifically the Geico-Google matter. It was a particular focus.

So how do you measure for causality? What do you do? Let's look at slide 25.

Historically, survey designs have been single-cell surveys, or tests. For example, in a likelihood of confusion survey, respondents were exposed to defendant's alleged infringing product, bearing the alleged infringing mark, and then asked questions to determine if the respondent evidenced confusion as to the source, sponsor, or approval of the product.

This type of design may provide evidence of confusion, but does not necessarily pinpoint what caused the confusion.

Slide 26.

Today, most likely the confusion of surveys, and for the most part many secondary meaning, genericness, and false advertising surveys, are designed as two cell studies. Much like a medical drug test, one half of the survey respondents are exposed to the pill with the active ingredient, in this case, the alleged infringing element. And one half of the survey respondents are exposed to a placebo, the alleged infringing product without the "active ingredient."

Both groups are asked the same question, the active ingredient again being the infringing element. Both groups are asked the same identical questions and close surveys employ the same procedures.

Slide 27.

This type of survey design controls for survey artifacts. By this type of survey design I'm talking about a traditional 2-cell, test-cell, control-cell survey design. Controls for survey artifacts such as noise in a survey data, more scientifically referred to in slide 28, as mis-measurement error.

It could be due to, slide 29, the survey questions, survey procedures, market share, brand popularity, preconceived beliefs, or some other factor which would influence the survey result beyond the active ingredient being tested.

Slide 30.

Slide 30 shows -- and I'm going to show you three examples of test-cells and control-cells -- shows an example of a matter between Eveready and Promax. The issue in this case was the use of "Ever," on batteries. The test-cell package is the package on the left that you see bearing the name Evermax alkaline batteries and the control-cell was the package on the right bearing the name Powermax alkaline batteries.

The company's name was actually Powermax, and as you can see the Ever portion of the mark is replaced by Powermax. Half the respondents saw and were queried about the source of the batteries on the left-hand side of the slide and the other half of the respondents were asked the same questions about the batteries on the right-hand side of the slide.

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In this case, the number of Eveready answers that were received to the questions about the control-cell, those people that were exposed to Promax alkaline batteries, the proportion of people that gave Eveready as an answer to, "Who put out those batteries?" was subtracted from the portion of Eveready answers in the test-cell, to identify the level of confusion that was attributable only to the word Ever on these packages. And not to some other element like the fact that these are batteries or that Eveready is well known along with Duracell for producing batteries.

Let's look at the next slide, slide 32.

This is an example from a false advertising case. The issue in this case was the claim on the box of golf balls that you may be able to discern on your screen below the mark A-10. It says, "The longest ball on tour." The test-cell is on the left, that was the box that was available in the market place. And the control-cell is the box on the right in which did not possess the claim's statement or false claim as the longest ball on tour.

In this case the control-cell provided a baseline to measure preconceived beliefs as well as the influence of the Maxfli name to the degree in which people thought that Maxfli was the longest ball on tour because of the name Maxfli.

Slide 32.

This is a case that involved Pfizer. In this case Pfizer was objecting to the defendant's use of the agra portion of its Viagra mark on tea that, I don't know if you can read from the slide, the tea claims to be "the world's number 1 selling performance enhancing tea for men and women." There's lots of discussions on the side of the box which you can't see about how the tea provided for sexual enhancement, if you will.

The test-cell saw the Viagra tea with all the references, if you will, to sexual enhancement and the control-cell saw the same box, with all the same references, but with the agra portion of the Viagra name readapted, so it did not have the active ingredient of agra.

A comparison of those results allowed for a precise measure of the likelihood of confusion that was attributable only to the agra portion that appeared on the defendant's box of tea.

Let's look at slide 33 now.

The third emerging issue and the final emerging issue, I think, appears to be the potential limits on criticism by opposing survey experts. I guess by this and the translation of this I mean that there are cases that may suggest that it's going to be harder to just criticize a survey without any data, just based upon the expert's personal opinion.

In the Integrity case, here the court excluded the expert from testifying, finding that survey standards, one of the areas the expert planned to testify on, was a matter of law and the judge was going to be responsible for instructing the jury on that.

