Frequently Asked Questions About Trademark Surveys

BY JAMES T. BERGER

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In likelihood of confusion, trade dress, secondary meaning, genericness and distinctiveness cases, I am often called upon to develop surveys to prove or disprove some aspect of a complaint. Most attorneys who have never personally been involved in such research generally ask a number of key questions such as:

1. How many interviews or responses are needed for significant results in such IP litigation surveys?
2. How many research venues are needed?
3. What types of surveys are possible?
4. What are the expected costs of doing a survey?
5. How do you gauge the effectiveness of results?

In this article, I will attempt to ask and answer many of these questions.

Q—WHAT ARE THE BASIC SURVEY METHODS AND THEIR BENEFITS AND PITFALLS?

A—Basic survey methods that are usually employed for I.P. matters include:
1. Mail Surveys
2. Telephone Surveys
3. Mall Intercept Surveys
4. Internet Surveys
5. Pre-Recruit Surveys
6. Telephone/Internet “Hybrid” Surveys

While often used in the past Mail Surveys are hardly ever used today because of the volume of junk mail. Telephone Surveys, another tried and true method of the past, also has lost some of its luster because of: (1) barriers such as called ID and automated answering systems, and (2) increased use of cell phones in place of or in addition to land lines. Mall Intercept Surveys are generally accepted by the courts but this industry is in decline as fewer and fewer malls have research facilities. Internet Surveys are becoming increasingly popular. Virtually everyone goes online and accepts e-mail. There are a number of consumer panels with tens of thousands of participants. Internet surveys can be done quickly and cost effectively. Pre-Recruit Surveys work well for hard to reach target markets and when you have to actually be face-to-face with the interviewee. It becomes necessary to arrange in advance for the interviewee to visit the research facility. Pre-Recruit Surveys tend to be quite expensive on a cost-per-interview basis because you have to use large incentives to entice the subject to visit the research center. The Internet/Telephone “Hybrid” Methodology functions as an electronic pre-recruit. Arrangements are made to call the subject at a specific time and the subject is supposed to be sitting by a computer and can access a Website. The telephone interviewer then asks questions of the subject while he/she is on-line. This is far less expensive than the in-person pre-recruit.

Q—HOW MANY INTERVIEWS ARE NEEDED?

A—While different circuits rely on different precedents, a good rule of thumb is a minimum of between 200 and 300 interviews. Fred W. Morgan, a professor of marketing at the University of Kentucky, wrote in the Journal of Marketing (January, 1990) when he was a professor at Wayne State University:

“Sample Size must be intuitively justifiable. In addition to concerns about the effect of sample size on confidence intervals, survey researchers must be able to justify sample with non-statistical arguments. In Kentucky v. Alabama, telephone sample of 100 persons was ruled insufficient to determine whether the trial atmosphere within a city of 60,000 was prejudicial to Kentucky. The court stated no reasons for deeming the sample too small, but was simply unwilling to accept the notion that a random sample of 100 persons could adequately represent the views of 60,000 persons.

Though sample size can always be criticized, minimum samples of 200 to 300 respondents seem to achieve a certain amount of face validity in the courts.”

Q—FOR A MALL INTERCEPT STUDY, HOW MANY VENUES ARE NEEDED?

A—McCarthy on Trademarks points out that four venues are usually required. “It has been said that an informal rule of thumb is that four testing sites are a minimum number to ensure a reasonable degree of projection to a universe of a larger area.”

Q—WHAT IS MEANT BY ‘MARGIN OF ERROR’

A—Margin of error is most applicable to a probability study — like political polling — where every member of the target universe has an equal chance of being selected. Most I.P. surveys are judgmental studies where specific members of the target market are selected, and here margin of error is less significant. Margin of error is a
measure of accuracy. For example, a sample of 200 (to the 95 percent level of confidence) has an error factor of plus or minus 7 percent while a sample of 300 has an error factor of 6 percent. What this means is that when you do a survey with 200 respondents you have a 95% chance that your findings are within a range of 7% plus or minus of your results. Error factors change dramatically with smaller samples. For example, a sample size of 50 has a 14 percent error factor and a sample size of 100 has a 10 percent error factor. On the other hand beyond 300 respondents there is a “sliding scale” in effect. A sample size of 400 has a 5 percent error factor; a sample size of 500 has a 4 percent error factor, and you need a sample size of 800 to achieve a 3 percent error factor, and you need 2,000 respondents to obtain a 2 percent error factor.

A Word of Caution:
Cost estimates expressed by this author are based on his personal frame of reference. Actual costs may vary depending on who is selected as the researcher to develop and manage the survey and the specific problem or opportunity being studied. In any case, an attorney should try to obtain a cost range from his/her survey expert. Nobody wants unpleasant surprises.

Q— WHAT PERCENTAGES ARE NEEDED FOR SIGNIFICANCE?
A— McCarthy also has quite a bit of information on the percentages needed to establish significance. For example: “The courts have been unwilling to be pinned down as to whether an ‘appreciable’ number of customers is to be measured quantitatively (in percentage figures) or qualitatively (by the actual number of persons). The distinction may be crucial where a survey shows a low percentage but can be extrapolated over a large relevant “universe” of potential customers. For example, one court indicated that even 11 percent of a national market of millions of consumers constitutes a very large number of confused consumers.” McCarthy adds: “Generally, figures in the range of 25 percent to 50 percent have been viewed as solid support for a finding of likelihood of confusion. The Ninth Circuit has said that survey showing a 27.7% level of confusion is alone sufficient evidence to prevent a summary judgment that there is no likelihood of confusion....the Second Court found that a 15-20 percent rate corroborates a finding of likely confusion.” McCarthy reports: “When the percentage results of a confusion survey dip below 10 percent, they can become evidence which will indicate confusion is not likely. The Seventh Court reviewing prior cases involving low percentage results found that 7.6 percent is “a factor weighing against the infringement.” Similarly low percentage figures have been relied upon to support a finding of no likelihood of confusion and no infringement.” “For secondary meaning studies, the threshold increases rather dramatically. A survey to prove secondary

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meaning or acquired distinctiveness generally requires results in the 50 percent range.”