Second, that survey reliability, another area in which the expert had planned to criticize plaintiff's survey and survey expert, was a responsibility of the fact finder and in this case it was the jury. So the court wasn't going to allow the expert to supplant the jury's responsibility.

And fourth, the court went on to talk about the fact that the expert offered no data for conflicting results to support the criticisms that the expert expressed.

Now, before we go on to the next slide, let me stop you for a moment. There's one slide that you did not get, which I have. It's another case, and it's in the written materials that you have. The caption of the case is Anheuser Busch versus (inaudible). The citation is 2003, U.S. District Lexis 18010.

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In this case, in a similar vein to the Integrity case, in the Anheuser Busch case, the court gave no weight to the opposing expert's criticism, finding for Anheuser Busch in a summary judgment motion. Here the court found that the defendant expert's criticisms to plaintiff's survey lacked foundation and again, offered no conflicting survey results as the basis for those opinions.

These two cases may be an outgrowth of a focus on scientific data as opposed to personal and professional opinions, but we will see and only time will tell.

And I think we are at your last slide now. I'd like to thank Judy Powell for asking me to speak today and I would especially like to thank the ACC and John Hogan who has been our moderator so far and I think is going to field some questions. As well as all the webcast attendees, I want to thank you very much.

QUESTIONS AND ANSWERS

John Hogan - ACC - Chair of Intellectual Property Committee

Thank you very much, Dr. Ford. We do have a few questions here. Could you elaborate on how surveys would be designed or used in copyright cases?

Gerald Ford - Ford, Bubala, & Associates - Partner

Well, one of the applications I think that you may see in a copyright case, not with respect to infringement, but with respect to damages, is much like the survey designs you've seen so far, is using survey designs that would allow you to determine the degree of sales that would be attributable to the copyrighted element as opposed to some other non-infringed element. If that makes sense to you.

John Hogan - ACC - Chair of Intellectual Property Committee

Would you comment on the usefulness of surveys in false advertising cases in light of those cases such as American Pasta rejecting them? What would the answer to a court be on why it should admit one in a false advertising case?

Gerald Ford - Ford, Bubala, & Associates - Partner

Well, as that webcast participant probably is aware, in every circuit that I'm aware of prior to the 7th and 8th Circuit decisions, any time that one claims to have, in any false advertising case, if the claim could be shown to be false on its face, no evidence was necessary. Other than showing it was false on its face for injunctive relief.

If the claim was false or misleading or implyably false, then in every circuit they require essential consumer reprotecton evidence, as far as I'm aware. This will surely have some impact. I'm not sure in the long run how much impact it's going to have, but in the 7th Circuit and the 8th Circuit, we would suggest that you approach false advertising claims with respect to what claims mean more cautiously and in light of these cases.

John Hogan - ACC - Chair of Intellectual Property Committee

Another question here. A full-blown survey is very expensive. How can a company determine, before it goes through the full survey, whether the expense is justified and whether the survey model and method make sense?

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And as a follow-up question, do courts generally accept, as a basis for granting a preliminary injunction, a small, sample survey or does a company have to get a full survey before seeking expedited release?

Gerald Ford - Ford, Bubala, & Associates - Partner

Let me go backwards. I'm aware of numerous cases where courts have acknowledged in preliminary injunction proceedings that full-scale studies were not necessary. In answering whether what a court would accept in terms of less than a full-scale study, that's crystal ball stuff and kind of depends upon the fact pattern and it depends upon the judge and to some degree it depends upon the forum and what circuit you're in.

Backing up again with respect to what do you do to test the methodology before you go to the expense of a full-scale study. Surveys today are very expensive. They've become more expensive since surveys have added control-cells to them. We've almost doubled the price of every survey, compared to surveys conducted in past years, where they were only test-cell or single-cell studies.

But you should never be doing a survey and spending all the cost on the total survey without doing a pilot survey to understand both how the methodology is working and to some extent, while it's not an issue for the researcher, but an issue for the purchaser of the research services -- to some extent what the results are.

Many people often do what we sometimes call a rolling pilot. For example, let's suppose that your survey expert was proposing a survey that was going to be conducted in 9 or 10 locations across the U.S. I assume now we're talking about a person-to-person, maybe a shopping mall intercept survey.