Q—WHAT DETERMINES THE COST OF DOING A SURVEY?

A—The cost of doing a survey is a function of a number of things. The paramount factor is to make sure you are interviewing members of the relevant universe. For example, if the product in question is a packaged good available on supermarket or drug store shelves, one can safely develop a questionnaire directed to members of the general population. Either the shopping mall intercept survey or the Internet survey can be ideal for such research, and such a survey generally can be done relatively quickly and inexpensively. If the product is a specialty good targeted to specific consumers, a fast and relatively inexpensive Internet protocol can be employed. On the other hand, if the product in question is targeted to a highly specific or hard-to-reach market segment and a face-to-face interview is required, the researcher and his/her research firm will be forced to do a rather expensive pre-recruit survey where appropriate members of this target have to make arrangements to come into a research center at a specific time. Targeting this type of subject can be time-consuming and expensive. An alternative is the electronic pre-recruit or what I call the telephone/Internet “hybrid” survey. Respondents are pre-recruited but need to be sitting by a computer when a telephone interviewer asks them to access a certain Website and then asks questions based on what the respondent is seeing on the computer screen. If the survey is relatively simple and does not require the subject to view any visuals, a telephone survey might work best despite the modern-day problems of doing telephone surveys.

Q—WHAT CAN I FIGURE ON COSTS OF DOING A MALL INTERCEPT SURVEY?

A—In addition to the general research costs, there is usually some small incentive involved. Depending on the length of the interview and who is being targeted and the time constraints, a good rule of thumb is $5.00. Most mall research centers will charge anywhere from $20 to $30 per interview in addition to the incentive fee. So, an attorney can figure a four- or five-venue survey of 250 people at from $6,250 to $8,750. In addition, there is the cost of the survey expert. When I contract to perform such studies, I sometimes like to be on hand at least for the pilot venue to make sure that all the protocols are being followed and I observe the recruiting and the interviewing. For complex surveys, I’ll often visit every venue. Fees for a research/survey expert can range at anywhere from $3,000 to $5,000 per day plus travel-related expenses. Totaling this up, one can safely figure a four-or-five venue mall study encompassing 250 participants to run from $20,000 to $30,000. Add to these costs the time for the survey expert to create the questionnaire, to manage the project and develop a research report, the costs of doing a typical mall intercept survey will generally fall within the range of $25,000 to $40,000.

Q—WHAT DOES IT COST TO DO A TELEPHONE SURVEYS

A—This is perhaps the least expensive research alternative. Research companies operate call centers where they can interview randomly selected consumers or consumers whose phone numbers and/or addresses are generated by mailing lists. There is no incentive needed and a good rule of thumb is $20 per call. However, the key factor is incidence — how many calls will be needed to obtain a usable response. A low incidence means higher costs and high incidence means lower costs. There is no need for the survey expert to be present at the call centers. Therefore, one can figure a telephone survey of 250 to cost from $16,000 to $24,000.

Q—WHAT ARE THE COSTS FOR AN INTERNET SURVEY?

A—Very similar to a telephone survey. There are additional costs for coding. When using an Internet panel, the panel vendor has to provide an incentive for its panel-members. A good rule-of-thumb for an Internet survey is $20,000 to $26,000. A benefit of some Internet surveys is the results of closed-end questions can be instantly tabulated on a real-time basis as soon as the respondent completes and sends in the questionnaire.

Q—WHAT ARE THE COSTS FOR A TELEPHONE/INTERNET ‘HYBRID’ SURVEY?

A—These costs are in the same ballpark as the telephone and Internet surveys. There an extra step because the respondent needs to be contacted twice: first to set up the interview and second to execute the interview. The initial step can often be done via e-mail. Depending on the target market and the quality of the list, one can generally figure costs for the telephone/Internet survey in the $20,000 to $26,000 range.

Q—WHAT WILL IT COST TO DO A PRE-RECRUIT?

A—Occasionally, I am called upon to develop surveys where specific respondents have to be specially recruited. For example, in doing work for a law firm representing a power tools company, it was necessary to interview professional tradesmen. The problem here is that these people are not available during the work day so the interviews had to be scheduled on weekends or evenings. Recruiting these people was time consuming and a rather large incentive was needed to bring them into the research center. The costs for recruiting can run from $30 to $40 and the incentive costs can run $50.00 or more. The incentive costs for professional people — like doctors — might be exceedingly high. The total cost of such a survey can range from $41,500 to $63,000, depending on the incentive.

Q—IS IT ADVISABLE TO DO A PILOT SURVEY?

A—Not only advisable but mandatory. ALWAYS do a pilot of approximately 50 respondents. This will allow you to approximate your eventual results and to learn if the survey will or not work. You might discover in the your pilot that questions can be worded better or there is some confusion on the part of the interviewer or interviewee. Even though there is a 14% error factor with a survey of 50, if you are looking for 20% confusion and you get 35% on your pilot you can safely assume you will meet you goals. If the pilot is unsuccessful, abandon the survey before you waste any more of your client’s money.