What you would do is have that expert design the survey under the guidance and observation of counsel and the maybe do test-cell interviews only in, for example, 4 of the 9 or 10 locations and then stop. And if there is no likelihood of confusion resulting from those interviews there's no sense in spending any further money.

If there is some likelihood of confusion, then you probably need to go forward and do the control-cell interviews and make sure that the confusion that is being measured is actionable trademark confusion in those 4 locations. Then you can go on and field the studying of the remaining 5, 6, or 7, however many locations you're going to do.

The same procedure works in telephone studies. If you're doing a random-digit-dial telephone study, (inaudible) or something. It's easy to design the survey. Have your expert design the survey again under the observation and guidance of counsel and do 50 or 60 interviews and stop and look at those results. There's no reason to be going on and doing a full-scale study until you have decided you want to improve those costs.

John, do you think I answered all of that question? Was that all the parts of that question?

John Hogan - ACC - Chair of Intellectual Property Committee

Yes, that was.

Gerald Ford - Ford, Bubala, & Associates - Partner

Thank you. I'm sorry.

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John Hogan - ACC - Chair of Intellectual Property Committee

And I think it does, but it leads into our last question here. Your answer kind of did. That is, what factors go into deciding whether to conduct a survey as a mall intercept or telephone survey or some other way?

Gerald Ford - Ford, Bubala, & Associates - Partner

Well, often times it's the fact pattern. If you need to show someone something, many times you're going to do that in a mall intercept, assuming that someone you're going to show is someone that can be found in a mall.

If you were doing likelihood of confusion with a respect for those two medical publications, you couldn't have done that in a mall. You'd be waiting for days to get doctors to walk by or medical professionals to walk by. You would have had to engaged in some other manner, either in person, office interviews, or using another technique that is sometimes referred to as a telephone-mail telephone protocol where you might buy a sample of physicians from the American Medical Association and then call and qualify them as subscribing to certain types of magazines and then send them the express mail or survey stimulus to look at or a survey exhibit and call them back and complete the interview.

Alternatively, telephone studies can be done when you don't need to show someone something. The major distinction between telephone and mall, though, is that telephone studies, if done in a particular way, are mathematically projectable. And mall intercept studies are by their definition because each element of the universe doesn't have the same random chance of being selected. They are called non-probability studies and they are not mathematically projectable.

And finally, another technique that has started to evolve is the use of Internet surveys. That's an area that is probably the most actively contested at this point I think at this juncture. Internet surveys are in their infancy. Most experts in this field still are not conducting them for a couple of reasons.

One is that only 64% of the U.S. population accesses the Internet at all, at home work, or at school or some other location. Which means that to begin with you've almost lost, in terms of representativeness, 40% of the U.S. public. And the other is that the Internet surveys for the most part are conducted among panels of people that have volunteered to participate in those surveys and they only represent 5% of Internet users. Under ethical standards in marketing research today you cannot do unsolicited emails to people who have not agreed ahead of time to participate.

But that's an emerging area. We have, and I know other experts in our field have used the Internet as a conduit to expose people to a survey stimuli. In a matter we did a couple of years ago for Google, the defendant in the case I'm speaking of operated a website under the name Googlegear.com and sold computer software, hardware, and video games. And so we actually captured that website and we randomly called people across the U.S., qualified them for inclusion in the survey, and then asked them to go to a particular website that we controlled and expose them to the Googlegear.com website and then ask them survey questions.

The test group saw the Googlegear website and the control group saw that same website, only we changed the name from Googlegear to the name that the firm had been using prior to adopting the Googlegear name. So, the Internet can be used as a conduit and can effectively be used. I think that's an emerging area.

John Hogan - ACC - Chair of Intellectual Property Committee

Well, I thank you and on behalf of the IP Committee, I thank everyone for coming to this webcast. Thanks again to Dr. Ford.

Sep. 27. 2005 / 1:00PM, **ACC - Trademark Survey Evidence - A Walk Down Memory Lane and a Year in Review

Gerald Ford - Ford, Bubala, & Associates - Partner

Thank you, John.

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